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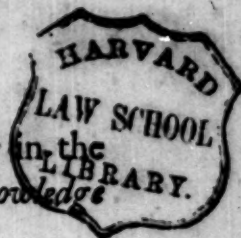
The Laws of England:

OR, THE

LAWS of ENGLAND in their *Natural*
Order, according to Common Use.

PUBLISHED

For the DIRECTION of Young *Beginners*, or *Students* in the
Law; and of *Others* that Desire to have a *General Knowledge*
in our *Common* and *Statute* Laws.



In Four BOOKS.

By THOMAS WOOD, L.L.D. and Barrister at Law.

The Ninth Edition, revised, corrected, and enlarged by considerable
Additions from the New *Reports* and *Manuscript Cases*, as also from the
Statutes, which are brought down to the present Time, and by upwards
of one thousand additional References: By a Barrister at Law.

Misera Servitus Est, Ubi Jus est VAGUM aut INCOGNITUM.
4 Inst. 246, 332.

L O N D O N :

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The Laws of England;

LAW OF ENGLAND AND OF THE
OF ACCORDING TO COMMON LAW



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P R E F A C E.

IT has been thought impracticable, to bring the Laws of *England* into a *Method*; and therefore a Prejudice has been taken up against the Study of our Laws, even by Men of Parts and Learning, as if there was no Way to attain to the Knowledge of them, but by a tedious Wandering about, or with the greatest Application and long Attendance on the Highest Courts of Justice. Now when I considered the Requisites in Teaching by *Method*, (*viz.* That there must be *Knowledge* and *Judgment* in the Art which one is to teach; that great *Skill* is necessary, to lay it in Order; and that *Care* and *Diligence* is required, to comprehend all the useful Parts of it: I was utterly discouraged from the Attempt, by the Sense of my own Inabilities, and the many Disadvantages I lay under in a private Country Life; especially by being barr'd from the Assistance of learned Lawyers, to consult with upon any Doubt, or to revise the Work; though I was fully persuaded that even an *imperfect* Performance of that Kind might be of Use.

But when I saw, that many Parts of our *Common* and *Statute* Laws were *disused* or *abrogated*; that the *Niceties* in *Pleadings* and *Practice* were lessened by Statutes or by new Inventions; I entertain'd Hopes, that *now* it might not be impossible, to *sort*, or to put in some *Order*, this Heap of good Learning; and that a *general* and *methodical* Distribution, preparatory to a more large and accurate Study of our Laws, might now be made, as well as an *Institute* of *Civil* or *Canon* Law, or of the Laws of *other* Nations; which were once too, heap'd up together without Beginning or End, before they were unravell'd and rescued from their first Confusion and Intricacy.

'Tis true, the *Exactness* now demanded in *Conveyances*, or in Deeds and Instruments to transfer Estates from one to another, beyond the Practice of former Times, the remaining *Niceties* expected in drawing up our *Pleadings*, and the precise *Form* in managing Causes thro' many *Offices*, from the Writ to the Execution, in the practical Part of the Law; and above all, the extraordinary Number and Length of our *Statute-Laws* (since
the

the Beginning of the Reign of H. 8.) did still make an Appearance of Difficulty to come up to the necessary Rules laid down for true *METHOD*, and especially in the last Instance, to avoid Tautology; where one Statute must be mentioned again and again under *distinct* Titles.

It is to be wished, that the *same* Constructions were allowed in *Conveyances*, as upon * *Acts of Parliament*, *Last Wills*, or *Testaments*, and *Awards*, following the Intention and Meaning of the Makers or Parties, without Regard to *Strictness* of Expression; especially when no good Reason can be given, why equal Allowances should not be made, in understanding the Meaning of Words in one Case, as well as in another, having always the same, or the like Signification, when they are applied the same Way.

Also, if there was a further *Amendment* of the Law in Reference to the Subtilties of *Pleadings*, and the Management of the practical Part of a Suit, it would be good News to all wise and disinterested Men, and Lovers of their Country. For it must occasion melancholy Reflections, to hear great Men insist, † *That it is the most honourable, laudable, and profitable Thing in our Law, to have the Science of Well Pleading; and that good Pleading is the ‡ Heart-string of the Common Law*; when at the same Time it is confessed, § *that more Jangling and Questions grow upon the Manner of Pleadings, and Exception to Form, than upon the Matter itself; and that infinite Causes have been lost* (God forbid it should be so any longer) or *delay'd for Want of good Pleading*. But it is a Comfort, that our Legislators are of another Opinion, and seem resolved to break this *Heart-string* of the Law, and to banish from our Courts, the Arts of Petty-fogging, Sophistry, and Cavil; which have flourished too long amongst us.

As our *Statute-Laws* are monstrously overgrown, (|| tho' very many Statutes are omitted in the printed Books) they too want the Skill of our Legislators, to bring them to a proper Shape. If many of our Statutes, with others continuing, enlarging, explaining, correcting, repealing, and reviving them, were under their proper Heads thrown into *one* short and plain *Act*, it would render the study of our Laws more inviting, and the Statutes more intelligible, to all those that are to be guided by them.

Then (in my Opinion) when *equitable* Constructions may be made upon *Deeds* or *Instruments*; when a little more Regard

* 3 Rep. 27. 8 Rep. 119. 10 Rep. 57, &c. † Lit. 534. ‡ 1 Inst. Pref. 2, b.
§ 1 Inst. 303. a. History of the Common Law, p. 173, 174, 175. || 4 Inst. 50, 51, 52.

may be allow'd to the *Merits* of a Cause, and to Matter of *Substance*, than to *Form* in the *Pleadings*; when our *Statute-Law* is brought into a shorter Compass (and all this may be done under a *KING* greater than *JUSTINIAN*, with the Advice of as wise and impartial *Judges* as ever adorn'd the Benches) the Study of our Laws must be easy and diverting. And upon this View, let me add, when we have *Juries* of the better Sort of Men, according to the original Design; when *Judgment* may be obtained with a moderate Attendance and Expence; and at last a speedy and certain *Execution* made by ministerial Officers; that Men may not be ruined by the Law, when they seek Redress from it; no People under Heaven can have Laws better suited to the publick Constitution, and their private Wants, or be more Happy under the Administration of them.

Many of our Lawyers are Men of sound and solid Reason, and, as in other Countries, Admirers of polite Learning, excellent Orators, and often called to manage the Affairs of the Commonwealth in the highest Stations. And surely such great Capacities must be willing, that the Study of our Laws should be made more easy, than they found it; and must have a secret Aversion to Chicanery, as a low Employment, tho' never so profitable; and must afford their Help, to make the Youth, that are following after them, wise and good Men, and truly Useful to the Publick.

Seeing then, at present, the Way to the Knowledge of the Laws of our Country is dark and rugged, full of Turnings and Windings; I hope for Pardon, if I must not expect Approbation, in making this *ESSAY* or Attempt, to shew a Student a more light, smoother, and nearer Way than has hitherto been discovered; tho' not the clearest, smoothest, and nearest that might be made: However I have endeavoured, that at his first setting out, he may see *directly* to the End of his Journey, and that he may travel in a strait Line. This being my Aim, he must not expect, to be entertained in his Passage with choice Cases, of greater Learning than real Use in the Occasions of Life; or with the remaining Niceties of Pleading and Practice. For that would be a nauseous and an endless Task; and was never undertaken in a Work of this Nature. When the Student is well acquainted with these *Elements*, touching only upon common Business, he may afterwards from *Reports*, *Common-Place-Books*, the most accurate *Treatises* upon particular Subjects, and the best *Precedents* and *Pleadings*, work upon this *Sketch*, and improve and fill up each Title, according to his *Fancy*. And then he may rectify my Mistakes where necessary Parts are overlooked, or too much

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contracted;

contracted; where any Thing, which is taken Notice of is misrepresented thro' Inadvertency; or where the Law is not confirmed by sufficient Authorities; tho' the Author had his Eye chiefly upon the Works of Sir *Edward Coke* throughout, as the firmest and surest Foundation to build on. For he is still allowed to be the *Oracle*; tho' many of his Opinions have of late been questioned or contradicted; or tho' it is now growing into Fashion with some, to speak slightly of him. But without doubt that *Sage* of the Law is the most methodical, clearest, most judicious, and most authentick *Reporter*; and his *Institutes*, (so call'd, but more properly *Commentaries*) will be held in the highest Esteem, while there are learned Lawyers amongst us. In *his* Works you will scarce find Opinions *Obiter*, or the *Sayings* of a Judge upon a sudden Motion at the Bar, or in the Hurry of an Assises, set down for *Resolutions*; which is too frequent amongst the *Moderns*.

My Intention, by this *Institute*, is not only to help the Students in the *Inns of Court* and *Chancery*, but moreover to recommend the Study of the *English* Laws, to our young *Nobility* and *Gentry*, and to the Youth in our *Universities* (not excepting those who are designed for the *Clergy*, but for many Reasons, earnestly inviting them to it) by supplying them with a *Method*, to help their Memories; and to convince them that the Study of our Laws is now of less Difficulty, and of more Use in publick and private Business, than they are aware of. A sufficient Knowledge may be attained by *them* at leisure Hours, without neglecting other Exercises or Studies. They may have enough to serve their Turns, if they learn only to understand the *Terms*, the *Definitions* and *Divisions*, with some *common* Cases, and the most useful *Acts* of Parliament. Chancellor *Fortescue* was of Opinion, that a sufficient Knowledge for *his Prince* might be acquired within the space of *one Year*, when he endeavoured to perswade him, to make an Enquiry into our Laws. And why may not his Words be directed to a most *Hopeful Prince* now shining on the Line of Succession to the *British* Monarchy? — “ * Nosco namque Ingenii T U I Per-
 “ spicacitatem, quo audacter pronuncio, quod in legibus illis
 “ (licet earum peritia, qualis iudicibus necessaria est, vix viginti
 “ annorum lucubrationibus acquiratur) T U doctrinam Principi
 “ congruam in ANNO UNO sufficienter nancisceris; nec in-

* *Fortescue de Laudibus Legum Angliae*, c. 8.

The P R E F A C E.

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“ terim militarem disciplinam (ad quam tam ardentem anhelas)
“ negliges; sed ea recreationis loco, etiam anno illo, TU ad
libitum perfrueris.

*Hardwick, Bucks,
March 25, 1722.*

T. W.

A D V E R T I S E M E N T.

ALTHOUGH this Book hath been corrected and improved in former Editions, yet as there are a great many Determinations of Cases in the Reports published since our learned Author wrote, and those by * Men of great Abilities, and deservedly Eminent in the Profession; the present Proprietors, willing to oblige the Public, have prevailed on an eminent Barrister thoroughly to revise and correct this VALUABLE INSTITUTE, and render it the most complete Work of its Kind, by inserting not only the Cases from the printed Books, but also from various Manuscript Adjudications never yet published: He has been careful also to amend the Errors and Mistakes of former Editions, to insert the additional Statutes, to examine the old, and to add a Multitude of new References.

It is proper likewise to observe, that by throwing many of the References into the Margin, which were formerly in the Body of the Work, and by printing the whole somewhat closer, room is hereby made for these large Additions, without enhancing the Price to the Purchaser.

* Lord Raymond's, Lord Chief Baron Comyns's, Sir John Strange's, Reports, &c.

ADVERTISEMENT.

The Reader is desired to correct the following Mistakes of the Press.

- P. 6. l. 14. *for* Freehold, Lease; *read* Freehold-Lease.
P. 57. l. 9. *for* 25 G. 2. *read* 15 Geo. 2.
P. 65. l. 6. after may; *read* to one, who is
Same Page. Place Reference c to the Word [Proof] and Reference d to the Word [But] in
the 16th Line.
P. 122. l. 8. from the Bottom, *del* the Reference.
P. 267. *for* 8 An. ch. 17. *read* 8 An. ch. 14.
P. 305. l. 7. from the Bottom; *read*, No Mannors.
P. 318. l. 15. *read* Leases of Lands.

To insert the Figures between these [] in the five following Pages where
the [] are left vacant.

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INSTITUTE OF THE LAWS OF ENGLAND, &c. THE INTRODUCTION. Of England and of its Laws.

THAT Part of Great Britain called *England* (being the *Subject* of our *English* Laws) comprehends *England*, *Wales*, and Part of the Sea. * The Principality of *Wales*, was incorporated and united to the Kingdom of *England*, by the 27 Hen. 8. cap. 26. The main Sea, beneath the low-water Mark and round *England*, is Part of *England*; for there the Admiral hath Jurisdiction. *
Scotland was united by 5 Ann, cap. 8. but hath different Laws and Customs.

The Isle of *Man* is no Part of *England*, but a distinct Territory of itself, and out of the Power of our Chancery, or of original Writs which issue out of Chancery; and hath been granted under the Great Seal to divers Subjects and their Heirs. No Act of Parliament extends to it, unless it is especially named. It hath peculiar Laws and Customs.

Neither are the Isles of *Jersey* and *Guernsey* bound by our Acts of Parliament, except they are specially named; neither do our original Writs run into these Islands. Yet the King's Commission under the Great Seal runs there to redress any Injuries or Wrongs, as it does in the Isle of *Man*: but the Commissioners must judge

according to the Laws and Customs of those Isles. Other Writs too, that are not originals, may be executed there.

* 1 Inst. 141. *Ireland* is still a distinct Kingdom; tho' by *Poyning's Law*,
a. & b. passed there 10 H. 7. All Statutes made in *England* before that
2 Inst. 2. Time, are of Force in *Ireland*; and by special Words our Statutes
2 Inst. 18. still may bind them: Yet they have Parliaments of their own, but
4 Inst. 351. their Statutes are to be affirmed by the King and Council here.
&c. They have the same Courts of Justice, and the same Laws (for the
7 Rep. 22, 23. most part) as we have in *England*.

By 6 Geo. 1. ch. 5. It is declared, *That the Kingdom of Ireland is subordinate and dependent, as inseparably annex'd, to the Crown of Great Britain, and that the Parliament of Great-Britain hath Authority to make Laws and Statutes to bind the Kingdom of Ireland. And that the House of Lords of Ireland have no Power to affirm or reverse any Judgment, Sentence or Decree, given or made in any Court within that Kingdom.*

England is divided into an *ecclesiastical* and *temporal* State.

* 1 Inst. 94. a. 1. The *ecclesiastical* State is divided into two Archbishopricks, or Provinces, (*viz.*) *Canterbury* and *York*: Each Archbishop has within his Province suffragan Bishops of every Diocese. The Archbishop of *Canterbury* hath under him twenty-one Bishops, seventeen of ancient Foundation, and four more founded by King *Hen. 8.* out of the Ruins of dissolved Monasteries, (*viz.*) *Gloucester, Bristol, Peterborough* and *Oxford*. The Archbishop of *York* hath under him within his Province four Suffragans, (*viz.*) The Bishop of the County Palatine of *Chester*, the Bishop of the County Palatine of *Durham*, the Bishop of *Carlisle*, and the Bishop of the Isle of *Man*.

Every Province is divided into Diocesses, every Diocese into Archdeaconries, every Archdeaconry into Deaneries, and every Deanery into Parishes; but there are some Places that are *extraparochial*. A Province is the Jurisdiction of an Archbishop; a Diocese is the Circuit of every Bishop's Jurisdiction; an Archdeaconry of an Archdeacon; a Parish of a Parson, or Vicar; for a † Parish is the Circuit of Ground in which the People that belong to one Church do inhabit. * [See 10 Ann. ch. 11. For building fifty new Churches in *London* and *Westminster*, &c.]

* See of Church-war-dens Ch. 7. post. 2. The *temporal* State is divided into several Counties; every County into Hundreds; every Hundred into Towns and Villages.

* 1 Inst. 50. a. 1. A *County* (*Comitatus à comitando*, from accompanying together, particularly at the Assizes and Sessions held for the County, or as some say, *à comitando Principem*) or *Shire*, is a certain Circuit, or Part of the Kingdom, governed by an yearly Officer, called *Sheriff*, or *Shire-Reeve*, under the King; for a County cannot be without a Sheriff. The King, by his Letters Patent, may make a County with its two Courts, the *Torn* and the *County-Court*; and that no Part should be exempt from the Authority of the Sheriff, every Parcel of Land lies in some County. Every County is, as it were, an entire Body by itself; so that regularly an Inquest, or Jury, shall not take Notice of any Thing done in another County. * There are three called Counties *Palatine*, (*viz.*) *Lancaster, Chester*, and *Durham*.
109. b. 168. a. 4 Inst. 248. Dav. 59.
* See B. 4. Ch. 1. post.
* See Ch. 7. post.
* See B. 4. Ch. 4. 5.

† *Parochia est locus in quo degit populus alicujus ecclesie.* 5 Rep. 67.

ham. Some Cities and Towns corporate are Counties; of these the famous City of London is one, as also York, Chester, Canterbury, Norwich, Worcester, Kingston upon Hull, &c. ^{1 Inst. 211, &c.}

2. ^b Hundreds were so called because there was a Jurisdiction over ten Tithings, or an Hundred Families dwelling in some neighbouring Towns. The People that live in a Hundred, are called *Hundredors*; and these Hundreds continue to this Day to some Purposes; but their Jurisdiction is transferred to the County-Court, some few excepted, which were annexed to the Crown, and granted to some great Men in Fee, and so remain in the Nature of a Franchise, and have Return of Writs, and wherein the Sheriff cannot meddle by his ordinary Authority. ^{1 Inst. 168. a. 2 Inst. 71. 1 Vent. 403, 404, 405. 3 Mod. 199.}

In some Counties, Hundreds are called *Ridings*, *Rapes*, or *Wapentakes*.

There is a Chief Constable * and a Bailiff of every Hundred, to execute the Orders of the Sheriff, Justices, &c. ^{* See Ch. 7. post.}

By 2 Ed. 3. cap. 12. 14 Ed. 3. cap. 9. Hundreds, which had been separated from Counties, are joined to them again, and are to be in the Sheriff's own Hands.

* All Grants made since 14 Ed. 3. of the Bailiwicks of Hundreds, except such as then were of Estate in Fee, are void. Such are Occasions of Delay and Hindrances of Justice, when the Execution of Process is taken from the Sheriff. ^{* 4 Inst. 267. 1 Vent. 399. 410.}

3. ^a A Town (*Villa* or *Vicus*) was a Precinct anciently containing ten Families, upon which account they are sometimes called *Tithings*: Upland Towns, which are not ruled and governed as Boroughs, are but Towns, though they are inclosed with Walls. ^{4 Finch 80.}

* It cannot be a Town in Law unless it hath, or had a Church, Celebration of divine Service, Sacraments and Burials. If a Town is decay'd so that it hath no Houses left, yet it is a Town in Law. There ought to be in every Town a Petty Constable, or Tithing-man, or both. ^{* 1 Inst. 115. b. 1 See Ch. 7. post.}

Several of these Towns have *Hamlets*, as there may be several Hamlets in a Parish; and some particular Places may be out of a Town or Hamlet, as out of a Parish, though not out of the County.

* The Addition of a Parish in original Writs, if there are two or more Towns within it, is not good. But if there is but one Town, the Addition of Parish is good within the Statute of 1 H. 5. ch. 5. and it shall not be intended * (if it is not pleaded) that there are more Towns than one in a Parish. ^{* 2 Inst. 669. 2 Vent. 31.}

Under the Name of a Town, or Village, Boroughs and Cities are contained; for every Borough or City is a Town, though every Town is not a Borough or City.

A ^b Borough is so called, because it sendeth up *Burgesses* to Parliament: And this maketh the Difference betwixt a Village or Town, and a Borough. Some Boroughs are corporate, and some not corporate; if a Borough is decay'd it shall send Burgesses to Parliament, as *Old Sarum* doth. ^{1 Inst. 108. b. 109. a. 115. b. 2 Inst. 93.}

In old Time, the Towns that are now called *Cities*, or *Cities* and *Counties*, were Boroughs, and the ancient Boroughs were first of all Towns.

* A City

* *Pluralitas non presumitur.* 2 Inst. 669.

^a 1 Inst. 109. b.
[†] See Ch. 8.
 post.

^a A City is a [†] corporate Borough that hath had, or at present hath, a Bishop; for if the Bishoprick is dissolved, yet the City remaineth. To have *Suburbs* proveth it to be a City. Some Cities are also *Coun- ties*, as before-mentioned.

Of the Laws
 of England.

II. * As Law in General is an Art directing to the Knowledge of Justice, and to the well ordering of civil Society; so the Law of England, in particular, is an Art to know what is Justice in Eng- land, and to preserve Order in that Kingdom: And this Law is raised upon six principal Foundations.

^b Dr. and
 Stud. Dial. 1.
 chap. 5.

1. Upon the Law of ^b Nature, though we seldom make Use of the Terms, *The Law of Nature*: But we say, that such a Thing is reasonable, or unreasonable, or against the Law of Reason.

^c Dr. and
 Stud. Dial. 1.
 chap. 6.
² 1 Inst. 625.

2. Upon the ^c revealed Law of God: Hence it is that our Law punishes Blasphemies, Perjuries, &c. and receives the *Canons* of the Church duly made, and supposeth a spiritual *Jurisdiction* and *Autho- rity* in the Church.

^d Dr. and
 Stud. Dial. 1.
 chap. 7.
^e 1 Inst.
 142. a.

3. The third Ground are several ^d general Customs; these Cu- stoms are properly called the *Common Law*: Wherefore when we say, ^e it is so by *Common Law*, it is as much as to say, by *common* Right, or of *common* Justice.

Indeed it is many Times very difficult to know what Cases are grounded upon the Law of Reason, and what upon the *Custom* of the Kingdom, yet we must endeavour to understand this, to know the perfect Reason of the Law.

Rules concerning Law.

^f 1 Inst. 56. b.
 319. b.
² 1 Inst. 179.
^g 1 Inst.
 142. a.
^h 2 Inst. 56.
ⁱ 1 Inst. 92. a.
 197. b.
^k 2 Inst. 669.
^l 1 Inst. 79. a.
 92. a. 127. b.
 197. b. 319. b.
^m 1 Inst. 197. b.
 199. b.
ⁿ 1 Inst. 55, 56,
 405.
^o 1 Inst. 145. a.

^f The Common Law is the absolute Perfection of Reason: For nothing that is contrary to Reason is consonant to Law.

^g Common Law is common Right.

^h The Law is the Subject's best Birth-right.

ⁱ The Law respects the Order of Nature.

^k It always intendeth the Best.

^l The Law forces no one to that which is impossible or vain.

^m The Law provides a Remedy for every Wrong.

ⁿ Where one hath several Remedies, he may use which he will.

^a Want

* *Lex est sanctio justa, iubens honesta et prohibens contraria.* 2 Inst. 588.

^b *Jura naturalia sunt immutabilia.* 7 Rep. 13.

^c *Lex est summa ratio.* 1 Inst. 319. b.

Lex semper intendit quod convenit rationi. 1 Inst. 78. b.

Nihil quod est inconveniens est licitum. 1 Inst. 97. b.

Qui rationem in omnibus quaerunt, rationem subvertunt. 2 Rep. 75.

^d *Impotentia excusat legem.* 1 Rep. 96. 5 Rep. 22. 6 Rep. 21. 10 Rep. 139.
 1 Inst. 258. a.

Lex non cogit ad impossibilia. 1 Inst. 92. a.

Lex non praecipit inutilia. 1 Inst. 127. b.

Lex neminem cogit ad vana seu inutilia. 1 Inst. 197. b. 310. b.

^e *Lex non debet deficere conquerentibus in justitia exhibenda.* 1 Inst. 197. b.
 2 Inst. 405.

Quod remedio destituitur, ipsa re valet, si culpa absit. 6 Rep. 68.

Lex beneficialis rei consimili remedium praestat. 2 Inst. 689.

Aliquid conceditur, ne injuria remaneret impunita, quod alias non concederetur.
 1 Inst. 197. b.

• Want of Right and Want of Remedy is all One. For where there is no Remedy, there is no Right. ¹ Inst. 95. b. ² Lit. 323.

• The Law hath a Delight in giving of Remedy. ¹ Inst. 54. b. ^{199. b. 200. a.}

• The Law favoureth Life, Liberty and Dower. ¹ Inst. 124. b. ² Inst. 168.

• Things of Necessity are to be excepted out of a general Law. ¹ Inst. 56. b. ^{173. b.}

• The Ignorance of Law cannot excuse. ^{Dr. and}

• The Act of Law never doth Wrong. ^{Stud. Dial. 2. Ch. 47.}

Where the Construction of any Act is left to the Law, the Law will never construe it to work a Wrong. ¹ Inst. 88. b. ^{148. a. b.}

• But it is better to suffer a Mischief (peculiar to one) than a General Inconvenience. ^{379. a.} ¹ Inst. 97. b. ^{152. b. 258. b.}

• The Agreement of Parties cannot make that good which the Law makes void. ¹ Inst. 51. b.

• When the Law giveth any Thing, it gives by Implication what is necessary for taking and enjoying the same. ¹ Inst. 56. a. ² Inst. 423. ^{424. 501.}

• What is annexed to any Thing by Law, is stronger than if it were put in Writing. ¹ Lit. 378.

• Judges ought not to change the Law, which always hath been used. ¹ Inst. 233. b.

• No Law can be abrogated but by Act of Parliament. ¹ Inst. 115. b. ² Inst. 619.

4. Certain ^a Principles and Maxims are another Foundation. Such Maxims are not only holden for Law, but all other Cases that may be applied to them, are to be taken for granted; wherefore it is dangerous to alter any of these Maxims or Grounds of Law; they are of the same Strength as Acts of Parliament when once the Judges have determined what is a Maxim; for this does not belong to a Jury. But if you please you may comprehend Maxims under general Customs, and take them for Part of the Common Law. ^{Dr. and} ^{Stud. Dial. 1. ch. 8 and 9.} ¹ Inst. 11. a. ¹ Pref. to the 4th Rep.

5. ^a Particular Customs are a fifth Ground of our Law: These may be used in several Counties, Hundreds, Towns, Boroughs, Cities, Honours, Manors and Hamlets in Special Cases. ^{Dr. and} ^{Stud. Dial. 1. chap. 10.} ¹ Inst. 110. b.

Custom is a Law not written, established by long Use and Consent. Particular Customs are always to be taken for Law, tho' they are always against the general Customs of the Kingdom, and the Maxims of the Law: Yet a Jury shall try whether there is a Particular Custom or no, and not the Judges, except the Custom in Debate is of Record in the same Court.

There is a Custom in the County of Kent called ^a Gavelkind, (Gave all Kind) That all the Sons shall inherit as Sisters at the Common Law: And by Custom when one Brother dies without Issue,

C

All Customs of Gavelkind.

• Ignorantia legis neminem excusat. 1 Rep. 177. 2 Rep. 3. 6 Rep. 54.

• Constructio et actus legis nulli facit injuriam. 1 Inst. 148. a. 183. a. & b. 2 Inst. 287.

• Lex citius vult tolerare privatum damnum quam publicum malum. 1 Inst. 252. b.

• Conventio privatorum non potest publico juri derogare. 1 Inst. 166. a.

• Modus et conventio vincunt legem. 1 Inst. 41. b. 166. a. 2 Rep. 73.

• Pacto aliquid licitum est, quod sine pacto non admittitur. 1 Inst. 166. a.

• Quod contra legem factum est, pro infecto habetur. 3 Rep. 74. 4 Rep. 31.

• Quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest. 1 Inst. 56. a. 2 Inst. 309. 4 Inst. 111. 3 Rep. 12, 47. 11 Rep. 52.

• Utique fortior et potentior est dispositio legis quam hominis. 1 Inst. 234. a.

• Principia probant, non probantur. 3 Rep. 40.

• Contra principia negantem non est disputandum. 1 Inst. 16. a. 343. a.

All the other Brethren may inherit. Lands lying in *Kent* shall be presumed *prima facie* to be of the Nature of Gavelkind, that being the general Tenure of that County; and it lies upon the other Side to prove them disgavelled'. But see the 31 *H. 8. cap. 3.* 2 & 3 *Ed. 6.* a private Act. And there is a particular Custom in some ancient Boroughs (called *Burgb-English*, or *Borough-English*, because this Custom was first in *England*) where the youngest Son shall inherit before the Eldest. And if the youngest Son die in the Life-time of the Father, leaving Issue a Daughter, she shall take *Jure Representationis*; and so as to Gavelkind Lands, if one of the Sons die in the Life-time of his Father, leaving Issue a Daughter, the Daughter shall inherit the Purparty or Share of her Father; for the Right of Representation holds in Inheritances descendable by Custom, as well as at Common Law: And a Freehold-Lease, or Rent in Fee, created out of Gavelkind or *Borough-English* Lands, shall descend in the same Manner as the Lands themselves would do^c. Gavelkind and *Borough-English*^d differ from all other Customs, inasmuch as the Law takes Notice of them when generally alledged; whereas other Customs must be particularly pleaded.

In *London* there are many particular Customs relating to Trade, Apprentices, Orphans, Reformation of Manners, Actions and Pleas, and all against the general Custom of the Kingdom. [See 8th *Rep.* 126. 2 *Danv. Abr.* 311. *Tit. Customs of London*, and those *Authors* who have wrote on this Subject.]

In a *Town* a Custom to devise Lands in Gavelkind, or *Borough-English*, cannot be alledged; for these are Customs proper to Cities, Boroughs and Manors. And yet it appears from our best *Authors*, that all the Lands in *England* were of the Nature of Gavelkind, and descended equally to all the Issue, before the Conquest^f. In special Cases (I said) a Custom may be alledged within a Hamlet, Town, Borough, City, Manor, Hundred, County. In an Upland Town (which is neither City or Borough) a Custom may be alledged to have a Way to their Church or to the Market, for the Inhabitants to dance upon another's Land for their Recreation; or to make By-Laws for the Reparation of the Church, or for the well-ordering of their Common: Yet as to By-Laws, these Differences must be observed; Inhabitants of a *Town*, without any Custom, may make By-Laws for the Reparation of the Church, Highway, or any Thing which is for the general Good of the Publick; for they are as it were incorporated by the Common Law for some Necessities; and in such Cases, the greater Part of the Inhabitants shall bind the rest without any Custom. But if the By-Law is for their own private Profit, as for the well-ordering of the Common; there without Custom, they cannot make By-Laws; and the greater Part shall not bind the lesser, if that is not a Custom too: For here every Act must be warranted by Custom.

To Particular Customs two Things are inseparably incident, *Usage* and *Time*. 1. *Usage* must be Long, Continual and Peaceable. Non-usage is a great Presumption that the Law will not bear it. But an Act of Parliament cannot be antiquated by Non-user. For no Custom can take away the Force of an Act of Parliament, unless the Custom is saved by another Act; because the Custom cannot be beyond Memory, if there is a Record to the contrary; for Knowledge is as well by *Proof*, as by one's own

pro-

proper Knowledge. Neither does an Act of Parliament always take away a Custom. An Affirmative Act does not take it away. And a Custom may be alledged against a Negative Statute, which is made in Affirmance of the Common Law. 2. Time must be beyond the Memory of Man. ¹ Inst. 113. b.

Rules concerning Customs.

Usage and ancient Custom make Law. ¹ Inst. 153. a.
Customs must be reasonable, and according to Justice, else void. ¹ Inst. 62. a.
But the Reason of every Custom cannot be assign'd. ¹ 40. a. 141. a.
Customs ought to be upon good Consideration. ¹ Coke's Compl. Copyb. Sect. 33.
Customs ought to be compulsory, not left to the Liberty of every one to use them or not. ² Inst. 66.
Customs ought to be certain. ¹ See of Copyb. Customs post. B. 2. Ch. 1.
Customs ought to be beneficial to him that alledgeth the Custom. ¹ Dav. 1.
If the Custom is beneficial to one, and injurious to a multitude, it is void. ¹ Tanistry 32. b.
Things cannot be challenged by Custom that are to be gained by Matter of Record only. ¹ Coke's Compl. Copyb. Sect. 33.
Customs are to be taken strictly, tho' not literally, because they tend to the Derogation of the Common Law. ¹ Inst. 114. a. & b.
They cannot extend to Things newly created. ¹ See of Franchises post. B. 2. Ch. 2.
Customs ought to be construed according to vulgar Apprehension. ¹ Coke's Compl. Copyb. S. 33.
Custom cannot exalt itself upon the King's Prerogative. Yet Custom may support that which the King's Grant cannot support. ² Ld. Raym. 1024. Contra.
A Custom meerly in the Negative is not good. If mixt with an Affirmative, it may be good. ¹ Dav. 1.
A Custom against a Custom cannot stand together. ¹ Tanistry 33. b.
¹ Prescription is different from Custom. ¹ Inst. 15. b.
² Tolls, Taxes, &c. are sometimes called Customs. ¹ 8 Rep. 125. 127.

6. Statutes, or Acts of Parliament, are a sixth Ground or Foundation of our Laws. These are made by the King, Lords Spiritual and Temporal, and the Commons in Parliament; which before the Invention of Printing were proclaimed by the Sheriff in every County, by Virtue of the King's Writ. Several Statutes are penned like Charters or Letters Patent in the King's Name only; yet they were made by lawful Authority. The several Ways of drawing up Acts of Parliament appear in the Prince's Case. ¹ Roll. Abr. 365. ² Roll. Abr. 270. ³ 9 Rep. 58. ⁴ 1 Inst. 113. b. ⁵ See of Prescription post. B. 2. Ch. 3. ⁶ 1 Inst. 58. b. ⁷ Dav. 8, 9, 10. &c. ⁸ 2 Inst. 526, 644. ⁹ 4 Inst. 25. ¹⁰ Pref. to the 4th Rep. ¹¹ 8 Rep. The Prince's Case, 19, 20, 21.

Rules

¹ Consuetudo est altera lex. 4 Rep. 21.
² Optimus interpret legum consuetudo. 2 Inst. 124, 228, 282. 4 Inst. 75.
³ Consuetudo loci est observanda. 6 Rep. 67.
⁴ Malus usus abolendus est. Lit. 212. 1 Inst. 141. a. 4 Inst. 274.
⁵ In consuetudinibus non diuturnitas temporis, sed soliditas rationis est consideranda. 1 Inst. 141. a.
⁶ Consuetudo licet sit magna auctoritatis, nunquam tamen praesudat manifestae veritati. 2 Inst. 654. 4 Rep. 18.
⁷ Frequentia actus multum operatur. 4 Rep. 78.
⁸ Obtemperandum est consuetudini rationabili, tanquam legi. 4 Rep. 38.
⁹ Consuetudo ex causa rationabili usitata privet communem legem. Lit. 37.
¹⁰ Consuetudo vincit legem. 4 Rep. 21.
¹¹ Consuetudo tollit communem legem. 1 Inst. 33. b.

Rules concerning Statutes or Acts of Parliament.

- ^a 1 Rep. 47. To an Act of Parliament ^a every Man in Judgment of Law is Party.
⁴ Rep. 76. Acts of Parliament relate to the ^b first Day of the Session of Par-
¹ Inst. 95. b. liament in which they were made, if it is not otherwise provided
^{333. a.} by the Act.
⁴ Inst. 25, 27. Hob. 111. The Judges ought to take Notice of Statutes which concern the
⁴ Rep. 13, 77. ^c King and Queen.
Pinch 86. The Judges will take Notice of general or ^a publick Acts, tho'
⁴ Rep. 76. they are not pleaded; but not of particular or *private* Acts, with-
⁸ Rep. 28. out Pleading.
¹ Inst. 98. b. The ^c Exposition of Acts of Parliament belongs to the Judges of
² Inst. 618. the Common Law, tho' they concern Things of a Spiritual Nature.
² Rol. Abr. The ^d Title of the Act is no Part of the Act.
^{65.} The ^e Preamble or Rehearsal of a Statute is to be taken for
^{Dr. and} Truth; therefore good Arguments and Proofs may be drawn from
^{Stud. Dial. 2.} the Preamble or Rehearsal.
^{cap. 55.} The Words of an Act of Parliament must be taken in a ^b law-
⁶ Rep. 13. ful Sense.
² Inst. 611, 614, 618. A Description ¹ specifying Persons and Things of an inferior
³ Inst. 43. Rank, ought not to be extended by subsequent *general Words* to
¹¹ Rep. 33. those that are superior; as in these general Words, (*viz.*) *And no*
⁴ Inst. 330. *other Person or Act whatsoever*, shall not be included *Persons* or
¹ Inst. 11. b. *Things* superior to those that are before particularly expressed. Pro-
^{19. b. 79. a.} vided there are any of inferior Rank to satisfy the general Words*.
⁴ Inst. 330. Statutes must be interpreted by reasonable Construction, accord-
¹ Inst. 381. b. ing to the ^k Meaning of the Legislature.
² Rep. 46. It is natural to construe ¹ one Part of a Statute by another.
² Inst. 165, 166, 457. They may be construed according to ^m Equity; especially where
³ Inst. 72. they give Remedy for Wrong; or are for Expedition of Justice, or
² Inst. 137, to prevent Delays; for Law-makers cannot comprehend all Cases.
^{627.} Things for Necessity-Sake, or to prevent a Failure of Justice, are
^{18.} excepted out of a Statute.
¹¹ Rep. 34. General Words of an Act shall not take away necessary Incidents.
⁴ Inst. 330. A ⁿ Penal Statute regularly ought to be construed strictly. But it
¹ Inst. 11. b. may be construed beneficially; for what is out of the Mischief, is
^{381. a. & b.} out
² Inst. 186. out
¹ Inst. 24. b. out
^{54. b. 76. a.} out
^{77. b. 224. b.} out
^{365. b. 381. b.} out
² Inst. 106, 107, 112, 127, 152, 168, 242, 251, 258, 393, 501.
¹ Inst. 54. b. out
^{268. b. 290. b.} out
^{365. b.} out
¹ Inst. 107, 199, 649. out
³ Rep. 7. out
¹¹ Rep. 34. out
¹⁸ strange 253. out
³ Cro. 71. out
^{See Tit. Acti-} on the Case
^{post. B. 4. Ch. 4.} out
- ^a Contemporanea expositio in lege est fortissima. 2 Inst. 10, 11, 136, 139, 181.
⁴ Inst. 138.
^b Ex antecedentibus et consequentibus fit optima interpretatio. 2 Inst. 317. 2 Rep. 71.
^c Relatio fit ad proximum antecedens, nisi impediatur sententia. 2 Rep. 71.
^d Verba posteriora propter certitudinem addita, ad priora quæ certitudine indigent sunt
referenda. 8 Rep. 119.
^e Generale dictum generaliter est intelligendum. 2 Inst. 81.
^f Qui omne dicit, nihil excludit. Ibid.
^g Generalis clausula non porrigitur ad ea quæ specialiter sunt comprehensa aut expressa.
8 Rep. 118.
^h Ubi lex est specialis et ratio ejus generalis, generaliter est accipienda. 2 Inst. 43, 83.
10 Rep. 101.
ⁱ Quamquam lex generaliter loquitur, cessante ratione potest restringi. 4 Inst. 330.
^j Casus omissus dispositioni juris communis relinquitur. 5 Rep. 37.
^k Qui hæret in litera, hæret in cortice. 1 Inst. 54. b. 365. b.
^l Apices juris non sunt jura. 4 Rep. 46. 1 Inst. 356. a. 8 Rep. 56.
^m Nimia subtilitas in jure reprobatur. 4 Rep. 7.
ⁿ Summum jus est summa injuria. 2 Inst. 495.

out of the Meaning of a Law, tho' it is within the Letter. And on the contrary, what is within the same Mischief, shall be within the same Remedy, tho' it be out of the Letter of the Law.

The Construction of a Statute must be in ^a Suppression of the Mischief, and in Advancement of the Remedy. ¹ Inst. 11. b. ⁴² a. 360. a. ³⁸¹ b.

It must be so construed, as that no innocent Man may by a literal Construction receive Damage. ³ Rep. 7. ¹¹ Rep. 71. b.

Statutes made to prevent and suppress ^b Fraud ought to have a ^a favourable Interpretation. ³ Rep. 82. ⁵ Rep. 60.

Acts of Parliament that are against *common* Justice and ^c Reason, or impossible to be performed, shall be judged void. ⁸ Rep. 118. ¹²⁸ 129.

The surest Construction is by the Reason of the ^d Common Law. ² Inst. 587. ⁵⁸⁸.

The Reason of the Law is the ^e Life of the Law. ¹ Inst. 272. b.

^f General Words will not always be allowed to transfer a Right. ² Inst. 148. ³⁰¹.

^g Custom or Usage is a good Interpreter of a Law. ¹ Inst. 183. ¹⁹¹ a.

Common Law must ^h give Place to a Statute where they thwart. And ³ Rep. 4. 5. ¹ Inst. 81. b.

ⁱ Old Statutes must give Place to new where they are contrary: But an Affirmative Act shall not repeal a precedent Affirmative Act, or the Common Law. ² Inst. 18. a. ²²⁸.

Acts of Parliament ^j against the Power of subsequent Parliaments bind not. ¹¹ Rep. 62. ⁶³.

A ^k Saving, which is repugnant to the Body of the Act, is void. ⁴ Inst. 43. ¹ Inst. 81. a.

When an Act makes any Thing good as against a Person in certain, ^l it shall not take away the Right of another, tho' there is no Saving. ¹ Rep. 47. ¹ Rep. 138.

By repealing of a repealing Statute, the first is revived.

By reviving an Act repealed, the Act of Repeal is of no Force.

^m An Act of Parliament cannot be antiquated by *Non-user*. ¹ Inst. 84. b. ¹¹³ a. 115. a.

For the true Interpretation of Statutes ⁿ Four Things are to be observed and considered: 1. What the Common Law was before the making of the Statute. 2. What was the Mischief or Defect not provided for by the Common Law. 3. What Remedy the Statute has appointed to cure the Mischief or Defect. 4. The true Reason of the Remedy. ³ Rep. 7.

These are the Foundations and Six Grounds of the Laws of England. For tho' they are usually divided into three Parts only, (*viz.*)

^o Into *Common Law*, *Particular Customs*, and Statutes or Acts of Parliament; yet under the Words *Common Law*, the Law of Nature or Reason, the revealed Law of God, the General Customs of the Kingdom, and the Principles and *Maxims* of the Law are included. ¹ Inst. 110. b. ¹¹⁵ b. 344. a.

This Division is most in Use, and most concise, but it is obscure.

There is ^p another Division of our Laws more large than either; as into the *Prerogative* or *Crown Law*; the Law and Custom of *Parliament*; the Law of *Nature*; the *Common Law*; the *Statute Law*; *reasonable Customs*; the Law of *Arms*, *War* and *Chivalry*; *Ecclesiastical*

D

Æquitas in paribus rationibus paria jura desiderat. ¹ Inst. 24. b.
Æquitas est quasi equalitas; et est perfecta quedam ratio, quæ juri scriptum interpretatur et emendat. Ibid.

Ratio legis est anima legis. ¹ Inst. 183. b. ¹⁹¹ a. ² Inst. 689.

Ubi eadem ratio, idem jus. ¹ Inst. 10. a. ¹⁹¹ a. ² Inst. 619. ⁷ Rep. 18.

Diffimilium diffimilis est ratio. ¹ Inst. 191. a. ⁷ Rep. 18.

Cessante ratione legis, cessat et ipsa lex. ¹ Inst. 70. b. ² Inst. 11. ³ Inst. 330.

^q *Leges posteriores priores abrogant.* ⁸ Rep. 137. ¹¹ Rep. 62, 63.

affical or *Canon Law* in certain Courts and Cafes; *Civil Law* in certain Courts and Cafes; *Foreft Law*; the Law of *Marque* or *Reprisal*; the Law of *Merchants*. The Laws and Customs of the Isles of *Jersey*, *Guernsey*, and *Man*; the Law and Privilege of the *Stannaries*. But this large Division too may be reduced to the common Division; into *Common Law*, *Particular Customs* and *Statutes*. All is founded on the Law of Nature or Reason, and the revealed Law of God; as all other Laws ought to be founded.

* See Mag.
Chart. Ch. 30.
and 2 Inst. 57.

Upon these Laws, there are many *Cases* solemnly *Adjudged* in the highest Courts of Justice, which are collected in the Books of *Reports*, * and have great Weight with the Judges in their Debates upon like Cases. Many of these *Reports* are as highly valued as the *Responsa Prudentum* amongst the *Romans* to be found in the *Digest*, which were *Authoritative*.

The *Objects* of these Laws are, 1. The *Persons* of which *England* is composed. 2. Their *Estates*. 3. The *Crimes* and *Misdemeanors* that may be committed by them, call'd *Pleas of the Crown*. 4. The *Courts of Justice*, or Jurisdiction of Courts, and the *Manner* of the *Proceedings* therein.

* *Periculosum est quod bonorum virorum non comprobatur exemplo.* 1 Inst. 81. b.

Non est recedendum a communi observantia. 2 Rep. 74. 1 Inst. 186. a. 229. a.

Minimè mutanda sunt, quæ certam interpretationem habuerunt. Ibid.

BOOK I. OF PERSONS.

CHAP. I.

Of Persons in their Natural Capacities: And therein of their Life, Sex, Age, Health, Liberty, Reputation.

I Have said, that the *Object* of the Laws of England are; 1. *Per-* Of Persons
in their Na-
tural Capa-
cities.
sons. 2. *Estates.* 3. *Crimes and Misdemeanors,* or *Pleas*
the *Crown.* 4. *The Courts of Justice.*

Persons are to be considered in their *Natural,* and in their
Relative or Civil Capacities.

A Person in its *Natural Capacity* is every Man or Woman: In
which Capacity the Law takes Notice of its *Life, Sex, Health,*
Liberty, Good Name or Reputation.

I. *Life* begins when an Infant stirreth in the Womb; * for if a Life.
Woman is quick with Child, and killeth it in her Womb, and the 1 Inst. 50.
is delivered of a dead Child, it is a great Misdemeanor, though H. P. C.
not Murder: But if the Child is born alive, and dieth of the Potion, Ch. 33. sect.
this is Murder. The Birth is usually at the End of nine solar 2. Contra.
Months after Conception, reckoning thirty Days to the Month: 1 Inst. 123. b.
Therefore if born within nine Months, or rather within forty Weeks 2 Cro. 541.
after the Death of her Husband, it is held to be legitimate: But
there is no exact certain Time fixed by Law, beyond which if the
Child were born the Law determines it to be illegitimate; but it
shall be found by the Jury, on the Examination of proper Physi-
cians, &c. for by Defect of Nourishment, perhaps an Infant may be
born * after forty Weeks, and by Accident at the End of seven
Months.

An Infant *in ventre sa mere* (in the Mother's Womb) may be 2 Cro. 541.
supposed to be born to many Purposes. A Surrender of a Copy 1 Roll. Ab.
hold Estate to an Infant in the Womb is good; so is a Devise, so 356.
is an Appointment of Guardianship of such an Infant by his Fa- Godb. 281.
ther, under 12 Car. 2. ch. 24. And See of Bastards
[By 10 & 11 W. 3. ch. 16. *Posthumous Children* are enabled to post. Ch. 6.
take Estates, as if born in their Father's Life-time, though there
be no Estate limited to Trustees after the Decese of the Father,
to preserve the contingent Remainder.]

As the *Life* of every Man is under the Protection of the Law;
and all Wrongs against it are punished: So the *Members* of every
Subject are under the Protection of the King, that he may serve
him and his Country: * Therefore, a Rogue for causing his Com- 1 Inst. 157.
panion s. & b.

panion to strike off his left Hand, thereby to have a Pretence to beg, was indicted and fined, with his Companion.

²² Rep. 48. There is a *Civil Death* as well as a *Natural Death*: If a Lease is made *during Life*, it may be determined by a Civil Death, as by entering into Religion, &c. But if the Lease is to have and to hold for the Term of one's Natural Life, it is not determined by a Civil Death.

The Sex.

¹ 1 Inst. 8. a.

²⁹ b.

² 1 Inst. 45.

³ 1 Inst. 4.

⁴ 1 Inst. 243. b.

II. The Sex is Male or Female, or an Hermaphrodite, *i. e.* both Male and Female. An Hermaphrodite ought to be Baptized according to that Sex which is most apparent, and doth most prevail. *Homo* includes both Man and Woman; and a *Virgo* is included under the Name of *Mulier*.

[See the *Statutes concerning Women*, which will be cited again in a proper Place, 3 H. 7. ch. 2. 4 & 5 Ph. & Mar. ch. 8. 18 El. ch. 7. 39 El. ch. 9. 21 Jac. 1. ch. 6. 3 & 4 W. & M. ch. 9. and 24.]

Age.

¹ Lit. 104.

III. *Full Age* of Male or Female is at Twenty-one Years. It is not material at what Hour of the Day one is born, for there must be no Fractions in a Day. Therefore if a Man were born the first Day of February, and lived to the last Day of January Twenty-one Years, and on this last Day makes his Will [of his real Estate] and dies by Six at Night; that Will is good, and the Devisor was of Age. Odd Hours in a Legal Computation are rejected. A

¹ 1 Ld. Raym.

480.

² 1 Ld. Raym.

1096.

³ 1 Inst. 135. b.

⁴ 1 Inst. 78. b.

⁵ 1 Gilb. Rep.

74.

Man hath divers Ages to several Purposes; at Twelve he ought to take the Oath of Allegiance; at Fourteen he may consent to Marriage, choose his Guardian, is supposed to be at Years of Discretion, and if so in Fact, may make a Will of his personal Estate; at Seventeen may act as Executor, and at Twenty-one he may alien his Lands, Goods and Chattels, but not before. A Woman had formerly *Seven Ages* for several Purposes; but now the Law is altered. At Nine Years of Age she may have Dower; at Twelve she may consent to Marriage; at Fourteen she is supposed to be at Years of Discretion, and may choose a Guardian; and (if of sufficient Discretion) may make a Will of her personal Estate; (tho' some say she may at Twelve) at Seventeen may act as Executrix, and at One and Twenty she may alienate her Lands, &c.

¹ 1 Inst. 78. b.

¹ 1 Gilb. Rep.

74.

Before the Age of Twenty-one, a Man or Woman is call'd an *Infant* or *Minor*; and before such Age, any Deed, or other Writing, may be avoided: Matters in *Fact*, either within Age or at full Age; but Matters of *Record*, as Statutes, Fines, only during Minority.

¹ 1 Inst. 171. b.

² 1 Inst. 380. b.

³ 1 Inst. 483.

⁴ 673.

⁵ 1 Cro. 569.

853.

But if an Infant appears by Attorney, and a Recovery is had against him, he may avoid it by Writ of Error after his full Age; for it shall be tried by the Country, whether he was within Age when he made the Warrant of Attorney?

¹ 1 Inst. 172. a.

² 1 Sid. 112.

³ 1 Str. 168.

⁴ 1 Rol.

⁵ 1 Abr. 729.

⁶ 1 Cro. 920.

⁷ 1 Lev. 87.

⁸ 1 Str. 339.

⁹ 1 Salk. 479.

387.

Though an Infant cannot alienate any Lands, Goods or Chattels; yet he may bind himself to pay for *Necessaries*, as Meat, Drink, Apparel, Physick, Instruction for Himself, Wife, Children and Family. But if he bind himself in a Bond, or other Writing, with a *Penalty*, for the Payment of any of these Necessaries, that Bond shall not bind him. And if he borrows Money to buy or pay a Debt for Necessaries; and applies it accordingly, he is not liable at law, because he might have wasted it. But he is liable in Equity, and the Lender of the Money stands in the Place of

the Creditor for Necessaries; or if after coming of Age he devise Lands in Trust for Payment of his Debts, such Debt, though contracted during Infancy, is within the Trust'. An Infant Defendant is liable to Costs^b, but not an Infant Plaintiff^c, for any one may commence a Suit in his Name as next Friend, but he does it at the peril of Costs. ^d An Infant is bound by all Conditions, Charges and Penalties in an Original Conveyance, whether he comes to the Estate by Grant or Descent; except that of doubling the Rent for Non-payment. [See the Statute of *Merton*, *ch. 5.*] He shall be also punished for doing or suffering Waste, when Tenant for Life or Years. Nay, the Law gives him a Capacity to *purchase or contract* without Consent of any other, for it is intended for his Benefit, and the other Party is absolutely bound: Yet he at his full Age may either agree to it and perfect it, or without any Cause alleged waive or disagree to the same; and so may his Heirs after him, if he agrees not to it after his full Age. If he is an Executor, he may give an Acquittance on Payment; not without Payment. He may appoint a Guardian to his Children by Deed or Will, pursuant to 12 *Char. 2. Ch. 24.*

By 5 *Ellz. ch. 4.* An Apprentice shall be bound by his Indenture, notwithstanding his Nonage. And by 2 & 3 *Ann. ch. 6.* Justices are empowered to put out poor Boys of ten Years of Age Apprentices to the Sea-Service.

By 7 *Ann. ch. 19.* Infants seised or possessed of Estates in Fee, in Trust or in Mortgage, are enabled and compellable to make Conveyances of such Estates, by the Directions of the Courts of Chancery or Exchequer.

As to an Infant's Right to an Estate, 'Nonclaim shall not bind him; nor any Laches or Lack of Diligence, or Negligence, be imputed to him during his Infancy, except in some particular Cases. Courts are so tender of the Interests of Infants, that where an Infant Heir by Answer in Chancery insisted, that being an Infant, the Parol ought to Demur, It was ordered accordingly, although the Infant's Counsel offered to Waive the Objection, as Prejudicial to the Infant. And where a Legacy being given to a Child, the Executor payed it to the Father; this was held to be a Mispayment, although the Testator had by Parol, on his Death-bed, directed it so^b.

Laches shall prejudice an Infant if he presents not to a Church within six Months: For Lapse shall incur. So in Case of a Fine, where the Time begins in the Life of the Ancestor. In Case of an Appeal of Death of his Ancestor, where he brings not his Appeal within a Year and a Day, as shall be observed under those Heads.

An Infant or Minor, shall Sue¹ by *Prochein Amy* (his next Friend) or Guardian; [See *Westm. 1. Ch. 48. Westm. 2. Ch. 15.*] but always Defend by Guardian. The Course hath been to allow One of the Officers of the Court to be *Prochein Amy*, or Guardian, if a Guardian hath not been particularly appointed by the Father, pursuant to 12 *Char. 2. ch. 24.* [See 21 *Jac. 1 ch. 13.*] But if an Infant joins with others of full Age, and sues in *auter Droit* (or

E

in

¹ *Negligentia semper habet infortunium comitem.* 1 *Inst. 246. b.*

^a 2 Ld. Raym. in another's Right as Executor,) ^{*} or to an Information in the Crown-office for a Riot, &c. he may appear by Attorney.

If Husband and Wife are sued, the Wife being under Age, she must appear by Guardian^b.

^{288.} ^c In Criminal Cases, the Act of an Infant shall not be imputed to him; no not in Case of High Treason, till he is of the Age of Fourteen; which (as hath been said) is accounted the Age of Discretion: But in some Cases of extraordinary Malice, an Infant under 14, comes within the Censure of the Law^d.

¹ Roll. Abr. ^e IV. *Health* is destroyed either by the Diseases of the Body or Mind.

¹ Vent. 185. ^f The Law regards Health, or the Diseases of the Body, when it allows of *Essoins* (or *Exonnies*, Excuses) upon the Account of Sickness and Danger of Travelling, for not answering in real Actions, or for not coming to perform Suit in a Court-Baron, or when a Writ is granted *De Leproso amovendo* to a Parish, [See 1 Jac. 1. ch. 31. *An Act for Ordering Persons infected with the Plague, and the 26 Geo. 2. ch. 6. 29 Geo. 2. ch. 8. For the Performance of Quarantine.*

But it is of more Use to consider the Diseases of the Mind.

He that is *Non compos mentis* is diseased in Mind. *Non compos mentis* (for that is the most sure and legal Word) is of four Sorts.

¹ 1 Inst. 246. b. ¹ 1. An Idiot, or Natural Fool, or one of unsound Mind and Memory from his Nativity. If he hath so much Knowledge that he can read, or measure an Ell of Cloth, or name the Days of the Week, whereby it may appear that he hath some Light of Reason, then such a one is no Natural Fool.

^{247. a.} ⁴ 2. A Madman, or he that by Sickness, Grief, or other Accident, wholly loseth his Memory, or Understanding.

⁴ 3. A Lunatick, that hath sometimes lucid Intervals: He is *Non compos mentis* so long as he hath not his Understanding.

⁴ 4. Lastly, he that by his own vicious Act depriveth himself of his Memory and Understanding for a Time; as he that is drunk. This kind of *Non compos mentis* shall give no Privilege or Benefit: But what hurt he doth his Dunkeness shall aggravate, tho' it is too often made Matter of Excuse.

Now every Deed, Grant, or Gift, which is made by one who is *Non compos mentis* is voidable, or may be made void. And yet it shall never be avoided by himself, because when he recovereth his Memory he cannot know what he did when he was *Non compos*; and because no Man of full Age shall be received in any Plea to stultify or disable himself, *i. e.* in Civil Cases: ^b For in Criminal Cases, as Petit Treason, Felony, his Acts shall not be imputed to him. But the King after Office found may avoid a Deed, or Grant, for the Benefit of the *Non compos*. ^a All Acts which he doth concerning his Lands, or his Goods, in a Court of Record, shall bind himself and all others claiming under him for ever; by reason of the Inconveniencies that might otherwise follow. But Acts done out of Court shall bind only during his Life, his Heir having

⁸ Lit. 405.

406.

¹ 1 Inst. 247. a.

⁴ 4 Rep. 123.

contr.

^{F. N. B. 202.}

^{Comyns 45.}

¹ 1 Inst. 247. b.

³ 3 Inst. 4. 6.

⁴ 4 Rep. 124.

¹ 1 Inst. 247.

a. & b.

⁴ 4 Rep. 124.

⁵ 5 Rep. 119.

⁸ 8 Rep. 42. 43.

¹ 1 Inst. 247. a.

² 2 Inst. 483.

^a *Nemo contra factum suum venire potest.* ² 2 Inst. 66.

^b *Actus non facit reum, nisi mens sit rea.* ¹ 1 Inst. 247. b.

Furiosus solo furore punitur. Ibid.

having Liberty to avoid them, and as to third Persons they are absolutely void'. But Relief may be had in a Court of *Equity*, against the Act of a *Non compos*, either by himself and his Committee during his Infanity, or by himself after he has recovered his Understanding'. [And according to later Determinations, even in a Court of Law, he may avoid his own Acts by pleading *Non est factum*, and giving Lunacy in Evidence. So that the Notion that a Man of full Age cannot stultify or disable himself, seems to be over-ruled'.] A *Non compos mentis* may purchase Lands without Consent of any other, and he himself cannot waive it; but his Heirs may. And [By 4 Geo. 2. ch. 10. *Idiots and Lunaticks and their Committees are enabled to convey Trust and mortgaged Estates by Direction of the Chancery.*]

The King is General Guardian of *Idiots, Madmen and Lunaticks*. By the Statute De Prerogativa Regis, or 17 Ed. 2. ch. 9. The King shall have the Custody of the Lands of an *Idiot*, or *Natural Fool*; taking the Profits thereof during his Life, without Waste, and finding him Necessaries: And after the Death of such *Idiots* shall render the Lands to the Right Heir.

This Statute does not refer to an *Idiot* by Accident, or subsequent Infirmary. The King shall have the Custody of the Lands of an *Idiot* during his Life, because there is no Hopes of his Recovery: And therefore he may let them to Farm rendering a Rent.

Though the Statute gives only the Custody of the Lands of an *Idiot* from his Nativity, the King shall have the Custody of the Body, and of the Goods and Chattels, as well as of the Lands; except the Lands of an *Idiot* holden by Copy of Court-Roll: For it would be prejudicial to the Lord of the Manor, if the King should have the Custody of Lands holden by Copy.

By 17 Ed. 2. ch. 10. The King shall provide that the Lands of *Lunaticks* be safely kept without Waste, and they and their Families maintained by the Profits: And the Residue shall be kept for their Use, and be delivered unto them when they come to their Right Mind.

This Statute (which was but a Declaration of the Common Law) says, Also the King shall provide, &c. which shews he hath not the Custody of the Lands or Body of a *Lunatick*, as he hath of an *Idiot*: For they may recover their Memories, which an *Idiot* is not presumed to do. So that the King is Guardian of *Idiots* Lands without Account, and of *Lunaticks* with Account. For if the King provideth one to have the Care and Charge of him that is *Lunatick*; or if one of his own Head taketh upon himself the Guardianship of one that is a *Lunatick*, he shall be accountable to him as Bailiff, or to his Executors or Administrators.

When an *Idiot* doth Sue or Defend, the Suit must be in his Name; but it shall be followed by others for his Benefit. So a *Madman* or *Lunatick* must sue in his own Name. If an Heir is an *Idiot* of what Age soever, any Man may make a Tender for him, the Law in this Case being grounded upon Charity.

But the Crown doth now grant, under the Royal Sign Manual, the Care and Commitment of the Custody of *Idiots and Lunaticks*, and of their Persons and Estates, to the Lord Chancellor or Lord Keeper who upon Petition issues a Commission in the Nature of the Writ *De Lunatico inquirendo*, and, the Party being found *Idiot* or *Lunatick*, grants

grants the Custody of his Person and Estate to some Relations or Friends, who are called Committees*. And whether he be *Idiot* or *Lunatick*, the Committee of the Estate hath it only for the Benefit of the *Idiot* or *Lunatick*; and the Lord Chancellor directs a proper Part of it to be applied for his Maintenance and Support.

a 3 Wms. 107.
108. &c.
See Harrison's
Practice in
Chancery.

By 17 Geo. 2. c. 5. *Lunaticks, or Madmen, may be apprehended by the Warrant of two Justices, and during their Madnefs locked up and chained where apprehended, if their Settlement is in the same County, or otherwise be sent to their last legal Settlement, to be there by Warrant of two Justices of that County locked up and chain'd: And the Charges of Removal, Maintenance, &c. shall be paid out of the Madman's Estate, if he hath any; if none, by the Parish.*

Liberty.

b 1 Inst. 253. b.
2 Inst. 590.
c 2 Inst. 53.
482.

V. *Liberty*, consists in a Power to do as one thinks fit, unless restrained by Force, or the Law. *Imprisonment* is a Restraint of a Man's Liberty under the Custody of another. One may be lawfully imprisoned by the King's Writ, or unlawfully. An unlawful Imprisonment is not only an unjust Imprisonment at the first, but when one is detained longer than he ought, though he was at first lawfully imprisoned. For if a Sheriff, or Gaoler detains a Prisoner in Gaol after his Acquittal (unless it be for his Fees, not for Meat, Drink, or Lodging) this is an unlawful Imprisonment. An Action of false Imprisonment doth lie against a Bailiff for Arresting One after the Return of the Writ is past, it being now without Writ.

d 2 Inst. 482.
589.
2 Roll. Abr.
74.
e 2 Inst. 482.
483.
3 Inst. 97.
4 Inst. 97.

He that is put into the Stocks, or is under an Arrest, is said to be in Prison. Unlawful Imprisonment is sometimes called *Durefs* of Imprisonment (from *Durities*) as where one is wrongfully imprisoned or detained, till he seals a Bond. But not where a Man is lawfully imprisoned for another Cause, and for his Delivery seals a Bond; nor where being arrested at the Suit of another, and in Prison on such an Arrest, he willingly seals a Bond to a Stranger.

f 1 Roll. Abr.
687.

A Son shall avoid the Action by Reason of the unlawful Imprisonment of his Father; a Husband by Reason of the unlawful Imprisonment of the Wife. So if one's Beasts are unlawfully imprisoned till he Seals a Deed, he may avoid the Action. So if one is under a just Fear of being imprisoned, killed, or maimed, and he seals a Bond to him that menaces him, it is *Durefs per Minas*, and in both Cases he may plead the *Durefs*, and avoid the Action. If it be only a Threatning of a Battery, which may be light, or to take away my Goods, or to burn my House, this will not make the Deed made upon that Occasion to be by *Durefs*; for there one may have Satisfaction by Recovery of Damages. There must be some Threatning of Life, or Member, or of Imprisonment, and to the End of obtaining the Deed, and thereupon the Deed must be made. To threaten another to kill or maim, or imprison him; if he will not seal a Deed to a third Person, and thereupon he do it, this is as voidable as if it were made to the Party himself.

g 1 Inst. 162. a.
253. b.
2 Inst. 413.

Even

Nemo tenetur exponere se infortuniis et periculis. 1 Inst. 162. a. 253. b.
Talis debet esse metus, qui cadere potest in virum constantem, non molitiosum.
Ibid.
Qui non cadunt in constantem virum, exani timores sunt. 2 Inst. 483. 7 Rep. 27.

Even *lawful* Imprisonment is so far pitied, that by several Statutes, as well as by Common Law, Defaults are saved on that Account.

The Law^a favours Liberty, and the Freedom of a Man from Imprisonment; and therefore kind Interpretations shall be made on its Behalf. If a Man is unlawfully imprisoned, he may have an Action of Trespass for false Imprisonment, and recover Damages:

^b Or he may have the Writ of *Habeas Corpus*, and upon Return of this Writ by the Gaoler, setting forth by whom he was committed, and for what Cause, he ought to be discharged if it appears to be against Law. But if the Case be doubtful, he may be bailed. If the Imprisonment appears to be just, he shall be remanded to the Prison, or bailed^c. [See *Magna Charta*, ch. 29. and the *Petition of Right*, 3 Car. 1. ch. 1.]

The King cannot send any Subject of England^d against his Will to serve him out of the Kingdom; for that would be Banishment: No, he cannot send one into Ireland, against his Will, to serve as his Deputy there^e.

By 31 Car. 2. ch. 2. [called the *Habeas Corpus Act*, and entitled, An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonment beyond Seas.] A Prisoner may have an *Habeas Corpus* from any Judge in the Vacation, returnable immediately (unless committed for Treason or Felony, plainly and specially expressed in the Warrant, or for other Offences not bailable) and upon his being brought up, such Judge shall discharge him upon Bail, to appear in the King's Bench the next Term, or at the next Assizes or Sessions, or General Gaol-Delivery, or in any other Court where the Offence is cognizable.

And Persons committed for Treason or Felony, plainly and specially expressed in the Warrant, who shall petition in open Court the first Week of the Term, or first Day of the Sessions of Oyer and Terminer, or Gaol-Delivery, after such Commitment, to be brought to Trial, and who shall not be indicted sometime in such Term or Sessions, shall upon Motion the last Day of the Term, or Sessions, be let out upon Bail; unless it appear upon Oath that the King's Witnesses could not be produced that Term, or Sessions: And if such Persons, upon such Prayer, shall not be indicted, and tried the second Term, or Sessions, after Commitment, they shall be discharged.

A Subject committed for any Crime, shall not be removed into the Custody of any other Officer, unless by Writ.

This Act shall not extend to discharge any Person charged in any Civil Cause, as to such Civil Suit.

VI. The Reputation also of a Person is under the Protection of the Law: For Persons in their Natural Capacity, absolutely and simply considered, have an Interest in their Good Name: Scandal and Defamation are injurious to it. But defamatory Words are not actionable, otherwise than as they are supposed to be a Damage to the Person injured: The mere Contumely is of little Consideration. A Contumely, or Scandal against the King, a Peer of the Realm, or a Magistrate, is esteemed to be of a heinous Nature^f.

^a Inst. 124. b.

^b Inst. 42.

^c 115.

^d 9 Rep. 56.

^e 2 Inst. 55.

^f 4 Inst. 182.

^g See Catalogue of Writs

B. 4. ch. 4.

post.

^h See of Bail

post. B. 4. ch.

4. & 5.

ⁱ 2 Inst. 47.

^j 48.

^k 2 Roll. Abr.

166.

^l 7 Rep. 7. 8.

^m See of Nobl.

ity post. ch. 4.

Of Labels B. 3.

ch. 3.

ACTIONS on the

Case B. 4. ch. 4.

C H A P. II.

Of Persons in their Relative or Civil Capacities: And therein of the King and Queen.

Of Persons in
their Civil
Capacities.

A Person in its Relative or Civil Capacity, is either the *King*, or a *Subject*: A *Subject* is either of the *Clergy*, or *Laity*, *Nobility* or *Commonalty*; and some amongst the Nobility and Commonalty, are of the *Military State*. And more particularly, a Person in a Civil Capacity is a *Master* of a *Family*, *Husband* or *Wife*, *Parent* or *Child*, *Ancestor* or *Heir*, *Landlord* or *Tenant*, *Guardian* or *Minor*. Afterwards a Person may be further considered in some *Publick Office*, as *Sheriff*, &c. And lastly, a *Corporation*, or *Body Politick*, is esteemed a *Person* in Law.

This Account of a Person in a *Civil Capacity*, shall be given in several Chapters to the End of this first Book. And as a Person is to be considered as *King* or *Subject*. It will be proper to speak first of the *King*, and his Consort the *Queen*.

The King.

* 4 Inst. 342,

343.

Bract. lib. 2.

cap. 16.

* 1 Inst. 16. a.

* Plowd. 212.

* 1 Inst. 43. a.

& b.

7 Rep. 10, 12.

* Finch 82.

* 1 Inst. 41. b.

57. b. 90. b.

* 1 Inst. 165. a.

* Finch 84.

* 4 Inst. 204.

* Plowd.

314. &c.

* 1 Inst. 297.

a. & b.

* 2 Inst. 576,

578.

* 4 Inst. 236.

* 5 Rep. 114.

* 11 Rep. 82.

* 2 Roll. Abr.

169.

* 1 Inst. 43.

a. & b.

* 2 Inst. 186.

* 7 Rep. 12.

* 1 Inst. 9. b.

* 2 Ld. Raym.

811.

* 1 Inst. 90. b.

I. The *King* is the Head of the Common-wealth, immediately under God, and the only ^a Supreme Governor. [See 24 H. 8. ch. 12. 25 H. 8. ch. 21. 1 El. ch. 1. 1 Ja. 1. ch. 1.] By his taking the Imperial Crown upon himself, all ^b Attainder of his Person is purged *ipso facto*, without any Reversal. He cannot be a Minor, or ^c under Age. In him there is no ^d Imperfection, Negligence, Laches or Folly.

It is his Prerogative to make War or Peace. He is the ^e Fountain of all Honour; has the sole Power of conferring Honourable Titles, and has the Choice and Nomination of all Counsellors and Officers of State. ^f He may create Bishöpricks, Deans and Chapters, Universities, Colleges, Counties and Counties-Palatine, Cities, Boroughs, Fairs, Markets, Forests, Denizens. He can put a Value to the Coin; ^g for it is either coined by his immediate Authority, or Foreign Coin is made Current here by his Proclamation. To make Money, the Law gives the King all Mines of Gold and Silver; or where the Gold and Silver in the Mine is of the greater Value, [See 1 W. & M. ch. 30. 5 W. & M. ch. 6.] and Liberty to dig in the Out-Houses of another, but not in his Dwelling-House. He is the General Guardian of all Idiots and Lunaticks. He is a ^h Corporation, or *Body Politick*; and when the Royal Body Politick of the King doth meet with his Natural Capacity, it is drowned in the most Worthy. He never ⁱ dieth, for in Law it is said, the *Demise* of the King. The Judges will take Notice, *ex officio*, of the Day of the King's Demise^k.

But more particularly, he hath a *Prerogative* with respect to Church Affairs, with relation to the *Parliament*, to *Property* and *Suits* in Courts, *Grants*, *Escbeats*, and *Forfeitures*. ^l His *Prerogative*

gative signifies the Powers, Preheminences and Privileges which the Law giveth the Crown: It is Part of the Laws of *England*.

1. The King's Power in *Church* Affairs does appear, in that he is the ^a Supreme Head of the Church, and Supreme Ordinary, to ^a Davi. 73. whom the last Appeal is made. [See 24 H. 8. *cb.* 12. 25 H. 8. ⁴ Inst. 325, *cb.* 19, 20, 21. 26 H. 8. *cb.* 1. 35 H. 8. *cb.* 3. 1 El. *cb.* 1. ³²⁶ and see the *Ordination of Priests and Deacons*.] His Proclamations and Injunctions for Reformation, Order and Correction in Matters of Religion, are to be obeyed. He has Power to call a National or Provincial Council; and by his Licence and Royal Assent, Ca- ^{Godb. 163.} nons made in Convocation ² concerning Ecclesiastical Affairs, obtain ² Salk. 412. the Force of Laws, so as to bind the Clergy, but not the Laity un- ^{See of Con-} less confirmed by Parliament^c. He can create Bishopricks, Deans ^{vocation B. 4.} and Chapters, as before has been said, and hath the supreme Right ^{ch. 1. post.} of Patronage all over *England*^d. He is the Founder and Patron of ¹ Ld. Ray. 7, all the Bishopricks; none can be chosen Bishop but at his Nomina- ^{449.} tion. ² Str. 1056. ² Salk. 673. ⁴ See of Ad- ^{vowsons post.} ^{B. 2. ch. 2.} ^{F. N. B. 32.} ^{34.} ² Inst. 15. ¹ Inst. 90. ² 388. ² 1 Inst. 134. ² Rol. Abr. ^{230.} ² Rep. 32. b. ² Ld. Raym. ^{1205.} ¹ Inst. 344. ² 1 Inst. 119. b. ^{344. a.} ² Rep. 44. ² Rep. 15. ² Inst. 647. ^{651.} ¹ Plenarty against a common Person. He shall have the Tithes of ² Forests and Places Extraparochial; and because he has the supreme ² Ecclesiastical Jurisdiction, he provides a sufficient Pastor for the ² Place which is not within any Parish; and he may grant these ² Tithes by Letters Patent. [See 2 & 3 Ed. 6. *cb.* 13.]

The King's ^m Palaces, where his royal Person resides, are ex- ³ ³ Inst. 141; empt from all Ecclesiastical Jurisdiction.

2. It is the King's Prerogative ^a to call, continue, prorogue and ^a Inst. 110. a. dissolve the *Parliament*: And ^o tho' an Act passeth both Houses of ⁴ ⁴ Inst. 4. 6, 7. ¹ Inst. 90. b. ² Finch 234. ⁷ Rep. 14, 36. ^{37.} ¹¹ Rep. 88. ³ Inst. 154. ^{236.} ⁴ Inst. 135. ² Roll. Abr. ^{179.} ¹ At *Common Law* it was formerly held, that he might dispense with ⁷ a Penal Statute, in respect of Time, Place and Person, wherein all ¹¹ his Subjects had not an Interest, ^a and make a new Grant with ³ ² *Non-obstante*, when any Thing was prohibited *sub modo*, as upon a ^{236.} ⁴ Inst. 135. ² Roll. Abr. ^{179.} ¹ Inst. 99. a. ^{120. a. 234. a.} ² Roll. Abr. ^{179.} ³ Inst. 154. ⁷ Finch 234. ^{235.} ¹ *W. & M. sess. 2. ch. 2. intituled, An Act declaring the Rights and Liberties of the Subject, it is expressly declared, that the pretended Power of suspending Laws or the Execution of them by regal Authority without Consent of Parliament, and of dispensing with Laws or the Execution of them by regal Authority, as it had been then late assumed and exercised,*

^a *Dispensatio est mali prohibiti provida relaxatio, utilitate seu necessitate pensata.*
¹ Inst. 99. a

cised, was illegal; and that all Grants and Promises of Fines and Forfeitures of particular Persons before Conviction were illegal and void. And it was also declared and enacted, That no Dispensation by Non obstante of or to any Statute or any Part thereof should be allowed; but that the same should be void, except a Dispensation be allowed of in such Statute; and see 21 Ja. 1. ch. 3.]

* Acts of Parliament do not bind the King unless he is specially named; or unless they concern the Common-wealth, ^b suppress Wrong, take away Fraud, or prevent the Decay of Religion, &c. The Common Words *No Person or Persons, Bodies Politick or Corporate* do not bind him; tho' the Statute is in the Negative: * But he may take Benefit of any Act, tho' he is not named.

The King's *Proclamations*, in some Instances, are to be taken for Laws, as in calling or dissolving the Parliament, declaring War and Peace. But he cannot by his Proclamation introduce new Laws contrary to those established by Common or Statute Law. When necessary Statutes have been for a Time discontinued, the King usually gives Notice by Proclamation, that such Statutes for the Time to come shall be put in due Execution. ^d None may make any Proclamation without the King's Authority, except Mayors or such like Governors of Towns, by Custom or Privilege.

3. Concerning the King's Advantages in respect of *Property* and *Suits* in his Courts, he is supposed to be ^e present in all his Courts, and on this Account the King cannot be nonsuit. ^f No Action lies against him, for who shall command the King? A *Petition*, instead of an Action, must be made to him in *Chancery* or personally; but Process shall go out against the King's Grantee to maintain his Title. Against the King there can be no ^h Prescription or Occupancy. General Acts of Limitation do not bind him: He cannot be a ^k Jointenant with any one; for no one can be equal with him. He cannot be Tenant in Common of an entire Chattel Personal, but shall have the Whole. There is no Tenant at ^l Suffrance against the King, for it is Intrusion. Where the ^m Title of the King and a common Person concurs, the Title of the King shall be preferred. The King ⁿ is to be preferred before any Subject, tho' his Debt is last. And no Protection shall be ^o allowed against the King. [See 25 Ed. 3. St. 5. ch. 19. 1 R. 2. ch. 8. 13 R. 1. St. 1. ch. 16. 33 H. 8. ch. 39.] ^p The King may reserve Rent to a Stranger, sue in what Court he pleases, and is not bound to make a Demand or Tender, where a Lease is made reserving Rent with a Clause of Re-entry. A *Chose in Action* (or a Thing recoverable by Action) may be assigned by and to the King. [See 7 Ja. 1. ch. 15.] No Distress can be made upon the King's Possession, ^q but he may distrain out of his Fee in other Lands of the same Person for his Rent-charge, if the Lands are in actual Possession and Manurance of the same Tenant, not if they are in the Hands of an Undertenant; and by 22 Car. 2. ch. 6. the Grantee of the King under that Statute hath the same Privilege. He may also take Distresses in the Highway or common Street. ^r An Heir shall pay the King's Debt tho' not named in the Bond. The King is not bound by Sale of Goods in ^s open Market. ^t If one gives Land to the King by

^a Jura publica sunt anteferenda privatis. 1 Inst. 130. a.

by Deed inrolled, A Fee-simple doth pass without the Words Heirs or Successors. Goods and Chattels may go in Succession to the King; not to any other sole Corporation. Judgment is never Final against him, but is with a *Salvo jure Regis*.

When any of the King's Goods come into the Hands of Subjects so as they are Accountant for them, their Land is chargeable for the same, and subject to the King's Seizure to whomsoever it comes, whether by Descent or Purchase. If one becomes Debtor to the King, being seised of Land in Fee-simple or Fee-Tail, and then aliens the Land, yet the Land is subject to Execution, tho' the Alienation was before an Action commenced; for it shall relate to the Time that he was in Debt to the King. But the Sale of a Lease for Years, or other Goods and Chattels, by such Debtor, is good at any Time after Judgment, and before Execution awarded. [See 29 Car. 2. ch. 3. See also 33 H. 8. ch. 39. 34 & 35 H. 8. ch. 2. 13 El. ch. 4. 14 El. ch. 7. 27 El. ch. 3. 39 El. ch. 7. 7 Ja. 1. ch. 15. and the rest of the Statutes concerning Accountants, Receivers and Collectors.]

4. Concerning the King's Grants.

The King cannot Grant nor Take any Lands, Tenements or Hereditaments, but by Matter of Record; as he cannot command but by Matter of Record. Otherwise it is when the Law casts a Freehold upon him; as in a Gift in Tail, Remainder to the King. To Personal and Transitory Things, the King may be intitled without Office, or other Matter of Record. Every Grant made by the King upon Surmise or Suit of the Party, shall be taken most beneficially for the King, and against the Party. But otherwise if the Grant is, *Ex certa scientia*, *ex speciali Gratia* and *ex mero Motu*. Yet there too, if the King is deceived, or if the Intent or Purpose of his Grant cannot by the Law take Effect, it shall not give the Patentee an Advantage. When the King is here deceived, it is to be understood of a Matter of Law, not of Fact, altho' it shall never be intended or presumed that he is misconfiant of the Law. But when it appeareth within the Body of the Grant, that the King is deceived as to Matter of Law, the Grant is not good, tho' with the Clause *Ex certa Scientia*, &c. His Grant shall not be taken to two Intents, that is, it shall not enure to any other Intent than that which is precisely expressed in the Grant. But then it may enure to two or three Intents, if they are expressed. The King's Grant shall be void if express Mention is not made of the true Value of the Lands, in the Petition of those that sue for them. [See 1 H. 4. ch. 6.] Nonage or Minority does not avoid his Grant. The King may grant over a Condition, and may grant an Estate in Fee upon Condition not to alien, because he may reserve the Tenure to himself. [Qu.] [See 34 & 35 H. 8. ch. 21. 1 Ed. 6. ch. 8. 7 Ed. 6. ch. 3. 4 & 5 Pb. & Mar. ch. 1. 18 El. ch. 2. 35 El. ch. 3. For Confirmation of Letters Patent.] A Gift to the King goeth to his Successors; his Successors being included under the Name of King. [See 1 Ann. st. 1. ch. 7. s. 5, 6, &c. which limits the Grant of Crown Lands to a certain Number of Years or Lives, &c.]

G

5. As

^a Presumitur Rex habere omnia jura in scrinio pectoris sui. 1 Inst. 99. a.

5. As to *Escheats* and *Forfeitures*.

^a 1 Inst. 65. ^a All Lands are holden either mediately or immediately of the King; for all Lands were originally derived from the Crown. ^b All Franchises ^c also are derived from the Crown; and therefore *Escheats*^d and *Forfeitures*^e of all Lands and Franchises belong to him, unless granted away. ^f So are all Deodands, Treasures-Trove of Gold and Silver, Estrays, Wreck, Waifs, Goods and Chattels of Felons or Fugitives, and of those put in the *Exigent*, in Order to an Outlawry [and outlawed.] And if a Felon hath Freehold held of an inferior Lord, the King shall have his Year, Day and Waste of it. [See 17 Ed. 2. ch. 16.] He shall have all Royal Fishes, as Whales and Sturgeons. He shall also have ^g white Swans, not marked, which have gained their natural Liberty. All Estates for want of Heirs (wherein no one can claim Property) belong to the King, or to those that claim under his Grant.

There are many more Prerogatives which arise wholly from the Reason of the Common Law, though they are generally against the Common Law. But still the Common Law and the Crown Law are not two different Laws; ^h tho' almost in every Case the Law for the King is not Law for the Subject. The King hath a Prerogative in all Things that are not injurious to the Subject; ⁱ for the King can do no Wrong: His Prerogative can never extend so far. [See the Statute of the *Prerogative*, 17 Ed. 2. and the 27 H. 8. ch. 24.]

The Queen. II. The *Queen* is either she that holdeth the Crown by Right of Blood, or else she is married to the King: This last is called the Queen Consort. She that holdeth by ^k Blood is in Construction of Law, and by the Statute, the same with the King, and hath the like Power in all Respects. [See 1 Mar. St. 2. ch. 1.] But the Queen Consort is inferior to the King, and is his Subject: Yet because she partaketh of several Prerogatives above other Women, I mention her in this Place.

^l 1 Inst. 31. b. The King may take an ^l Alien to Wife, and she shall be endowed notwithstanding she is an Alien. ^m By the Common Law the Wife of the King, or Queen Consort, is a Publick Person, exempt from the King, and is capable of a Gift of *Lands* from the King, and may sue and be sued alone (by *Præcipe*, not by Petition) and may purchase, grant, and make Leases without the King. She may also have in herself the Possession of ⁿ *Personal Things* during her Life; for she may have an Action in her own Name for them. But both real and personal Estate goes to the King after her Decease, if she does not in her Life-time dispose of them, or bequeath them away by Will.

^o 1 Inst. 133. a. The Queen, and the King's Son, are not restrained by the 1 H. 4. ch. 6. *Concerning the Grants by the King*.

^p 1 Inst. 133. b. The Queen shall pay no ^p Toll. And if a Tenant of the Queen aliens a Part of his Tenancy to one, and another Part to another, the Queen may distrain in any one Part for the Whole, as the King may

¹ Nihil aliud potest Rex, quam quod jure potest. 9 Rep. 123. 11 Rep. 74.
² Inst. 63, 187.

Potestas regia est facere justitiam. 2 Inst. 374.

Nihil tam proprium est imperii quam legibus vivere. 2 Inst. 63.

may do. Nor is the Queen bound by the Statute of *Marlebridge*, for driving a Distress into another County. And in a *Quare Impedit* brought by her, some say that Plenary is no Plea^a, no more than ^a 2 Inst. 361. in the Case of the King. ^{contra.}

No Man may marry the Queen Dowager without the^b Licence ^b 2 Inst. 18, 50. of the King, upon Pain to lose his Lands and Goods. And if she marry any of the Nobility, or under that Degree, yet she doth not lose her Dignity; but by the Name of Queen may maintain an Action. Nay, a Foreign Queen marrying a Subject in *England* shall bring an Action by the Name of Queen.

Acts of Parliament concerning her need not be pleaded; for ^c Finch 86. the Court must take Notice of them, because she is a publick ^d 8 Rep. 28. Person. ^{See of High} ^{Treason post} ^{B. 3. ch. 1.} ^{and of Trials} ^{B. 4. ch. 5.}

CHAP. III.

*Of Subjects. And therein of the Clergy and Laity.
Of the Clergy, as Archbishops, Bishops, Dean and
Chapter, Archdeacons, Parsons, Vicars, Curates.*

A Person may likewise be considered in his Relative or Civil Capacity as a Subject. ^{Of Subjects}

The Subjects are the Members of the Commonwealth under the King their Head.

Aliens living in *England*, are Subjects. ^a An Alien is he that is ^a Lit. 198. born out of the *Ligeance* of the King. ^b *Ligeance* is the true and ^b 1 Inst. 129. faithful Obedience of a Subject to his Sovereign. It is either *Perpetual* or *Temporary*. *Perpetual*, where one is born a Subject, or ^c 7 Rep. 16, 17. *Temporary*, where one is born a Subject, or ^d Kelynge 38. ^e 1 Inst. 2. b. hath the Right of a Subject by *Denization*, or *Naturalization*. If ^f 8. a. 129. a. one is *Born* in any of the Dominions belonging to the Crown of ^{and b.} ^{1 Inst. 741.} *Great Britain* in any Part of the World, he is a Subject born. *Denization* (from *Donation*, *Donatio*) is a Right to be a Subject by ^{7 Rep. 4. 5.} ^{2 Cro. 539.} ^{Vaugh. 297.} Letters Patent of the King. This may be either *General*, as to be accounted in all Things as a Subject; or *Particular*, enabling one to sue only. If it is the former, and he had Issue within the Realm before his Denization, that Issue is not at Common Law inheritable to his Father. But after Denization he may purchase Lands, and the Issue born afterwards shall inherit. *Naturalization* is a Right of being a Subject, given by Act of Parliament, whereby one is a Subject to all Intents and Purposes, as much as if he was born so. His Issue before the Naturalization shall inherit at Common Law, if born within the Realm; so if the Issue of an *Englishman* is born beyond Sea, and that Issue is naturalized, he shall inherit his Father's Lands.

By 11 & 12 W. 3. ch. 6. *All Persons, being the King's natural born Subjects, may inherit as Heirs to their Ancestors, though their Ancestors were born out of the King's Allegiance, and out of his*
Do-

^a *Ligeantia naturalis nullis claustris coercetur.* 7 Rep. 10.

Dominions, as fully as if such Ancestors had been natural born Subjects.

But by 25 Geo. 2. ch. 39. It shall not give any Person Right to inherit by enabling him to claim or derive his Pedigree through any Alien Ancestor, unless such Person so claiming was in Being and capable to take as Heir at the Death of the Person who last died seised, and to whom he shall claim to be Heir; provided that in Case the Person who shall be in Being and capable to take at the Death of the Ancestor so dying seised, and upon whom the Descent shall be cast by Virtue of this and of the last Act, shall be a Daughter or Daughters of an Alien, and that the Alien Father or Mother through whom such Descent shall be derived by such Daughter or Daughters shall afterwards have a Son born within the King's Dominions, the Descent so cast upon such Daughter or Daughters shall be divested in Favour of the Son, and such Son shall inherit in like Manner as by the Common Law in case of the Birth of a nearer Heir; or in Case such Father or Mother shall have no Son, but shall have one or more Daughter or Daughters afterwards born within the King's Dominions, the Daughter or Daughters so born afterwards shall inherit and take in Coparcenary with the Daughter or Daughters upon whom the Descent shall be cast at the Death of the Ancestor last seised.

By 7 Ann. ch. 5. and 4 Geo. 2. ch. 21. Children of all natural born Subjects, except of Parents at the Time of such Childrens Birth attainted of Treason, or in the actual Service of a Foreign Prince in Enmity with the Crown, tho' born out of the Allegiance of the King, shall be deemed natural born Subjects.

By 5 Geo. 1. ch. 27. Artificers going beyond Sea to work in our Manufactures, or to teach Trades to Foreigners, are to be deemed Aliens, and to be out of the King's Protection.

By the 12 & 13 W. 3. ch. 2. 1 Geo. 1. st. 2. ch. 4. No Aliens, tho' naturalized or made Denizens since K. George the First's Accession to the Crown, except such as are born of English Parents, shall be capable to be of the Privy-Council, or a Member of either House of Parliament, or to enjoy any Office of Trust, either Civil or Military, or to have any Grant of Lands, Tenements, or Hereditaments from the Crown.

Temporary Ligeance is an Allegiance due by Reason of Residence in the King's Dominions, or because one is made Denizen only for Life. If one is naturalized for a Day, it is good for Ever.

^a 5 Rep. 52.

⁷ Rep. 17, 18.

¹ Inst. 2. b.

⁸ a. 129. b.

²⁶¹ a.

² Inst. 741.

¹ Ventr. 417.

⁴¹⁸, &c.

³ Cro. 9.

² Str. 1082.

¹ Salk. 46.

¹ Id. Raym.

²⁸².

^a An Alien can hold no Lands by Descent, Devise or Purchase, nor can an Alien be Tenant by Curtesy, or in Dower. Neither can he take by Descent, but he may by Devise or Purchase, and the King on Office found shall have the Lands; and so if he purchase Lands and die, the King shall have them. There is an Alien *Enemy*, and an Alien *Friend*: An Alien *Enemy* could not formerly so much as bring an Action; but now an Alien *Enemy*, who is Resident here, may maintain Personal Actions^b. An Alien *Friend* may maintain an Action *in autre droit*, as Administrator, and Personal Actions. And such an Alien may purchase a House for Years, for Habitation during his Residency, as necessary for Commerce and Trade; but not Lands. This must be understood of an Alien Merchant; for if the Alien is no Merchant, the King shall have the Lease for Years, tho' it were for his Habitation. See *Sy. If this*

this is Law at this Day. If an Alien Friend being a Merchant leaves the Realm, the King shall have the Lease; and if he dies here possessed thereof, his Executors or Administrators shall not have it, but the King. For he had it only for Habitation, as necessary for his Trade and Traffick. [See 32 H. 8. ch. 16.] Whether his Sovereign be in League with our King, in a Plea of Alien born, shall be tried by the Record of the Chancery; for every League is of Record.

A Subject cannot be an *Enemy*, though in open War against the King; for he is to be used as a Traitor. So on the other Hand an Alien *Enemy* cannot be indicted of Treason, but an Alien Friend may.

See the 25 Ed. 3. St. 2. 43 Ed. 3. ch. 10. *Subjects* may be divided into *Clergy* and *Laity*, *Nobility* and *Commonalty*; and among the Nobility and Commonalty, we shall consider those of the *Military State*.

This is the General Division of Subjects; we shall be more particular hereafter.

I. The *Clergy* (from *Klerikos*, *Sons*) are those that are chosen to be the Lot and Inheritance of God, and are separate from the Noise and Bustle of the World, that they may have Leisure to spend their Time in Heavenly Meditation and Prayer. The *Clergy* are called *Clerks*, and are either *Regular* or *Secular*.

These are *Regular* which live under certain Rules and are of some Religious Order, and are called Men of *Religion*, or the *Religious*. Such are all Abbots, Priors, &c. There were 118 Monasteries here in England, whereof 27 Abbots, and two Priors, were Lords of Parliament.

But By 27 H. 8. ch. 28. 31 H. 8. ch. 13. 32 H. 8. ch. 24. 37 H. 8. ch. 4. 1 Ed. 6. ch. 14. All *Abbeys*, *Priories*, *Monasteries*, and other Religious Houses, and also all Free Chapels and Chauntries perpetual, were dissolved, and their Possessions given to the Crown.

The *Secular* are those who live not under any certain Rules of the Religious Orders, as Archbishops, Bishops, Deans, Archdeacons, Parsons, Vicars, Curates.

The Church ought to have all the Privileges of one under Age. And the Clergy had greater Privileges at Common Law than the Laity, which are confirmed by *Magna Charta*, and other ancient Statutes. But these Privileges are lost, the Clergy being included under general Words in later Statutes. So that Clergymen are liable to all publick Charges imposed by Act of Parliament, where they are not particularly excepted. Indeed they are not forced to undergo Temporal Offices, by Reason of their Lands; to serve on Juries, nor to appear at Turns and Leets, or pressed to serve in the Wars in Person, (tho' they always are obliged by Statutes to contribute to the Charge of a War, and to Musters of the Militia) or perhaps their Bodies are not to be taken upon Statutes Merchant or Staple, or a Recognizance in the Nature of a Statute Staple (for the Writ to take the Body of the Conusor is *Si laicus sit*. See *West. 2. ch. 18.*) or perhaps he that beats a Clergyman may still be

¹ *Ecclesia est infra statum, et in custodia Domini Regis.* 2 Inst. 3.

^a 2 Inst. 492,
608, 620.

^b 2 Inst. 636.
Hob. 288,
294.
H. P. C. ch.
51.

obliged to do Penance in the Spiritual Court; [See 13 Ed. 1. *ch. 4*] or a Clergyman may not be arrested in the Church, or Church-Yard, while he is attending on Divine Service. [See 50 Ed. 3. *ch. 5*. 1 Ri. 2. *ch. 15*.] But these are all the Privileges remaining on Civil Accounts. They are uled like other Men in Criminal Cases, except as to Burning in the Hand for Felony, from which, upon producing of their Orders, or the Ordinary's Certificate, they ought to be freed. And though they have had the Privilege of the Clergy for a Felony, yet they may again have their Clergy, and so cannot a Layman. [See the 4 H. 7. *ch. 13*. 32 H. 8. *ch. 3*. 34 & 35 H. 8. *ch. 14*. 1 Ed. 6. *ch. 12*. 5 Ann. *ch. 6*.]

In the Clergy there are *Archbishops, Bishops, Deans and Chapters, Archdeacons, Parsons, Vicars, Curates* and anciently there were *Parish Clerks*.

Archbishop.

1. An *Archbishop* is the Chief of the Clergy in one Province only; and is that Spiritual Secular Person, who hath Supreme Power under the King, within his Province, in all Ecclesiastical Causes. [For the Manner of his Creation see 25 H. 8. *ch. 20*.] The Archbishop of Canterbury is stiled *Metropolitanus & Primas totius Angliæ*; and the Archbishop of York is stiled *Primas & Metropolitanus Angliæ*. They are called *Archbishops* in respect of the Bishops under them; and *Metropolitans*, because they were consecrated at first in the *Metropolis* of the Province. *Primate* is a Degree betwixt an Archbishop and a Patriarch. The Archbishop of Canterbury hath the Precedency, before all the Nobility, and next to those of the Royal Blood; then the Lord Chancellor, and then the Archbishop of York. [See 31 H. 8. *ch. 10*. For placing of the Lords.]

^c See P² Ante

Both the Archbishops have distinct Provinces; and each hath within his Province Suffragan Bishops of several Diocesses with Jurisdiction under them: But each Archbishop hath a Diocess too within his Province.

^d See B. 4. ch.
1. post.

It is the Right of an Archbishop to call the Bishops and Clergy of his Province to Convocation, upon the King's Writ. Each Archbishop is the *Ordinary* of the whole Province, to Visit it, and to receive Appeals from inferior Jurisdictions within his Province: For regularly an Archbishop has no Jurisdiction over the Subjects of the Suffragans, unless in his *Visitation*, or upon Appeals. [But see 23 H. 8. *ch. 9*.] An *Ordinary* (a Name taken from the Canonists) is he that has Jurisdiction in his own Right, and not by Deputation: And this Name is only applied to a Bishop, or any other that hath an Original Jurisdiction in Causes Ecclesiastical. But in some late Statutes, Chancellors, Commissaries, Archdeacons, are stiled Ordinaries.

^e 1 Inst. 96. a.
344. a.
2 Inst. 398.
9 Rep. 41.

An Archbishop hath a standing Jurisdiction over his Suffragans, he *Confirms* the Election of Bishops within his Province, and afterwards *Consecrates* them; and hath the *Option* of a Dignity or Benefice in the Gift of every Bishop consecrated by him, which the Bishop then Assigns to him by Deed, to dispose of it at the next Vacancy: He may appoint *Co-adjutors* to a Bishop that is grown infirm, or disabled to manage his Charge: He may censure and excommunicate, suspend or depose them for Cause.

^f Salk. 154.
1 Ld. Raym.
447. S.C. 541.
3 Inst. 204.
21 Rep. 49.

During

During the Vacancy of any See within his Province he is ^a Guardian of the *Spiritualties* by Prescription or Composition, whereby ^{a 2 Roll. Abr. 223.} all Episcopal Ecclesiastical Rights of the Diocess belong to him for that Time, and all Ecclesiastical Jurisdiction. But when an Archbishopial See is vacant, the Dean and Chapter of his Diocess are Guardians of the *Spiritualties*; that is the Spiritual Jurisdiction of his Province and Diocess is committed to them^b.

By 21 H. 8. ch. 13. *Each Archbishop may retain eight Chaplains.* ^{b See of Ecclesiastical Courts post. B. 4. ch. 1.}

By 25 H. 8. ch. 21. *The Archbishop of Canterbury has Power of dispensing in any Case, wherein Dispensations (not contrary to the Law of God) were formerly granted by the See of Rome; and may grant such Dispensations to the King as well as to his Subjects; but if the Case is new, the King and his Council are to be consulted; such Dispensations, &c. not to be granted out of the Realm, nor in any other Manner.*

During the Vacancy of the See of Canterbury, the Guardian of the Spiritualities shall grant Dispensations.

Notwithstanding the ^a negative Clause in the Act, the King's Authority remains as before at Common Law; the Archbishop is only enabled by the Statute to have a concurrent Power with the King. Therefore if the Dispensation is to be in Matters extraordinary, it is Prudence to have it confirmed under the Great Seal. ^{a 1 Cro. 542. 601.}

The Archbishop of Canterbury grants these Dispensations^a, not only within his own Province, but in the Province of York, by Virtue of this Statute; the Statute allowing only to the Archbishop of York and other Bishops, to dispense as they were wont to do by the Common Law and Custom of the Realm. ^{a See Faculty Vir-Court post. B. 4. ch. 1.}

By Virtue of this Statute, the Right of Conferring Degrees of all kinds, is vested in the Archbishop of Canterbury.

If an Archbishop resigns, it must be to the King as Supreme Ordinary.

As to the Custody of the ^a Temporalities of an Archbishop during the Vacancy of the See, it belongs to the King, as in the Case of a Vacancy of a Bishoprick, to be mentioned hereafter. ^{a Inst. 15.}

2. A ^a Bishop simply so called, (for the Pope, a Patriarch, a Primate and an Archbishop is a Bishop) is the Archbishop's Suffragan, or Assistant under him; for *Suffragari* signifies to help or assist. [For the Manner and Order of his Election, Confirmation, and Consecration, see 25 H. 8. ch. 20.] ^{a Bishop 1 Inst. 79.}

He must be full ^a thirty Years of Age. ^a All the Bishopricks in England are of the King's Foundation, and therefore the Power of choosing them is lodged in the Crown; and this Power is recognized by 25 H. 8. before-mentioned. The Bishopricks in Wales were founded by the Princes of Wales, and came to the Crown of England by Forfeiture; so that now the King is Patron of all. At this Day the Bishopricks of Ireland are donative, and not elective. ^{a Preface to the Ordination Service. 1 Inst. 97. a. 134. a. 344. a. 1 2 Roll. Abr. 342.}

Every Bishop is an Ordinary; and ^a hath Jurisdiction in his Diocess at his Confirmation, and therefore the Guardian of the Spiritualities ceases to act from that Time. ^{a 8 Rep. 69.}

Upon his ^a Consecration, he has a Right to his Temporalities, in which he hath an absolute Fee. He cannot sue for them till his Consecration is certified by the Archbishop; but the King may grant ^{a 1 Roll. Abr. 330, 331, 332. 1 Inst. 67. a.}

grant his Temporalities immediately after Election and Confirmation.
[See *Godolphin's Repert. Canon.* for the Order of making a Bishop.]

He is Overseer of the Manners of the People of his Diocese, and has great Authority in the Church: He hath his Consistory Court^a to hear Ecclesiastical Causes, and may visit the Clergy and Laity within his Jurisdiction, and the^b Hospitals therein if they are Spiritual; if Lay, the Patron shall visit them. [But see 2 H. 5. ch. 1. 25 H. 8. ch. 20, 21. 31 H. 8. ch. 13. 39 El. ch. 5. 21 Ja. 1. ch. 1. When he visits the Clergy he hath a Fee called *Procurations*, in lieu of an Entertainment that was to be procured. He may consecrate Churches and Altars, ordain Priests and Deacons, admit and institute Priests into Benefices, confirm after Baptism, suspend and depose the offending Clergy, impose Purgation and Penance, excommunicate both Clergy and Laity, dispense by granting Licences and Faculties; [See 3 H. 8. ch. 11. For *Physicians* and *Surgeons*. 1 Ja. 1. ch. 4. 13 & 14 Car. 2. ch. 4. for *Schoolmasters*] Grant Probate of Wills, and Letters of Administration of Intestates Estates.

He is regularly the immediate^c Officer to the Highest Courts of Record in Causes Ecclesiastical: None but the King *i. e.* his Courts of Record can write to the Bishop, to certify Excommunication, General Bastardy, [See 9 H. 6. ch. 11.] Mulierty (*i. e.*) Legitimation, Loyalty or Lawfulness of Matrimony, &c.

Every Bishop hath his Chancellor (*i. e.* the Principal Official) and his Vicar General, commissioned by him to assist in all Matters and Causes Ecclesiastical, within his Diocese. The Offices of the Principal Official, and Vicar General, are two distinct Offices, tho' they are usually united. His Commissary is he that is limited by the Bishop to some certain Place of the Diocese, to assist him; and in most Cases hath the Authority of a Principal Official and Vicar General within his Limits.

If the See of a Bishop is vacant, the Archbishop of the Province is Guardian of the *Spiritualties* by Prescription here in *England*, as before observed; tho' by the Canon Law, the Dean and Chapter was to take Care of the Spiritual and Temporal Jurisdiction belonging to the Bishoprick. The Guardians of the *Spiritualties* have all Manner of Jurisdiction of the Courts; as the Power of granting Licences and Dispensations, Probate of Wills, Administrations, during such Vacancy; and of admitting and instituting Clerks presented to them; but they cannot (as such) consecrate or ordain, or present to vacant Benefices.

The Custody of the^d Temporalities of every Bishop (as well as of an Archbishop) after the Sees are vacant, belongs to the King as Founder, during the Vacancy; so that no Subject can claim the Temporalities of an Archbishop or Bishop, by Grant or Prescription: During the Vacancy, The Freehold of the Temporalities is in the King. The Temporalities are all such Things as a Bishop hath by Livery from the King; as Castles, Manors, Lands and Tenements, Advowsons, Tithes. These the King may commit during the Vacancy. [See *Magna Charta*, ch. 5. and the 14 Ed. 3. ch. 4. ch. 4 & 5.]

When an Archbishop or Bishop hath done Homage to the King, and received his Temporalities of him, he hath in them a Fee-simple absolute, and may maintain a Writ of Right.

A

A Bishop must *resign* to the Archbishop, not to the Dean and Chapter.

By 21 H. 8. ch. 13. *Each Bishop may qualify six Chaplains.*

By 25 H. 8. ch. 21. *A Bishop may dispense in Cases accustomed.*

By 26 H. 8. ch. 14. *There may be Bishops Suffragans in several Towns.*

[See the 31 H. 8. ch. 10. *For placing the Lords.*]

By 6 Ann. ch. 27. s. 5. *Four Years are allowed to Archbishops and Bishops to pay their First-Fruits, paying one fourth of the whole Sum yearly.*

[What Leases made by Bishops may be good, See of *Leases and Confirmation*, B. 2. ch. 3.]

3. * Every Archbishop and Bishop hath a *Dean and Chapter*,^{Dean and Chapter.} and a Bishop may have^b two Chapters.

The * *Dean* (*Decanus à dix*, ten, for at first he was over ten Canons and Prebendaries) is an Ecclesiastical Secular Governor next under the Bishop, and is Head of the Chapter. The antient Deans, as the Dean of *York*, *St. Paul's*, &c. are chosen by the Chapter, by a *Congè d'elire*, (or Licence to proceed to Election) from the King, as Bishops are: And (the King afterwards giving his Royal Assent) they are confirmed by the Bishop, who gives his Mandate to have them installed. But the new Deans (which are either newly translated or founded) are *Donative*, and are installed by the King's Letters Patent, without Election or Confirmation,^d and are^d visitable only by the Lord Chancellor, or by special Commis-^{47.} sion from the King. But the Letters Patent are presented to the Bishop for Institution, and a Mandate for Instalment goes forth.

A Dean that is solely seised of a distinct Possession hath an * *absolute Fee* in him, as well as a Bishop.^{341. b.}

* A *Chapter* (*Capitulum*) is a Congregation of Clergymen under¹ one Dean in a Cathedral Church. They make a Spiritual Corporation. The Chapter in a Collegiate Church is more properly called a College, as at *Westminster* and *Windsor*, where there is no Episcopal See. And where there are Chapters without a Dean, as at *Southwell*, those are not properly Chapters. Chapters as well as Deans are antient and new, and were either translated or founded by H. 8.

Whenever a Dean and Chapter doth confirm Grants, &c. * the^d Dean must join with the Chapter. A Deputy Dean cannot make^{Dav. 47. 48.} a Grant or Confirmation, unless the Statutes of the Church expressly give the Deputy Dean that Power, in the Absence of the Dean: And then Confirmations and Grants made by the major Part of the Corporation are good. But the Dean, or any other, hath not a negative Voice. [See 33 H. 8. ch. 27.] There must be the Consent of the major Part, and their Consent must be expressed by fixing of their Seal to the Deed in one Place and at one Time; either in the Chapter-House, or some other certain Place: For when they meet in any Place, that is the Chapter-House.

It was thought necessary, That every Bishop should be assisted with a Council, (*viz.*) a *Dean and Chapter*, to assist him in Affairs of Religion, and in his Temporal Concerns; 1. To consult with him in deciding difficult Controversies in^b Religion; to which Purpose every Bishop hath his *Cathedra* in the Chapter. 2. To con-^{3 Rep. 75. 1 Inst. 103. a.}

sent to every Grant which the Bishop shall make to bind his Successors: For the Law did not judge it reasonable, to repose Confidence in the Bishop alone as to the Disposal of the Inheritance of the Church. But the Dean and Chapter hath nothing to do with that which the Bishop does as ^a Ordinary. ^b In other Things they remain a Dean and Chapter to assist him, though they surrender all their Possessions to the King; for they were a Chapter before they had Possessions.

^a 1 Inst. 300. b.
^b 3 Rep. 75.

The Bishop and Chapter are but one Body, yet their Possessions (for the most Part) are divided: The Bishop hath his Part, the Dean hath a Part alone in Right or his Deanery, and each particular Prebendary a certain Part in Right of his Prebend; and each too is incorporate by himself. The Dean and Chapter have the Residue in Common: The Dependence on the Bishop by Degrees grew less and less, tho' they were at first maintained out of his Estate; and tho' now they have distinct Parcels of the Bishop's Estate assigned for their Maintenance, the Bishop hath little more left him than a Power of ^c Visiting the Dean and Chapter, and is scarce allowed to nominate Half of those to their Prebends, who were originally of his Family: But of Common Right he is their Patron.

^c 2 Roll. Abr. 229.

^d See post. B. 2. ch. 2.

A Chapter of itself is not capable to take by Gift or Purchase^d, without the Dean.

Deans and Chapters have sometimes an Ecclesiastical Jurisdiction in several Parishes, besides that Authority which they have within their own Body: This Ecclesiastical Jurisdiction is executed by their Officials. And they have also Temporal Jurisdictions in several Manors belonging to them, as well as Bishops, where their Stewards keep Courts.

^e Plowd. 498.
^f 5 Rep. in Cawdrie's Case.

^e The Resignation of a Deanery may be made to the King, as well as to a Bishop.

By 25 H. 8. ch. 20. *The Dean and Chapter must elect the Person to be Bishop whom the King Names.*

The Dean and Chapter of Canterbury, and the Dean and Chapter of York, are Guardians of the Spiritualities of their respective Archbishopricks, during a Vacancy.

See 31 El. ch. 6. against Abuses in Elections of Scholars, &c. 6 Ann. ch. 21. Concerning the Statutes of Cathedral Churches founded by King H. 8. and the 6 Ann. ch. 27. How Deans and other Dignitaries shall compound for the First-Fruits.

How the Grants or Leases of a Dean, Prebendary, &c. must be confirmed, See of Confirmation, B. 2. ch. 3.

There are some Deans in England without any Jurisdiction, as the Dean of the Chapel Royal, the Dean of the Chapel of St. George at Windsor. And some Deans there are without any Chapter, and yet they do enjoy some Jurisdiction, as the Dean of Croydon, the Dean of Battel, Bocking, &c.

The Power of Rural Deans is almost extinguished.

Archdeacon.

4. An Archdeacon (heretofore the first and chief of the Deacons) is such a one that hath obtained an Ecclesiastical Dignity in a Cathedral Church, and a Jurisdiction over the Clergy and Laity, next after the Bishop, throughout the Diocese, or in some Part of it only: But he cannot regularly exercise any Jurisdiction within the Cathedral Church. And indeed he hath no original Jurisdiction, but

what

what he hath got is from the Bishop, either by *Prescription* or *Composition*, and (as the Dean and Chapter) he does derive his Jurisdiction from him; and yet he is allowed to be an *Ordinary*, because now he hath a Branch of Episcopal Power in his own Right. ^{2 Cro. 556. 1 Lav. 193.}

An Archdeacon therefore may visit his Jurisdiction once every Year; some visit twice every Year, by Prescription; He is entitled to Procurations^b. He hath a Court where he may enjoin Penance, suspend, excommunicate, prove Wills, grant Administrations of Intestates Estates, and hear Causes of Ecclesiastical Cognizance. In many Places Archdeacons grant Licences and Faculties. ^{See ante.}

It is one Part of the Archdeacon's Office to examine the Candidates for Holy Orders, and to *Induct* or put into Possession all Clerks into their Benefices within his Jurisdiction, upon Receipt of the Bishop's Mandate. But by Prescription, the Dean and Chapter of St. Paul's and Litchfield, do induct: And the Grantee of the King, of a free Chapel, is put into Possession by the Sheriff of the County; so the Dean of *Battel* is said to be inducted by the Patron. And in some Places a Prebendary shall have present Possession where the King collates by Letters Patent, as at *Westminster*. Usage generally takes Place. ^{2 Rol. Abr. 356, 357. Waton 275. 276.}

He hath an *Official*^a (or Church-Lawyer) to assist him; from whom, as well as from the Archdeacon, an Appeal lies to the Bishop of the Diocese. [See 24 H. 8. ch. 12. And see 6 Ann. ch. 27. How Archdeacons shall compound for their First-Fruits.] ^{2 See of the Archdeacon's Court B. 4. ch. 1. post.}

5. A *Parson* is a Rector of a Church Parochial, and is called *Persona Ecclesie*, because he taketh upon him the Person of the Church, and is seised in Right of his Church, that in his Person the Church might sue for and defend her Right, and also be sued by any that have an Elder Right. The Word *Ecclesia* is always applied to a Parsonage, as *Vicaria* is to a Vicarage: But the Word *Parson*, in a large Sense, includes also Vicars, Prebendaries, &c. ^{Parson. 1 Inst. 300. a. & b. F.N.B. 32. 2 Inst. 407.}

A *Church*, in a strict Sense, signifies the Building only; and if it hath Administration of the Sacraments and Sepulture, it is in Law adjudged a Church: These Divine Administrations make it a Church. Any good Christian may build a Church without Licence; but the Law takes no Notice of it as a Church till it is consecrated by the Bishop: And this is the Reason why Church or no Church, Chapel or no Chapel, shall be tried and certified by the Bishop. ^{2 Inst. 363. 3 Inst. 202, 203.}

A *Parsonage*, or a *Rectory*, is a Parish-Church endowed with a House, Glebe, and Tithes, and such originally were all Parish-Churches. Glebe is the Church Lands exclusive of the Tithes.

A Chapel of *Ease* is that which is built for the Ease of those Parishioners who dwell far from the Parochial or Mother Church: It is for their Ease in Prayer and Preaching only; for the Sacraments and Burials ought to be performed in the Parochial Church. Here, generally, the Curate is removeable at the Pleasure of the Rector or Vicar. But a Chapel of Ease may be Parochial too, and have a Right to Sacraments and Burials, and to a distinct Minister by Custom, though subject in some Respects to the Mother Church. ^{2 Rol. Abr. 340, 341.}

A *Free Chapel* is that which is perpetually maintained and provided with a Minister, without Charge to the Rector or Parish;

or

^a See of the Court of Peculiars post. B. 4. ch. 1.

^b 2 Roll. Abr. 337.

^c 2 Str. 1126.

^d 2 Inst. 653.

^e Corven's Case 12 Rep.

^f 2 Cro. 605.

^g 3 Lev. 73.

^h 2 Mod. 8.

Cart and

Marsh K. B.

Mich. 11 G. 2.

Pawson and

Scot K. B.

Hil. 28 G. 2.

ⁱ Lit. Sect.

644.

645, 646.

647, 648.

^j 1 Inst. 341. a.

342. b.

^k See of Fee-simple, B. 2. ch. 1.

^l 1 Inst. 67. a.

^m 1 Inst. 341.

a. & b.

ⁿ 1 Inst. 18. b.

^o 2 Cro. 366.

or that which is Free and exempt from all ordinary Jurisdiction^a. [See the 1 Ed. 6. ch. 14.]

The Parochial Church and Church-yard are the Freehold of the Parson, and he may let a^b Lease of the Church-yard. [See 15 R. 2. ch. 5.] But the beneficial Use of the Body of the Church and Church-yard, and the Maintenance, or Repairs thereof belong to the Parishioners by the Custom of England. So that a Parishioner may prescribe in Right of his Messuage to repair and sit in a particular Pew or Isle^d, or for a particular Isle, Vault or Place in the Church or Church-yard to bury in; but the Direction of the Seats, the building Galleries or new Pews, or erecting Monuments, which is not a Right consequent upon that of Burial, and all other Directions necessary for the Service and Maintenance of the Church, and the Celebration of publick Worship, are in the Ordinary who grants Faculties for those Purposes. ^e The Freehold of the Church, Church-yard and Glebe, after Induction, are in the Parson; but not the Fee-simple; for that is not in any one, but always in Abeyance (from the French Word *Bayer*, to expect) or Remembrance of the Law: So if the Parson dies, during the Voidance the Freehold of the Glebe is in Abeyance till another is made. And so it is of a Bishop, Dean, Archdeacon, Prebendary, Vicar. Though a Parson, for the Benefit of his Church, in some Cases hath a Fee-simple qualified^f; yet in other Respects he hath in effect but an Estate for Life. ^g But an Archbishop, or Bishop, or Dean solely possessed, hath a Fee-simple absolute, as hath been said.

^h A Parson may have an Action for any Trespas committed in the Church or Church-yard. ⁱ For defacing a Monument, they that build the same shall have an Action during their Lives; afterwards the Heir of the deceased, for these Monuments serve for Proof of Descents and Pedigrees. The Carcass that is buried belongs to no one; but is subject to Ecclesiastical Cognizance, if abused or removed. Neither the Ordinary, nor the Churchwardens, can grant Licence to bury in the Church, but the Parson only. *Sed Qu.* and see the Cases above referred to.

By 35 Ed. 1. st. 2. *The Parson cannot cut down Trees growing in the Church-yard, unless for the Repair of the Chancel, or (in Charity) of the Body of the Church.*

[See 10 Ann. ch. 11. For building Fifty New Churches in and about London and Westminster, and the Suburbs thereof.]

We will now enquire, 1. How one may be made a Parson of a Church. 2. How one may cease to be a Parson.

1. The Things requisite to make a Parson of a Church, are, Holy Orders, Presentation, Institution, and Induction into a Rectory.

^k Can. 33.

As to Holy Orders, ^l None is to be ordained Priest or Deacon without a Title. A Title, is some certain Place where one may exercise his Function. For a wandering Clergyman will be a Scandal to Religion: But though one has a Title, the Bishop may refuse to ordain him Priest or Deacon, without giving a Reason. When he is to be ordained, he is to be ordained by a Bishop, according

ording to the Book of Common Prayer. [See 5 & 6 Ed. 6. ch. 1. and the 13 & 14 Car. 2. ch. 4.]

By 13 El. ch. 12. One cannot be ordained Priest, or admitted to preach or administer the Sacraments, under twenty-four Years of Age, nor unless he bring to the Bishop a Testimonial of his honest Life, and of his professing the Doctrine of the thirty-nine Articles of Religion, in the Year 1562. and unless he is able to render to the Ordinary an Account of his Faith, in Latin, according to the said Articles, or have a special Gift to be a Preacher; nor shall be admitted to the Order of Deacon, or the Ministry, unless he shall first subscribe the said Articles. All Dispensations to the Contrary to be void.

Therefore if one is made Priest before the Age of twenty-four compleat, he can never be a Statutable Parson. [Qu. if it is not usual to grant Orders *currente anno*?]

To subscribe the thirty-nine Articles with this Addition, (*viz.*)

^a So far forth as the same are agreeable to the Word of God, is not a Subscription according to this Statute; because the Statute requires an absolute Subscription, and without Reserve. ^b Note, That this Act confirms and establishes the thirty-nine Articles. ^c Preface to the Ordination-Service, §. 7.

^c None shall be ordained Deacon, except he be twenty-three Years of Age, unless he have a Faculty or Dispensation; which gives a Latitude to the Archbishop to dispense with one to be made Deacon at what Age he pleases. But he cannot dispense with the Age of one that is to be made Priest, because that Age is fixed by Statute.

He that is to be ordained Priest or Deacon must take the Oaths appointed instead of the Oaths of Allegiance and Supremacy. [See 1 El. c. 1. 1 W. & M. Sess. 1. ch. 8. and 6 A. ch. 7.]

By 31 El. ch. 6. If any Person shall receive directly or indirectly, any Reward or Assurance thereof (all ordinary Fees excepted) for or to procure the Ordaining of any Minister, or giving Orders, or Licence to preach, he shall forfeit forty Pounds, and the Party so corruptly ordained, &c. ten Pounds: And if at any Time within seven Years next after such corrupt entering into the Ministry, he shall take any Benefice, or Ecclesiastical Promotion, it shall be void immediately after Induction.

As to Presentation. When one is ordained he may be Presented to a Parsonage ^d or Vicarage, by the Patron: That is, the Patron may ^e offer his Clerk to the Bishop of the Diocese, to be instituted to his Church. But the Clerk may be refused if the Patron is excommunicate, or if the Clerk himself is not *Persona Idonea*; which includes ^f Ability in Learning, and Honesty in Conversation. If the Person is outlawed, excommunicate, a Layman, under Age, a Man of ill Life and Conversation, a Heretick, Schismatick, an Alien, [See 3 Ric. 2. ch. 3. 7 Ric. 2. ch. 12.] unlearned, the Bishop upon Examination may refuse the Person presented. [See 9 Ed. 2. ch. 13.] But in a *Quare Impedit* brought against the Bishop for Refusal of the Clerk, he must shew the Cause of his Refusal specially and directly. Because the Clerk is of ill Life and Conversation, or a Schismatick in general, is not sufficient, without shewing what Crimes, or sort of Schism he has been guilty of. The Temporal Court then will judge whether the

Cause be just or not: And if the Party denies the same, the Court may write to the Metropolitan to examine the Matter, and certify it: And tho' the Matter be of a Spiritual Nature, it shall be tried by a Jury. For whether the Cause be Temporal or Spiritual, the Examination of the Bishop concludes not the Clerk; for tho' the Bishop is Judge of the Ability, he is not the ultimate Judge. But in Case of Refusal for Insufficiency in Learning, it hath been adjudged,^a That the Ordinary is not accountable to any Temporal Judge; and that in *Literaturâ minus sufficiens* is a good Plea, without setting forth the kind of Learning, or the degrees of it.^b That the Presentee has a Benefice already is no good Cause of Refusal. For Crimes that are *c Mala in se*, as Incontinency, Drunkenness, Perjury, he may be refused; but not for Crimes that are *Mala prohibita*, as haunting Taverns.

^a Show. Cases 88.

³ Lev. 313. S. C.

^b 2 Roll. Abr. 355.

^c 5 Rep. 58.

^d 1 Cro. 27.

See of Corrupt Presentations, post. B. 2. c. 2.

^e 1 Inst. 344. a.

³ Cro. 342.

^d If a Bishop once refuses a Clerk for Insufficiency, he cannot accept of Him afterwards, if a new Clerk is presented.

As for *Institution*,^e When the Ordinary upon Examination finds the Clerk qualified in all Respects, he *Admits* him, or approves of him; and thereon actually *institutes* him in these Words, from a Written Instrument under his Seal, (*viz.*) *Instituto te Restorem Ecclesie parochialis de A. cum Curâ Animarum, & accipe Curam tuam & meam.* The Bishop (or Vicar General sometimes, if his Patent impowers him) may institute as well out of the Diocese as within it, for this Power is not local. If the Institution is suspected to be void, for want of Title in the Patron, a *Superinstitution* hath been sometimes granted to another, to try the Title of the present Incumbent by Ejectment.

^f 2 Roll. Abr. 220.

By 31 El. ch. 6. *A taking a Reward for Institution is Forfeiture of the double Value of one Year's Profit, and makes the Living void.*

By 13 El. ch. 12. *Those that are to be admitted to any Benefice with Cure, must subscribe to the thirty-nine Articles, in the Presence of the Ordinary.* See the 36 Canon of King James, and the 13 & 14 Car. 2. ch. 4. An Act for Uniformity, &c. 1 W. & M. ch. 18. in Relation to the 39 Articles; and 23 Geo. 2. ch. 28. for explaining Part of 13 & 14 Car. 2. and 13 El.

When the Bishop has given Institution, he issues out his *Mandate* to the Archdeacon to *Induct* the Clerk; who thereupon issues out a Commission to some neighbouring Clergymen and others (if he himself cannot be personally present) to act for him.

The *Induction* is performed by Delivery of the Ring of the Church-Door, or a Bell-Rope, to the newly instituted Clerk, that he may toll the Bell, &c. and shew that he hath taken Corporal Possession.

^g F. N. B. 47.

¹ Roll. Ab. 108.

P. 31 ante.

^h See of the Writ De vi Laicâ Remo-

venda, post. B. 4. c. 4.

ⁱ Watson's Clergyman's Law 275.

276, 820. Edit.

If the Archdeacon^g refuses to induct, or to grant a Commission to others to supply his Place, an Action on the Case lies against him; for Induction is a temporal Act; or he may be cited into the Bishop's Consistory-Court, to answer for his Contempt^h.

ⁱ By Prescription or Composition, other Persons, as well as Archdeacons, may make Inductions.

If after a *Caveat* entered against an Institution, a Clerk is presented, instituted, and inducted, the Institution, &c. is not void; for it^k is only a Breach of the Canon Law.

^k 2 Roll. Abr. 353. a Cro. 463.

By

^a By *Institution* only the Clerk is compleat Parson as to the Cure ^a Dyer 221. of Souls; but as to Temporalities, as the Glebe-Land, Tithes, &c. ⁴ Rep. 79. he hath no Freehold in him till Induction; nor can he grant, or let them, or sue for them till Induction.

^b By *Institution*, the Church, as to all common Persons, is full, ^b 2 Inst. 358. but not against the King till *Induction*. ^c See of Usur-

Instalment into Dignities, Prebends, &c. answereth to Induction in Parochial Cures. ^c 2. post.

Observe now by what has been said, That by receiving *Holy Orders, Presentation, Institution, and Induction*, one may be made a Parson of a Church. But by Reason of several Statutes there are yet great Difficulties in following a right Method to perform the Solemnities required to secure the Title; which may be learned (among other Books) from Sir S. Degg's *Parson's Counsellor*, ch. 6. *Watson's Clergyman's Law*, ch. 15. which give particular Directions, too long to be here inserted. [See the 13 *El.* ch. 12 13 & 14 *Car.* 2. ch. 4. 25 *Car.* 2. ch. 2. 1 *W. & M. Seff.* 1. ch. 8, 18. 13 *W.* 3. ch. 6. 9 *G.* 2. ch. 26. 23 *Geo.* 2. ch. 88.

There are other Ways by which one may gain a Title to an Ecclesiastical Benefice, as by *Collation, Donation, Union, Appropriation* and *Commendam*.

Collation ^a is the giving of a Benefice by a Bishop, which supplies ^a See of Advowson Collative, post. the Place of Presentation and Institution. But the Bishop's Clerk is to be inducted, as any other Patron's Clerk is. If this Benefice was in any other it would be Presentative. ^b 2. c. 2.

Donation is when the King, or other Patron (though a Layman) does by Gift in Writing put the Clerk into Possession without Presentation, Institution or Induction. These Benefices are called *Donatives*. A Clerk taking Title to a Donative, must at or before his Admission, subscribe the Declaration before the Bishop or Ordinary of the Diocese. And if the Donative be either Parsonage or Vicarage, he ought to have a Certificate under the Hand and Seal of the Person before whom he subscribed, and to read the same in the Church belonging to his Donative: He ought also to take the new Oaths of Allegiance and Supremacy. And if the Donative be a Benefice with Cure, he must subscribe the 39 Articles in the Presence of the Ordinary of the Diocese; and it is the safest Way to read the said Articles in his Church, within two Months after he hath Possession; for the Case of such a Donative seems to be within the Reason and Equity of the 13 *El.* ch. 12. ^c See of Advowson Donative, post. B. 2. C. 2.

Union is when a Church is united to a Church, of which one was before possess'd: It must be made by Assent of the Ordinary, or Ordinaries of the Diocese where such Churches stand, and of the Incumbents of them, and of the Patrons, according to the Common Law, or according to the Statutes of 37 *H.* 8. ch. 21. and 17 *Car.* 2. ch. 3.

^d *Appropriation* (because the Profits of a Benefice are held in *Propriety*) is an Annexing a Benefice to the proper and perpetual Use of a Spiritual Person or Corporation (being Patrons of the Advowson in Fee) and their Successors; as to a Bishop, Dean, Dean and Chapter. ^e The Things requisite to make it are, 1. The King's Licence to the Spiritual Person, or Body Spiritual; for the King at one Time or other may have an Interest in the Presentation to the Benefice. 2. The Consent of the Ordinary, the Person appropriating; ^f Terms of the Law, v. Appropriation. Davis 80. ^g Plowd. 496. ^h 11 Rep. 11. ⁱ Roll. Abr. 238, 239. ^j 240.

appropriating; because he too may have an Interest by Lapse. And 3. The Consent of the Patron, the Spiritual Person having the absolute Inheritance of the Advowson, who is to be made^a Parson in direct Words, or by Words of the like Effect; for in Suits brought by or against him, he must be named *Parson*.^b This may be done during the Vacancy of the Benefice, to be executed immediately, or by apt Words constituting the Patron Parson *after the Church shall become void*. When this Appropriation is made and takes Effect, the Patron is perpetual Parson, or hath (as it were) perpetual Institution and Induction; for the Appropriation alone is a sufficient Admission.

^a Hob. 149.
307.

^b Plowd. 499.
¹¹ Rep. 11.

^c Plowd. 499.

^c It is said, That an Appropriation may be made by the King alone, as supreme Ordinary, where he himself is Patron; as when by his letters Patent he grants the Advowson, which he is seised of in Right of his Crown, to a Dean and Chapter.

^d 1 Inst. 46. b.

The Church becomes^d *Disappropriate* by the *Presentation, Institution and Induction* of a Clerk into the Parsonage, or of the Vicar to the Parsonage, if the Parson is Patron of the Vicarage; for that is a Re-union of the Vicarage and Parsonage. It may also become disappropriate by *Recovery* of the Advowson by an elder Title, or by *Dissolution* of the spiritual Corporation.

By 15 R. 2. ch. 6. 4 H. 4. ch. 12. *Upon all Appropriations a Vicar must be sufficiently endowed.*

You see that an Appropriation could not be properly made unless to a spiritual Person and his Successor, or at most to a spiritual aggregate Corporation, that consists of Priests. But now,

By 31 H. 8. ch. 13. *The King and his Patentees (though Laymen) are capable of having the Parsonages appropriate of dissolved Monasteries. But they are to be subject to the Visitation of the King's Commissioners, or the Ordinary.*

^e See of Mortmain, post.
B. 2. c. 4.

These are Vulgarly called *Impropriations*, and the Proprietors *Impropriators*^e.

^f Terms of the Law, v. Commendam.

By *Commendam*,^f which is holding a void Benefice, *commended* to the Care of a sufficient Clerk till it may be conveniently supplied of a Pastor; so that originally it was in the Nature of a *Depositum*. It is founded upon the Statute of the 25 H. 8. ch. 21. that Part which concerns the Power of Dispensation. A Sequestration of the Cure and Profits of a Living (according to 28 H. 8. ch. 11. till the Patron doth present his Clerk, or while the Church is Litigious) is not a *Commendam*. For by that Statute (the Supply of the Cure being first paid) the *Successor* shall have the Profits during the Vacancy. Now a *Commendam* gives the Profits to the Commendatory; and may be *Temporary* or *Perpetual*:^g *Temporary*, for six or twelve Months, two or three Years or more. The *Commenda Semestris* (neither more nor less than six Months) is not in use amongst us. *Perpetual*, or for Life, (which is the compleatest) is equivalent to a *Presentation*; and by Virtue thereof, one is Parson or Vicar to all Intents and Purposes, without Institution or Induction.

^g 3 Lev. 381.
382.
Show. Rep.
414.

^h Dyer 228.
4 Inst. 356,
357.
Dav. 68, &c.
1 Cro. 527.
542, 601, 790.
3 Lev. 381,
382.
Show. Rep.
414.

When any spiritual Person is made a Bishop,^h all his spiritual Promotions (except Donatives) are void upon his Consecration, in case of Creation; and upon his Confirmation, in Case of Translation; whether he takes a Bishoprick in *England* or *Ireland*, or in the *Isle of Man*, or whether the Benefices lie in *England* or *Ireland*. But he may prevent the Avoidance by Dispensation of *Retainer* of such

such Benefices which he had, if obtained before his Consecration or Confirmation of his Election: This is called a *Commendam Retinere*, and is usually granted by the Archbishop of *Canterbury*, according to the 25 H. 8. ch. 21. upon the King's Mandate expressing his Consent to it, as the true Patron of the Benefices for that Turn, by Virtue of the Promotion of the Clerk to a Bishoprick. By this *Commendam Retinere*, the Incumbency is continued: And this *Commendam* hath been granted of *Headships* of Colleges and Hospitals, as well as of Dignities and Benefices.

But there is also a *Commendam Recipere* (or *Capere de novo*) to take a Promotion in the Bishop's own Gift, or in the Gift of some other Patron, whose Consent must be obtained, and expressly recited in the Instrument of Dispensation. ^b This must be for Life, as other ^{Hob. 143;} Parsons and Vicars enjoy their Benefices. [In the late Statutes for ^{Hob. 155;} erecting new Parishes there is usually a Clause, for preventing the Church being granted in *Commendam*.]

By these Methods one may be a complete Parson, Parson Imparsonce, or Rector in Possession of a Church Parochial.

^c There may be two several Parsons in one Church, one of one ^{1. Inst. 17. b.} Moiety, and the other of the other Moiety; and a Part of the Church ^{18. a.} and Town allotted to each. And there may be two that make one Parson in a Church, presented by one Patron. Also two Prebendaries may be one Parson of a Church.

Note, That before Institution, and before Induction, *First-Fruits* are payable to the King, and to be agreed and compounded for.

^d *First-Fruits* are the Profits of the first Year of all spiritual ^{4. Inst. 120;} Livings according to a Valuation thereof, made the 26 H. 8. These ^{121.} are called *Annates*. The *Tenths* also, or a tenth Part of the yearly ^{2. Inst. 627,} Value of all Church Livings, are to be paid according to the before-^{628.} mentioned Valuation. [See 26 H. 8. ch. 3. 28 H. 8. ch. 11.] There was a Valuation of Ecclesiastical Livings, 20 Ed. 1.

By 26 H. 8. ch. 17. *Not the Farmers of spiritual Persons, but the Lessors themselves shall be charged with the First-Fruits and Tenths.*

By 27 H. 8. ch. 8. *No spiritual Person shall pay any Tenths the same Year that he pays his First-Fruits; but it shall be deducted out of the First-Fruits:*

Where a Successor pays the Tenths for the Predecessor, he may distrain his Goods found on the Benefice, and retain them till Satisfaction.

By 2 Ann. ch. 11. *He must give one Bond with Surety, to pay the First-Fruits at four Payments.*

By 1 El. ch. 4. *Vicarages that are not above ten Pounds yearly, and Rectories not above ten Marks yearly, in the King's Books, are discharged from Payment of First-Fruits; and Incumbents that die, or are removed before all the Payments are due, their Payments shall be made only according to their Continuance in the Benefice proportionably.*

By 5 Ann. ch. 24. *All Benefices, with Cure of Souls, not exceeding the Clear yearly Value of 50 l. by the improved Valuation, are discharged from First-Fruits and Tenths, and the Payment of all Arrears.* [See 2 & 3 Ann. ch. 11. 6 Ann. ch. 27. and 3 Geo. 1. ch. 10. For the better Collecting and Levying the Tenths of the Clergy. *Whereby the old Method is altered: And B. 4. ch. 1. Of the Court of Exchequer.*]

^a 2 Inst. 624,
625, 626, 627.

A Parson or Vicar, is called an *Incumbent*, and the Law doth intend and suppose him to be *Resident* on his Benefice. And therefore,

By 21 H. 8. ch. 13. *He that is wilfully absent from his Benefice for one Month together, or two Months in the whole Year, though at different Times, forfeits Ten Pounds, the one Half to the King, the other Half to him that will sue for it. But Chaplains to the King, or other great Persons mentioned in the Statute, and in 25 H. 8. ch. 16. and in 33 H. 8. ch. 28. are excused from Residency, while they attend those that retain them.*

^b 6 Rep. 21.
¹ Cro. 590.

The Parson ought to *Abide* upon his Rectory, and in the Parsonage-House, and not in any other House within the Parish. For the Statute is intended not only for serving the Cure, and for Hospitality, but to maintain the House in Repair, that his Successors may keep Hospitality too. Lawful Imprisonment, Sicknes, Want of a Parsonage-House, are good Excuses for Non-residency, and excepted out of the Act by Construction of Law; for the Words of the Statute are, *That he that wilfully absents himself, &c.*

^c 4 Rep. 118.

If a Duke, Earl, &c. retain a Chaplain, and die, or are attainted of Treason; or an Officer qualified to retain a Chaplain is removed from his Place, the Retainer upon the Statute is determined, and will not excuse Him from Residency.

By 28 H. 8. ch. 13. *The Chancellor, Vicechancellor, Commissary, Rulers of Colleges and Halls, Doctors of the Chair, and Readers in Divinity, and Clergymen under forty Years of Age, residing in the University, and bearing Lectures, and doing exercise in Person, are exempt from the Penalties of the 21 H. 8. [See 13 El. ch. 20. 14 El. ch. 11. 18 El. ch. 11. 43 El. ch. 9.]*

By the above-mentioned Statute of 21 H. 8. ch. 13. *No Clergyman can hold two Benefices with Cure of Souls, if the first to which he was instituted; or collated and inducted, be worth eight Pounds in the King's Books of Record, without Dispensation from the Archbishop of Canterbury, confirmed under the Broad Seal. And he that without Dispensation takes a second, makes void the first ipso facto.*

^d 4 Rep. 79.

The Statute says, *Instituted and Inducted* to the Second; but Institution is looked upon to be sufficient, for otherwise the Act might be eluded by Deferring the Induction.

See of Nobility, post. ch. 4.

But by this Act there must be certain Qualifications necessary to obtain such Dispensation; as of Birth, Degree, to be Chaplain to the King, Queen, a Duke, &c. Archbishop or Bishop, or to a Dutches, Marchioness, Countess, Baroness, being Widows (or married to any Person under the Degree of a Baron, though noble only by their first Marriage) or to other great Persons by Virtue of the said Statute, and 25 H. 8. ch. 16. and 33 H. 8. ch. 28. By Reason of such Qualifications one may purchase Dispensations to keep two Benefices.

If one hath his full Number of Chaplains allowed to be Qualified, and retains one more, who obtains a Dispensation before Others are advanced; His Dispensation to hold a *Plurality* is not Good.

^e 4 Rep. 89.

^{90.}

¹ Cro. 723,

724. 839.

^f 4 Rep. 118,

119.

If a Duke, Earl, &c. retain a Chaplain and die, or is attainted of Treason before his Chaplain takes a *second* Benefice, this Retainer too is determined: If he had taken a second Benefice before his Death, &c. the original Retainer would have continued in Force,

to

to qualify Him to enjoy the Benefices, which were once lawfully settled in him. And this Retainer is good during his Life. One cannot Discharge his Chaplain, if he purchases Dispensation, and is advanced by it, to qualify another in his Place.

Further, By 21 H. 8. ch. 13. *No spiritual Person shall take to Farm any Lands, &c. in pain to forfeit ten Pounds for every Month he so continues the same, to be divided betwixt the King and Prosecutor. And he shall not (by himself or any other) buy to sell again for Profit, any Cattle, Victual, or Merchandize whatsoever, in pain to forfeit treble the Value thereof, and every such Bargain shall be void.*

By 2 & 3 Ed. 6. ch. 1. *If a Minister is disturbed in the Exercise of his Office in the Church; the Punishment upon Conviction is 10 l. and upon Non-payment, three Months Imprisonment without Bail.* [And by 1 W. & M. ch. 18. a Penalty of 20 Pounds is laid on the Disturber of publick Worship in any Church or licensed Meeting-house, &c.]

[The Statutes concerning Leases by spiritual Persons will be mentioned under the Title *Leases*, Book 2. ch. 3.]

By 13 El. ch. 10. *If fraudulent Gifts of their personal Estate are made by Ecclesiastical Persons, on purpose to binder their Successors from recovering Dilapidations against their Executors or Administrators; the Successor shall have like Remedy in the Ecclesiastical Court against the Grantee, as he might have had against the Executor or Administrator of his Predecessor.*

By 14 El. ch. 11. *All Money recovered for Dilapidations, shall be employed within two Years, upon the Building, in pain to forfeit double the Sum received, and not so employed.* [See 7 Ann. ch. 14. concerning Parish Libraries.]

2. One may ^a Cease to be a Parson of a Church. 1. By *Death*, ^a 1 Inst. 120. ^a 2.
2. By *Cession*, which is by taking a second Benefice with Cure of Souls, ^a 4 Rep. 75. 76, contrary to 21 H. 8. ch. 13. before-mentioned: ^b or contrary to the ^{77. 117.} Canon Law, without Dispensation, when the first Benefice is under ^{2 Roll. Abr.} eight Pounds *per Annum*: This is properly called Cession. Cession ^{360. 361.} is not made by taking a Deanery, Archdeaconry, Prebend, or Rectory with Vicarage endowed, because they are not Benefices with Cure within the Statute, but particularly excepted. 3. By *Creation*, for when a Parson is made a Bishop, his Benefice his void upon his ^{1 Sid. 426.} Consecration. 4. By *Resignation* to the Bishop, the immediate ^{1 Cro. 526;} Ordinary, ^a in whose Discretion it is either to accept or refuse the ^{527.} Resignation. ^a *Resigno* is not so proper a Term in Law as *Renuncio*, ^{2 Roll. Abr.} *Cedo*, *Demitto*. A Resignation before a Notary, without the Bishop's ^{360.} Acceptance, does not make the Church void. The Notary can only ^{See P. ante.} attest the Resignation in order to its being presented: It cannot be ^a made upon Condition, because it is a judicial Act. ^a A Donative ^{2 Cro. 63,} must be resigned into the Hands of the Patron. [See 31 El. ch. 6. ^{198.} concerning *Corrupt Resignations*.] 5. By *Deprivation*, as upon *Simony*, ^{2 Roll. Abr.} contrary to 31 El. ch. 6. 12 Ann. st. 2. ch. 12. By maintaining any ^{358.} Foreign Power, [See 1 El. ch. 1.] or any *Doctrine* contrary to the ^{1 Inst. 344. a.} thirty-nine *Articles* of Religion, and persisting therein. [See 13 El. ch. 12.] Or by neglecting to make the *Declarations* in the Church, and to read and to assent to the thirty-nine *Articles* there. [See 13 El. ch. 12. 13 & 14 Car. 2. ch. 4. and 23 G. 2. ch. 28.] Or by neglecting to take the Oaths, &c. within six Months after one enters on a Be-

¹ W. & M.
St. 1. ch. 8.

^a 6 Rep. 29.

^b 3 Inst. 204.

² Roll. Abr.

222.

6 Rep. 13 &

14.

11 Rep. 49,

98.

Hob. 243.

Vicar.

Curate.

a Benefice. [See the 13 W. 3. ch. 6. 1 Geo. 1. ch. 13. 2 Geo. 2. ch. 31. 9 Geo. 2. ch. 26.] By *Absence* of sixty Days in one Year from a Benefice belonging to a Papist, in the Presentation of one of the Universities, or if the Clerk presented had *Another* Benefice with Cure. [See 1 W. & M. ch. 26.] By using any *other Form* of Prayer, or *Administration* of Sacraments than what is contained in the Common Prayer Book, or by *Refusing* to use the said Form, or by *Depraving* the Book of Common Prayer, or any Part of it, upon a second Conviction. [See 1 El. ch. 2.] In all these Cases the Parson is *Deprived*, and the Benefice made void by *Statute Law*,^a where there needs not any Sentence Declaratory in the Ecclesiastical Court. ^b There are also many Causes of Deprivation by the *Canon Law*, upon Sentence in the Spiritual Court, as for Adultery, Drunkenness, Dilapidations.

6. A *Vicar*, (*Vicarius, quasi vice fungens Rectoris*) is the Priest of that Parish where the predial Tithes are appropriated: The Parson or Rector has the predial Tithes to himself. At first a Vicar was a mere Curate to the Impropiator, temporary and removable at Pleasure; but by Degrees he got a settled Maintenance of Glebe, and some kind of Tithes, and now claims his Dues either by *Endowment* of the Impropiator or by *Prescription*. The Ordinary hath Power to increase his Allowance. [See 15 R. 2. ch. 6. 4 H. 4. ch. 12.]

The Freehold of the Church, Church-yard and Glebe is in him; and in some Cases he is esteemed to have a Fee-simple qualified. In some Places the Vicar has a *Pension* from the Impropiator: But some Benefices that were formerly severed by Impropiation, have since been united, and all the Glebe and Tithes have been given to the Vicarage; and many Vicars have a good Part of the great Tithes, or a Lease of them upon reasonable Terms from the Impropiators. [See 29 Car. 2. ch. 8. For Confirming Augmentations made by Ecclesiastical Persons, to small Vicarages, &c. and see the 2 & 3 Ann. ch. 11. and 1 G. 1. st. 2. ch. 10. for the Augmentation of the Maintenance of the poor Clergy, &c. and 12 Ann. S. 1. ch. 4. concerning the Endowment of poor Vicarages in the West-Riding of Yorkshire.

The Method of taking *Holy Orders*, *Presentation*, *Institution* and *Induction* to a Vicarage, or the Way of obtaining a Title to a Vicarage, by *Collation*, *Union*, and *Commendam*, is the same by which a Parson obtains a Rectory, and the same Methods are to be observed in performing the Solemnities of *Subscriptions*, *Oaths*, &c. required to secure the Title of a Parson. But a Vicar over and above is to take an Oath of perpetual Residency, which the Bishop may dispense with. The *Statutes* concerning *Residence*, *Pluralities*, *Farming* and *Merchandizing*, *Disturbance* of Ministers in Execution of their Office, and concerning *Dilapidations*, also relate to them, as well as to Parsons; and one may cease to be a Vicar in the same Manner as a Parson.

7. A *Curate* is he who represents the Incumbent (Parson or Vicar) and officiates in his Stead; though every Clergyman that officiates in a Church (whether Incumbent or Substitute) is in our Liturgy, called a Curate. He ought to be licensed by the Bishop or Ordinary: However he may recover his Salary for serving the Cure, though

though he has no such Licence. [See 28 H. 8. *ch.* 11. How the Curate is to be paid during the Vacancy of a Benefice upon a Sequestration. 1 *El.* *ch.* 2. 13 & 14 *Car.* 2. *ch.* 4. and see 13 *El.* *ch.* 20.]

There are *Perpetual* Curates as well as *Temporary*, where all the Tithes and Profits are impropriate, and no Vicarage endowed. The Impropriators are obliged to find them; and some of them have certain Portions of Tithes settled on them. [See the several Statutes above-mentioned, under the Title *Vicars*.]

By 13 & 14 *Car.* 2. *ch.* 4. *Curates must* Subscribe and Declare before the Archbishop, or Bishop, &c. as Lecturers, upon pain of losing their Places, and of being imprisoned three Months without Bail.

By 12 *Ann.* S. 2. *ch.* 12. If any Rector, or Vicar, presents any Curate to the Bishop or Ordinary to be licensed to serve the Cure in his Absence; he shall appoint under his Hand and Seal (before he grants such Licence) a Stipend not exceeding 50 l. per Annum, nor less than 20 l. to be paid at such Times as he shall think fit. And upon Non-payment of the said Stipend, he may sequester the Profits of the Benefice until Payment shall be made.

Every Parson, Vicar, or Curate, hath a *Parish-Clerk* under him; who was formerly a real Clerk in Orders, though now he is generally a Layman. He is the Assistant to the Parson, Vicar, or Curate, in performing Divine Service: * He is chosen by the Minister for the Time being, unless there is a Custom that the Parishioners or Church-wardens should appoint him; because the Custom is temporal, and cannot be altered by a Canon. He ought to be deprived by him that placed him in the Office; ^a but if he is unjustly deprived, a *Mandamus* will lie to the Church-wardens to restore him, as it will lie to the Bishop or Archdeacon to swear him when he is elected. The Law looks upon him as an Officer for Life, and one that hath a Freehold in his Place, and not as a Servant; and therefore will not suffer the Ecclesiastical Court to deprive him, but only to correct him for any Misdemeanor by Ecclesiastical Censures. The same Law is with Respect to a *Sexton* that has a fixed Salary. ^a *Can.* 91. ^b *Ventr.* 143, 153. ^c *Roll. Abr.* 234.

Thus much of the *Clergy*; which is fit to be known by the Students of the Common Law; though many Cases relating to them are triable in the Ecclesiastical Courts.

II. The *Laity* (from *Laos* the People) are the *People* especially Of the *Laity*; so called; as distinct from the *Clergy*.

CHAP. IV.

Of the Nobility and Commonalty.

A Person in his *Civil* Capacity is moreover either of the * *Nobility* or *Commonalty*. ^a *Inst.* 16. b. 156. b.

I. * The *Nobility* or *Peers* of the Realm are divided into Barons, Viscounts, Earls, Marquisses and Dukes. All the Nobility are Barons or Peers. They are called * *Barons* by Reason of a *Barony* or *Lordship*. ^b *Of the Nobility.* ^c *Inst.* 156. b. ^d *Inst.* 3.

Lordship held by some Service in Chief of the King; not that every one that has a Barony is a Lord of Parliament; for he must moreover be called by Writ to Parliament. Every Barony in ancient Time was held by *Grand Sergeanty*. They are called *Peers (Pares)* because in all publick Affairs they are equal as to their Votes in Parliament; tho' there is a Difference of Degrees in respect of their Dignities.

^a 1 Inst. 16. ^a One may have a Title of Nobility and Dignity by *Creation*,
^{a. & b. 110. a.} *Descent*, or by *Prescription*.

^b 1 Inst. 9. b. 1. By *Creation* either by Writ, or Letters Patent. ^b By *Writ* is
^{16. a. & b.} the most ancient Way, and gives a Fee-simple in the Barony without Words of Inheritance, (*viz.*) *To him and his Heirs*. Yet the King may limit the general State of Inheritance to Heirs male, or to the
^c 1 Inst. 16. b. Heirs of the Body. As soon as he sits in Parliament by Virtue of this Writ, his Blood is ennobled, and he is a *Peer*. But if he dies before he sits in Parliament, he is not ennobled. The Bare Direction and Delivery of the Writ hath no Effect. By Sitting in
^d 1 Inst. 16. b. Parliament his Blood is ennobled to him and his Heirs Lineal ^d.
² Inst. 48. But Creation by *Letters Patent* is the surest Way, and ennobleth his
¹ Ld. Ray. 11. Blood though he never sit in Parliament. Yet he must have the
^{&c.} Inheritance in this Case limited by apt Words, as to him and his
^e 1 Inst. 9. b. *Heirs*, or the *Heirs* male of his *Body*, or the *Heirs* of his Body, otherwise he hath no Inheritance. ^f The King may create either
^f 1 Inst. 16. b. Man or Woman Noble for Life only; but not for Years, because
⁹ Rep. 97. 98. then the Nobility might go to Executors or Administrators. Nobility also may accrue to one for Life by *Act of Law* only; as if a Duke takes a Wife, she is a *Dutchess* in Law by the Intermarriage. So if a Marquis, Earl, &c.

2. By *Descent*, as when Nobility comes down from the Ancestor, and is enjoyed by Right of Blood. ^e The Dignity of an Earl may descend to a Daughter, if there is no Son; and if there are many Daughters and no Son; the Possessions of the Earldom shall be divided amongst the Daughters, but the King shall dispose of the Dignity to which Daughter he pleases, by Reason of the Incertainty, and she shall be a Countess.

^h 1 Inst. 16. b. ^h A Woman Noble by Descent, marrying one that is under the
² Inst. 50. Degree of the Nobility, remaineth noble. But if she was noble by
⁶ Rep. 53. Marriage only, she loseth it if she marry one that is under the
See of Trials Degree of the Nobility; not if her second Husband is noble, and
of Criminals, inferior in Dignity to her first Husband.
post. B. 4. ch. 5.

By 25 H. 8. ch. 22. *The Dignity of the Crown is descendible to the eldest Daughter alone, and to her Posterity.*

3. By *Prescription*; as those that have continued Barons beyond the Memory of Man.

¹ 1 Inst. 16. b. A Duke, Earl, &c. of ¹ another Kingdom are not sued by those
² Inst. 48. Names here. Duke or ^k no Duke, Earl or no Earl, Baron or no
³ 1 Inst. 16. b. Baron, if created by *Writ*, shall be tried by the King's Writ, or
⁶ Rep. 53. the Record of Parliament, and not by a Jury: But if created by
⁷ Rep. 15. *Letters Patent*, they may be pleaded and given in Evidence to a
⁹ Rep. 31. Jury; and so *Dutchess* or no *Dutchess*, &c. by Marriage, shall,
¹ Ld. Ray. 14. as a Matter of Fact, be tried by a Jury.

^m 1 Inst. 70. b. ^m But there are Barons by *Succession*, and those are the *Bishops*,
^{97. a. 110. a.} who by Virtue of ancient Baronies held of the King (into which the
^{134. b.} Possessions
² Inst. 5. 6. 7.
^{79.}
³ Inst. 30.

Possessions of their Bishopricks have been converted) are called by Writ to Parliament, have always had Place in the upper House, and are called ^a Lords Spiritual: but there are no Feudal Baronies, or ^a Lit. 163. Baronies by Tenure at this Day. The temporal Possessions of ¹ Inst. 109. a. Bishops are held by their Service to attend in Parliament, when call- ² Inst. 5, 6. ed, and that is in the Nature of a Barony. The Bishops of ³ Lev. 401. Wales ¹ Inst. 97. a. are Lords of Parliament as the Bishops of *England*; and all the Bishops together make one of the ^c three Estates in Parliament, and ⁴ Inst. 1, 2. are so accounted in several Statutes. [See 1 *El. ch. 3.* 8 *El. ch. 1.*] ¹ Vent. 325. But though the Bishops are Barons and Lords of Parliament, and are called by the King's Writ, and have a Vote there, ^d yet they ³ Inst. 30. shall not be tried by the Peers, because they do not sit in Parliament ^{S. P. C. 153.} by Reason of their Nobility, but by Reason of their Baronies, which they hold in Right of the Church, as some Abbots did heretofore, and yet were not to be tried by the Peers; but they are to be tried by the Country, *i. e.* by a Jury, for that they are not of the Degree of the Nobility. And when one of the Nobility is to be tried by his Peers in Parliament for a capital Offence, the Spiritual Lords withdraw, ^e because by the Canon Law they ought not to ³ Inst. 30. condemn any one to Death. ² Inst. 586, 587.

Let us now examine what the Law says particularly to the Case of Nobility.

A Peer shall not be ^f arrested upon mean Procefs, or upon Exe- ⁶ Rep. 52. cution for Debt or Trespass, because he is presumed to attend the ^{53.} King and the publick Affairs; and because the Law does presume ⁹ Rep. 49. that he hath sufficient Lands in which he may be distrained: But ² Ld. Ray. he may be arrested or apprehended in criminal Cases. Neither ^{1247.} is an *Exigent* awardable against a Peer in civil Cases. Before the ^{S. C. Salk. 512.} 24 *Geo. 2. ch. 18.* If a Peer of the Realm was Plaintiff or Defendant (whether Lord Spiritual or Temporal) a ¹ Knight was to ¹ Inst. 156. b. be returned of the Jury. A Peer is not to be put on *Juries*. If he is Defendant in a Court of Equity, he is not sworn to his Answer, but answers upon his Honour, as upon the Trial of a Peer. But his Affidavit, his Examination upon Interrogatories, and Examination as a Witness must be upon Oath ^h. So at Common Law when he ¹ Wms. 146. is a ⁱ Witness upon a Trial, he ought to be sworn. [How a Peer ⁹ Rep. 49. ought to be tried in High Treason, Petit Treason, Felony, &c. ³ Inst. 29. see *B. 4. ch. 1. and 5 post.*]

By *West. 1. ch. 34.* None shall report any false or slanderous News ² Inst. 223. or Tales whereby Discord may arise betwixt the King and his People, &c. or the Great Men of the Realm, on Pain of Imprisonment, till he produce the Author.

By *2 R. 2. st. 1. ch. 5.* None shall devise or tell any false News, Lies, &c. of Prelates, or Lords, or of the Chancellor, Treasurer, Privy Seal, Steward of the King's House, Judges, &c. whereby any Discord or Slander may arise, or Mischief come to the Realm, on Pain of Punishment, as is ordained by *West. 1.*

Since the Union, Peers of Scotland may maintain the Action of *Scandalum Magnatum* upon this Statute ^k.

By *12 R. 2. ch. 11.* When one hath told false News, Lies, &c. contrary to *2 R. 2. ch. 5.* and cannot produce the Author, and is thereupon imprisoned, he shall afterwards be punished by the King's Council, notwithstanding the Act of *West. 1.*

^k Com. 459.

The

^a 4 Rep. 13. The Statute of *Scandalum Magnatum* is a ^a General Law, of which the Court is to take Notice.

^b 5 Rep. 125. If the Slander is published in a Libel, the Party may be ^b indicted, fined and imprisoned. But the Action of *Scandalum Magnatum* is usually brought upon 2 R. 2. ch. 5. *tam pro Domino Rege quam pro seipso*, in the Name of the King and the Party; the King being concerned in the Credit of Great Men, who act by his Authority; so that the Plaintiff recovers Damages upon this Statute for the Wrong, and the Defendant is imprisoned on the Statute of *West.* upon the King's Account. The Words in such Cases shall be taken in the worst Sense ^c to preserve the Honour of Great Persons. Yet a Defendant may ^d justify in a *Scandalum Magnatum*, setting forth the special Matter.

^e 1 Vent. 60. These Statutes extend only to ^e extrajudicial Slanders; and so it is at Common Law. For tho' the Charge be false which is alledged in a Court, no Action de *Scandalo Magnatum* lieth.

By 21 H. 8. ch. 13. A Duke may have six Chaplains, a Marquis and an Earl five, a Viscount four, a Baron three; every Dutcheff, Marchioness, Countess and Baroness, (being Widows, &c.) two.

^f 4 Rep. 89, 90, 117. &c.] By 31 H. 8. ch. 10. The Precedency of the Nobility, Lords of Parliament, and of the Great Officers is settled and determined.

Of the Commonalty.

II. The *Commonalty* are divided into several Degrees, as *Knights*, *Esquires*, *Gentlemen*, and *Yeomen*. And as every one of the Nobles is a Peer to the other, though there are several Degrees; so it is of the Commons.

^g 1 Inst. 74. b. 1. ^g A Knight is of five Kinds (*viz.*) Knight of the Garter, Knight Baronet, Knight Banneret, Knight of the Bath, and Knight Bachelor. All these must have their Honours by Creation, except Baronets, who may be by Descent. One who was a Baronet by descent, levied a Fine of his Honour to another, who enjoyed it, and took Place in Seniority from the Date of the Patent, as if it had been granted to his Ancestors ^h. The Title *Baronet* is used in old Acts of Parliament ⁱ: Baronets, as such, are not Knights.

^k 4 Inst. 5. A Knight Bachelor is termed in Law *Miles*, for ^k *Equus Auratus* is not used; ^l therefore in Writs and Indictments he ought to be so named. See 16 Car. 1. ch. 20.]

^m 2 Inst. 594, 595. 2. ^m *Esquire* (*Armiger*) is a Name that is frequently used in divers Acts of Parliament to denote an Estate and Degree. All Dukes, Marquisses, Earls, Viscounts, and Barons of other Nations, or which are not Lords of Parliament, are to be named *Esquires*. If *Knights*, they are to be termed *Milites*. The Sons of all the Peers and Lords of Parliament are in Law *Esquires* in the Life of their Fathers. And ⁿ the ⁿ eldest Son of a Knight is an *Esquire*.

^o 2 Inst. 596, 667. A Foreign King being in *England*, must sue and be sued by the Name of *King*.

^p 2 Inst. 595, 667, 668. 3. ^p A Gentleman is he that beareth a Coat of Arms. There is but a small Difference betwixt an *Esquire* and a Gentleman. There may be Gentlemen by *Office* and *Reputation*. And if one is so reputed, he may be called so in legal Proceedings. ^q But if he is named *Yeoman*, he cannot abate the Writ, as a real Gentleman may. If a Gentlewoman is named *Spinster* instead of *Generosa* in any Original

Writ,

Writ, Appeal, or Indictment he may abate and quash the same. In other Cases, Widow, or single Woman, are good Additions.

He that hath taken a Degree in our Universities, may be named by that Degree. And if he hath taken Holy Orders, he may have the Addition of *Clerk*.

4. * *Yeoman* in legal Understanding is properly a Freeholder that^a 2 Inst. 668. may spend forty Shillings *per Annum*. This Degree is applied only to Men, not to Women,^b but it comprehends all under the Degree^c 2 Ld. Ray. 1179. of Gentlemen, as Citizens,^d Burgeffes, (*i. e.* Men of Trade) Day-^e 1 Inst. 80. a. 1 Str. 556. Labourers, Beggars. [*Yeoman* is generally reckoned a distinct Addition from *Labourer*, and of higher Degree.]^f *Citizen* and *Burgeffs*^g 2 Inst. 668. are no sufficient Additions in Writs,^h &c. because they are too general. A Man may be named either with the Addition of his Degree or Mysteryⁱ: And a Peer must be named by the worthiest^j See of Writs, post. B. 4. ch. 4. 2 Inst. 665. &c. name of Dignity. [See the Statute of *Additions*, 1 H. 5. ch. 5.]^k 2 Ld. Raym. 1541. 1 Str. 556.

CHAP. V.

Of Those that are amongst the Nobility and Commonalty in the Military State.

* **W**HEN the Courts of Justice are open to distribute Justice^{Of the Military State.} to all, it is said to be a Time of Peace. But when by Invasion, Rebellion, &c. the peaceable Course of Justice is stopt, then^{2 Inst. 249. a. & b.} it is said to be a Time of War. This shall not be tried by a Jury, but by the Records and Judges, whether Justice at such a Time had her equal Course of Proceeding or no? For Time of War doth not only give Privilege to them that are in the War, but to all others within the Kingdom.

The *Military State* includes the Soldiery by *Land* and *Sea*. But it must be observed, that in Time of War particular Orders are always made for the due Order and Discipline of Officers and Soldiers, and for the Regulation of the *Army* and *Navy*; which we must consult upon all Emergencies, and not expect many standing or perpetual Laws on that Account.

But it appears in our Books,^b that if any one in Commission in^{3 Inst. 52.} Time of Peace put to Death any Man by Colour of Martial Law, it is Murder, and against *Magna Charta*, ch. 29. But now an Act of Parliament for punishing Mutiny and Desertion is passed yearly, empowering the King to appoint Courts Martial though in Time of Peace.

The chief *Statutes* relating to the *Army* and *Navy* are as follow:

By 7 H. 7. ch. 1. and 3 H. 8. ch. 5. It is enacted, *That if a Captain shall not have the whole Number of his Soldiers, or not pay them their due Wages within six Days after he hath received them, he shall forfeit all his Goods and Chattels and suffer Imprisonment. And it is made*¹ *Felony without Clergy for a Soldier, (not being a Captain)*^{6 Rep. 27.} *retained in Wages, or taking any Piest to serve the King upon the*^{3 Cro. 71.}

N

Sea,

² *In republica maximè conservanda sunt jura belli.* 2 Inst. 58.

Sea, or upon the Land beyond-sea, to depart from his Captain without Licence. [See 11 H. 7. ch. 18.]

See B. 3. ch. 1.
post.

6 Rep. 27.
3 Inst. 86.

By 2 & 3 Ed. 6. ch. 2. *It is Felony without Benefit of Clergy for a Soldier retained, to depart without Licence of his Commander.* * But this Part of the Act doth extend only to a Soldier that departeth after he hath served the King in his Wars.

The Officer that receives more Wages for Soldiers than he ought, and doth not every Month (by a Note in Writing) acquaint the Treasurer of the Army with every Soldier's Entry, Death, or Departure, shall forfeit five Pounds to the King, suffer one Month's Imprisonment and lose his Place. [See more in this Act concerning Commissioners and Captains, Licences of Soldiers to depart, and concerning the Punishment of a Soldier that makes away with his Horse or Arms.]

By 4 & 5 Ph. & M. ch. 3. *If any Person being commanded to muster, doth absent himself (having no lawful Excuse) he shall suffer ten Days Imprisonment, unless he will agree to pay forty Shillings for a Fine. And if any Person authorized to levy or Muster Soldiers shall take any Reward to discharge or spare any from the said Service, he shall forfeit ten Times as much as he shall so take. And a Captain or other Officer which doth not pay the Soldier his Wages, shall forfeit ten Times as much as he shall take, and to the Soldier three Times as much as he should have paid to him.*

Offences committed during the Time of Service shall be heard and determined by the chief Commander.

[See 31 El. ch. 4. 9 & 10 W. 3. ch. 41. 1 Geo. 1. Sess. 2. ch. 25. 9 G. 1. ch. 8. As to Embezzlement of Armour, Stores, &c.]

By 43 El. ch. 3. *The most Part of the Justices of the Peace yearly in Sessions have Power to charge every Parish towards a weekly Relief for maimed Soldiers and Mariners.*

A Soldier or Mariner that begs, or counterfeits a Certificate of his chief Commander, shall suffer Punishment as a common Rogue. [See 17 G. 2. ch. 5.]

See of Felony, post.
B. 3. ch. 1.

By 3 Ja. 1. ch. 4. *If any one goeth beyond Sea, to serve foreign Princes, not having taken the Oath of Allegiance before he goes, it is Felony.* ^b *If he is a Gentleman or Officer that is going to serve a Foreign Prince; he must be bound with two Sureties in twenty Pounds, not to be reconciled to the Pope, or to consent to any Conspiracy against the King; or else it is Felony.* [See 1 G. 1. st. 2. ch. 47. for the Punishment of those who persuade Soldiers to desert, and of Soldiers of the popish Religion.]

By 31 Car. 2. ch. 1. *No Soldier shall be quartered upon any Person or Inhabitant without his Consent. And every such Inhabitant may refuse to quarter any Soldier, notwithstanding any Order whatsoever.* [See the Petition of Right, 3 Car. 1. ch. 1.]

But by the Mutiny Acts which are now passed annually, and have only Continuance for one Year, the Constables, &c. are to quarter Officers and Soldiers in Inns, ^c not in private Houses: But those Acts do not exempt Officers or Soldiers from the ordinary Process of Law; (though they are not to be arrested for Debts under ten Pounds) ^d nor extend to the Militia, except when embodied and in actual Service, pursuant to 30 G. 2. ch. 25. by which Act all the former Laws relating

^a 1 Ld. Ray.
479.

^d 2 Ld. Ray.
1246.

lating to the Militia are repealed, and several Regulations made relating hereto, too long to be here inserted. [See therefore that Act, and also 31 G. 2. *ch.* 26 & 30. 32 G. 2. *ch.* 20. 33 G. 2. *ch.* 22 & 24. As to the Militia and their pay, &c.

See for the Increase and Encouragement of Seamen, 7 & 8 W. 3. *ch.* 21. and 8 & 9 W. 3. *ch.* 23. 2 & 3 Ann. *ch.* 6. 13 G. 2. *ch.* 17. and 17 G. 2. *ch.* 34. and 29 G. 2. *ch.* 24. and 32 G. 2. *ch.* 25. and 33 G. 2. *ch.* 19. Concerning Apprentices to Seamen. And 9 & 10 W. 3. *ch.* 41. 1 Geo. 1. *st.* 2. *ch.* 25. 1 Geo. 2. *st.* 2. *ch.* 9, 14. 14 G. 2. *ch.* 38. and 31 G. 2. *ch.* 10. Concerning Seamen's Wages, &c. And Disturbances by Seamen on Pay-days, &c. and 30 G. 2. *ch.* 18. As to bringing and landing Prize Goods taken from the Enemy.

By 1 Ann. *ch.* 9. and 4 G. 1. *ch.* 12. *Captains and Mariners belonging to Ships, destroying the same to the Prejudice of the Owners, Merchants, or Insurers, shall suffer Death as Felons.* See of Felony, *post.* B. 3. *ch.* 1. 12 Ann. S. 2. *ch.* 18.

[See 2 Geo. 2. *ch.* 36. for regulating Seamen in Merchants Service; And 3 Geo. 1. *ch.* 13. 7 Geo. 1. *st.* 1. *ch.* 21. 5 Geo. 2. *ch.* 20. For the better Regulating of Pilots for Conducting Ships from Dover, Deal, and the Isle of Thanet up the Rivers of Thames, and Medway.]

See also 7 Geo. 2. *ch.* 15. which discharges the Owners of Ships from being liable farther than the Value of the Ship and her Appurtenances, and Freight, for Loss, or Imbezilment, by Master, or Mariners. And 10 Geo. 2. *ch.* 14. For collecting Money at Legborn for Relief of distressed Seamen. See 22 Geo. 2. *ch.* 33. For amending, explaining and reducing into one Act the Laws relating to the Government of his Majesty's Ships and Forces by Sea. And also 29 Geo. 2. *ch.* 27. and see B. 4. *ch.* 1. *post.* of the Admiralty Court and Courts of Commission for the Trial of Piracies and other Crimes committed at Sea: See also the Acts which are annually past for the Regulation of the Marine Forces while on Shore.

CHAP. VI.

Of a Person, as Master of a Family, Husband, or Wife, Parent or Child, Ancestor or Heir, Landlord or Tenant, Guardian or Minor.

HAVING shewn a general Division of Persons in respect of their Civil Capacities, as the King and Subject; and of Subjects, as they are either of the Clergy or Laity, Nobility or Commonalty, or of the Military State; I proceed to give an Account more particularly of Persons that are in Civil or Relative Capacities; as a Master of a Family, Husband, or Wife, Parent or Child, Ancestor or Heir, Landlord or Tenant, Guardian or Minor. And then in the next Chapters of this Book, I shall give an Account of some Publick Officers, and of Corporations, which are Particular Persons in the Eye of the Law, and so conclude my Observations upon the

the first Object of our Laws, (*viz.*) The Persons in our Commonwealth.

A Person therefore in a Civil Capacity may be further considered,
 Of a Master I. As a Master of a Family; where I shall understand the Word
 of a Family. Family in a large Signification, including not only the Kindred, but
 Apprentices and Servants, under the Master of it.

1. As for the Kindred. The Master of a Family may be considered, as his Kindred are related to him, tho' not of the same House:
 2. 1 Inst. 23. b. Kindred are a certain Body of Persons of Kin to each other. The Kindred is distinguished by Lines either Ascending, Descending, or Collateral, with respect to him. The ascending Line is from Son to Father, and so directly upwards. The descending Line is from Father to Son, and so directly downwards. The collateral Line is between Brothers and Sisters, and the rest of the Kindred upwards and downwards, a-cross and amongst themselves. Now to know the Degrees of Kindred, there are four Rules; 1. A Person added to a Person in the Line of Consanguinity maketh a Degree. As in the ascending Line, take the Son and add the Father, and it is one Degree ascending; then add the Grandfather, and it is a second Degree ascending. 2. If there are many Persons, take away one, and you have the Number of Degrees. For if there are four Persons, it is the third Degree, if five, four Degrees. As in the descending Line, take the Father and add the Son, and it is one Degree; then take the Son and add the Grandchild, and it is the second Degree, wherein observe that the Father, Son and Grandchild, tho' three Persons, yet make but two Degrees. 3. In every Line the Person must be reckoned from whom the Computation is made. For Example, If the Question is in what Degree the Sons of two Brothers stand, we must begin from the Grandfather and descend to one Brother, which is one Degree; then descend to his Son, which is a second Degree; then descend again from the Grandfather to the other Brother, which is one Degree; then descend to his Son, which is the second Degree. Thus reckoning the Person from whom the Computation is made, it appears there are two Degrees, and that the Sons of two Brothers are distant from each other two Degrees. For in what Degree either of them is distant from the common Stock, the Person from whom the Computation is made, they are Distant betwixt themselves in the same Degree. This is the Way when the Kindred are equally distant from the common Stock. But if they are not equally distant, then, 4. In what Degree the most remote is distant from the common Stock, in the same Degree they are distant betwixt themselves; and so the most remote maketh the Degree: Thus I and the Grandchild of my Uncle are distant in the third Degree; for the Grandchild of my Uncle is distant three Degrees from my Grandfather, the nearest common Stock.

The Common Law agrees in its Computation with the Civil and Canon Law as to the right Line; and only with the Canon Law as to the collateral Line. [See my *New Institute of the Civil Law with Notes*, &c. B. 1. ch. 2.]

2. Apprentices and Servants may be under the Government of the Master of the Family.

1. Apprentices (from *Apprendre*, to learn) signify those that are bound by Indenture (with their own Consents, or by the Agreement

ment of their Friends) to serve Men of Trade, &c. for certain Years, upon Condition that the Master shall in the mean Time instruct them in his Art or Mystery.

By 5 El. ch. 4. §. 43. *Apprentices, bound according to that Statute, shall be bound by their Indentures, notwithstanding their Non-age.*

They shall be bound by their Indentures to serve their Masters, so as to be punished for Misbehaviour, but not to entitle the Master to bring an Action against them for Breach of Covenant; * 1 Cro. 179. *Danvers* except in London, where the apprentice is above fourteen Years of Age. But it hath been adjudged, * that there, notwithstanding the Custom, a collateral Covenant shall not bind an Infant. Some *Abr. Tit. Customs of London, 421.* Friends are usually bound for the Apprentice in the Country. [See * 1 Cro. 652. 8 Ann. ch. 9. 18 G. 2. ch. 22. and 20 G. 2. ch. 45. Concerning Rates on Monies given with Apprentices * 2 Str. 1132.]

Apprentices to Trades and Husbandry ought to be regulated by the 5 El. ch. 4. which see at large, where it is set forth, *Who may take Apprentices, and who not; Who shall be compelled to serve in Trades: The Manner of Punishing and Discharging Apprentices; and how long they must serve.* [But by 5 W. & M. c. 9. the 32 Sect. In that Statute relating to Cloth-weavers is repealed.]

By 35 Sect. of that Statute, Four Justices in open Sessions have Power to Discharge Apprentices upon Complaint of the Master, as well as of the Apprentice, (and upon Complaint originally made at Sessions, though that was formerly questioned) if there be good Cause of Discharge in the Order, but Sickness is no Cause, nor the Using him unkindly, nor that the Master declared in open Court he would not take him again * 1 Sand. 314. *Ventr. 1743*

By 20 Geo. 2. ch. 19. On Complaint of any Parish-Apprentice, or other Apprentice upon whose binding no more than 5 l. was paid, touching any Misusage, Refusal of necessary Provision, Cruelty or other ill Treatment; any two Justices may Summon the Master or Mistress to appear before them, and examine into the Matter of such Complaint, and on Proof thereof upon Oath, (whether the Master or Mistress be present or not, if the Service of the Summons be upon Oath proved) may discharge such Apprentice by Warrant or Certificate under their Hands and Seals, for which Warrant or Certificate no Fee shall be taken. And such Justices upon Complaint on Oath by any Master or Mistress against any such Apprentice, touching any Misdemeanor, Misdemeanor, or ill Behaviour in such Service, may hear and determine the same, and punish the Offender by Commitment to the House of Correction, there to be kept to hard Labour for any Time not exceeding a Calendar Month, or by discharging such Apprentice. * 1 Str. 143. 663. 704. *Ld. Ray. 1410.*

At the Common Law any one might use what Trade he pleased: * 11 Rep. 511. But to prevent Unskilfulness in Trades, by 5 El. ch. 4. §. 31. It is enacted, That no Person shall exercise any Craft, Mystery or Occupation, then used, except he had been brought up therein seven Years as an Apprentice; or set any Person on Work in such Craft, &c. who had not been as an Apprentice as aforesaid, upon the Forfeiture of forty Shillings a Month. This Clause is not to be extended to the getting of a Livelihood by mere Labour, where there is no Craft or Mystery, or any further than the Words expressly direct. And therefore a Person serving as an Apprentice, though not bound, or having used or exercised the Trade as Master or Servant for seven Years, may exercise his Trade and set others to Work therein: And the Clause * 11 Rep. 54. *Hob. 211.*

Clause * 11 Rep. 54. *Salk. 67.* * *Salk. 619.* *Ld. Ray. 718.*

Clause extends only to Crafts and Mysteries *then* used, at the making of the Act, and not to new Arts and Mysteries since invented.

It must be expressly proved, that the Party did publickly exercise the Trade, or set others to work, and make Gain by it: For the Act does not forbid any one to exercise a Trade *privately* in his own Family; as to bake, brew, trim and shave, &c.

The Penalty in this Clause of the Act is to be recovered by Indictment or Information (but without Costs) in the proper County where the Offence is committed, according to 31 *El. ch. 5.* 21 *Ja. 1.*

ch. 4. ^b Or by Action of Debt, in any of the Courts at *Westminster*.

^c An Apprentice cannot be sent out of *England*, unless the Nature of his Service doth imply it.

As an Apprentice cannot be made without Writing, so he cannot be ^d discharged by his Master without Writing under his Hand, and with the Allowance of one Justice. See 20 *Geo. 2. c. 19. ante.*

If any Master dies, the Apprentice may go to the Executor or Administrator, to be maintained, if there be Affets ^e. But the Executor cannot bind him over to another Master for the remaining Part of his Time, unless by special Custom, or with the Concurrence of the Apprentice; neither is the Apprentice bound to serve the Executor or Administrator of the Master ^f. By the Custom of the City of *London*, an Apprentice may be *turned over* from one to another; and he to whom such Apprentice is turned over, may have an Action of Covenant on Breaches assigned; *24.* And in *London*, if a Master shall refuse to make his Apprentice free when the Term of his Apprenticeship is expired, the Chamberlain ^h will make him free, if the Master cannot shew Cause to the contrary. In other Corporations the Apprentice may have a *Mandamus* out of the *King's Bench*, directed to the proper Officer, to make him free, if the Master refuses to do it.

By 22 *H. 8. ch. 4.* The Fee for Entry of an Apprentice into a Fellowship is settled at 2 s. 6 d. and his Fee for Entry into his Freedom, at 3 s. 4 d.

By 28 *H. 8. ch. 9.* No Master or Ruler of any Guild or Fellowship shall, by Oath or Bond, restrain any Apprentice or Journeyman from using his Trade after his Apprenticeship or Term expired.

But an Apprentice or Journeyman of full Age, may restrain himself upon a good Consideration, either by Bond or otherwise, from exercising his Trade in a particular Place ⁱ.

See 5 *El. ch. 5.* Concerning Apprentices to Owners of Ships and Vessels, or Housholders, using the Trade of the Sea by Fishing; 1 *Ja. 1. ch. 16.* Concerning Apprentices to Wherry-men and Watermen. And for Binding poor Boys Apprentices to the Sea-Service to Masters of Vessels, See 2 & 3 *Ann. ch. 6.* And 4 *Geo. 1. ch. 11.* Where any Person of the Age of fifteen, and under twenty-one, is willing to serve in any of the Colonies or Plantations in *America*.

See 43 *El. ch. 2.* 1 *Ja. 1. ch. 25.* 7 *Ja. 1. ch. 3.* 3 *Char. 1. ch. 4.* 8 & 9 *W. 3. ch. 30.* For poor Apprentices bound out by the Churchwardens and Overseers; and 15 *Car. 2. ch. 15.* Of Apprentices to Hemp-Dressers, and making Cloth of Hemp, Nets and Tapestry-Hangings; 4 *W. & M. ch. 23.* Against Apprentices hunting, &c.

^a 8 Rep. 129

¹¹ Rep. 54.

¹³ Rep. 11.

^{12.}

¹ Salk. 373.

^b 1 Vent. 8.

⁹ 364.

¹ Lev. 249.

² Lev. 204.

³ Lev. 71.

^c Hob. 134.

^d Dalt. ch. 58.

pag. 121.

² Ld. Ray.

1117, 1410.

¹ Str. 663.

^e 1 Salk. 66,

68.

^f 2 Stra. 1266.

¹ Lev. 177.

to the contrary

not Law.

⁸ Danvers.

Abr. Tit.

Custom of

London, 421.

Quere & vide

Barker v.

Beardwell,

Showder 4.

^h See of his

Court, post.

B. 4. ch. 2.

¹ Danv. Ab.

735.

ⁱ 1 Wms. 181.

in Point.

² Str. 1110,

1268.

¹ Str. 48.

12 Ann. ch. 18. Concerning Apprentices to Persons that come into a Parish by Certificate; 1 Geo. 1. §. 2. ch. 41. For giving Liberty to Persons to work who have served their Apprenticeships to the Woollen Manufacture in Colchester, &c. and 22 Geo. 2. ch. 44. To enable Officers, Mariners and Soldiers, to set up Trades.

See Dalton, Nelson, and Burn's Just. Tit. Appren- tice per Tot.

2. Servants are either *Menial*, or not *Menial*.

1. *Menial* Servants are the *Domesticks* living (infra *Momia*) within the Walls of the House.

If one retains a Servant generally without expressing any Time, the Law construes it to be for a Year, according to the Statute of 5 Ed. ch. 4. By which It is enacted, that no Clothier, Woollen Weaver, Taylor, &c. shall retain a Servant for less Time than a Year; and Persons unmarried, or under thirty Years of Age, though married, are compellable to serve one Year at least, in those Trades, if brought up therein, or have used the same for three Years, for the Wages limited by the Statute: And others are compellable to serve in Husbandry by the Year: Also unmarried Women, between the Age of twelve and forty, may be compelled to serve by the Year, Week, or Day, for such Wages as two Justices of the Peace shall think fit, on Pain of Imprisonment.

P.N.B. 168. 1 Inst. 42. b. Noy's Max. 91.

If any Servant make any Assault upon his Master, Mistress, or Overseer of him or his Work, he shall be imprisoned for one Year or less, and have farther Punishment as the Justices in open Sessions shall think convenient.

A Servant retained according to the Statute, cannot be put away before the End of his Term, unless for some reasonable Cause to be allowed by a Justice of Peace: And none shall put away any such Servant at the End of his Term without a Quarter's Warning, on Forfeiture of forty Shillings. And no Person so retained, shall depart from his Master before the End of the Term, unless for some reasonable Cause to be allowed as aforesaid, or at the End of his Term without a Quarter's Warning, upon the Penalty of Imprisonment.

If a Servant shall refuse to do his Service, this is a Departure in Law, altho' he continue with his Master.

It is a reasonable Cause of Departure from Service, if the Servant is not allowed sufficient Meat, Drink, &c. or if the Master's Wife beats him: But Apprentices and Servants may be corrected with Moderation by their Masters.

F.N.B. 168.

If a Woman that is a Servant doth marry, yet she must serve out her Time, and her Husband cannot take her out of her Master's Service. And if a Woman being with Child of a Bastard, procures herself to be retained with a Master, who knoweth nothing thereof, or if she be gotten with Child during her Service; this is a reasonable Cause why the Justices should discharge her from her Service; for she has made herself incapable to serve any longer. But if a Servant retained for a Year falls sick, the Master cannot put him away or abate his Wages; nor is Marriage of itself any reasonable Cause of Discharge within the Statute, and the Discharge by the Justice must be in Writing.

2 Salk. 529.

If a Man retains a Servant for ten Pounds *per Annum*, and he departs within the Year, he can have no Wages. And if Wages are to be paid Half-yearly, and the Master dies after the first Half-year, the Servant shall have Wages only for the first Half-year.

Rex v. Hanbury, Trin. 27 G. 2. K. Noy's Max. 90.

A Servant, when his Master is dead, is legally discharged.

If

^a 5 Rep. 14. If my Servant damages my Goods by his Negligence, an Action of the Case lieth against him.

^b 3 Inst. 105. See 33 H. 6. ch. 1. and 21 H. 8. ch. 7. ^b Where Servants imbezel their Masters Goods, or steal from their Masters to the Value of forty Shillings; and 12 Ann. ch. 7. as to Apprentices.

Servants not Menial, or not Domesticks, are Labourers, who not having a sufficient Estate to live upon, and not employed in any Art, ^c F.N.B. 168. are ^c compellable to serve, by the above-mentioned Statute of 5 El. ch. 4. Which also directs that all Persons meet for Labour shall be compelled to serve by the Day, in the Time of Hay or Corn Harvest; and that the Wages of Servants, Labourers, Artificers, Husbandmen, or Apprentices of Husbandry, shall be assessed Yearly at every Easter-Sessions; [See 1 Ja. 1. ch. 6. By which Statute, The Sheriff shall cause the said Rates to be proclaimed.] And that None shall give greater Wages than those rated as aforesaid, in pain of five Pounds, and ten Days Imprisonment; nor take greater Wages on pain of twenty-one Days Imprisonment. And every Retainer, or Payment, or Writing contrary to the true Meaning of the Act, to be void.

If any Labourer shall make an Assault upon his Master, or the Overseer, he shall suffer as Servants making such Assault.

Every Artificer, or Labourer that shall be retained for Building, or Repairing, or for any other Work done by the Great, shall not depart from the same before the Finishing thereof, unless it be for Non-payment of Wages, or other lawful Cause, without Licence, on pain of one Month's Imprisonment, and Forfeiture of five Pounds to the Party grieved; nor if retained in any Service, depart without Finishing the Work, upon pain of one Month's Imprisonment.

The Statutes of 5 El. ch. 4. and 43 El. ch. 2. are excellent Statutes for the Government of Apprentices, Servants and Labourers; but they are not put in Execution as they ought, as to the Ability of Parents of Apprentices, Testimonials, Rates for Wages, Workers in Harvest, &c. which makes Servants intolerably insolent.

^d 1 Mod. 78. ^d The Testimonial concerns only hired Servants in Trades and Husbandry. And the Statute does not extend to the Wages of other ^e Jones (Th.) Servants than in Husbandry and Trades.

^e 47. By 2 & 3 Ed. 6. ch. 15. Artificers, Workmen and Labourers, that ^f Salk. 441. conspire together concerning their Work or Wages, or not to meddle with ^g Ld. Ray. one another's Work, or finish what another hath begun, forfeit ten Pounds, ^h 820, 1305. &c. [See 1 Ann. S. 2. ch. 18. For Labourers in the Woollen Ma- ⁱ Str. 8. nufacture.] ^j Str. 1002.

By 20 G. 2. ch. 19. [and 27 G. 2. ch. 6. as to the Stannaries in Devon and Cornwall.] Complaints and Disputes between Masters or Mistresses and Servants in Husbandry, hired for a Year or longer, [by 31 G. 2. ch. 11. extended to Servants employed in Husbandry tho' hired for less Time than a Year.] and Artificers, Handicraftsmen, Miners, Colliers, Keelmen, Pitmen, Glassmen, Potters and other Labourers, employed for any certain Time, or in any other Manner, may be determined by a Justice of the Peace of the County or Place where such Master or Mistress shall inhabit, though no Rate of Wages has been made that Year by the Justices. And the Justice may examine upon Oath such Servant, Artificer, &c. or any other Witness, and make Order for Payment of so much Wages to such Servant, Artificer, &c. as

to such Justice shall seem reasonable, provided the Sum in question exceed not 10 l. to a Servant, or 5 l. to an Artificer, &c. and on Non-payment in twenty-one Days, may cause the same to be levied by Distress and Sale of the Goods of such Master or Mistress. On Misbehaviour of a Servant, Artificer, &c. the Justice, upon Complaint upon Oath, may punish the Offender by committing him to the House of Correction, there to be held to hard Labour for any time not exceeding a Calendar Month, or by abating some Part of his Wages, or discharging him from his Service. And for Misusage, Refusal of necessary Provision, Cruelty or other ill Treatment, committed by the Master or Mistress, the Justice may, by Writing under his Hand and Seal, which is to be given gratis, discharge the Servant, Artificer, &c. from his Service. [See 22 G. 2. ch. 27. relating to Workmen in the Woollen and many other Trades.]

See 7 Ann. ch. 12. Concerning the Servants of Ambassadors.

There are some common Cases necessary to be known concerning Servants, in a more particular Manner; which may be applied partly to Apprentices, as also to Stewards and Bailiffs. Therefore, I will

Let us see what the Master may do Against others with respect to his Servant, and how a Servant may charge his Master by his Act.

1. The Master may maintain the Cause of his Servant against another. He may have an Action of Trespas for the Battery of his Servant; but then it must be alledged, That by Reason of such Battery he lost his Service. For otherwise the Servant must bring the Action. A Master may also justify an Assault and Battery in Defence of his Servant; for otherwise he might lose his Service, as a Servant may justify an Assault and Battery by way of Interposition in Defence of his Master.

If a Servant rides upon his Master's Horse to do an Errand, and the Horse is attached upon a Plaint of Debt against the Servant, and forfeited for Non-appearance of the Servant, the Master shall have an Action of Trespas against the Officer that attached him.

If my Servant is travelling upon my Horse, about my Business, and comes to a common Inn, and delivereth the Horse to the Hostler, and it is stolen; the Master shall have an Action against the Inn-keeper; but not if he is put to Grass by the Servant's Order.

If a Servant is robbed on the Highway, of the Master's Money, the Master being absent; the Master, or the Servant may bring the Action against the Hundred; and the Master may be a Witness to prove the Delivery of the Money to the Servant before the Robbery, though he brings the Action in his own Name.

If my Servant is cozened of my Money; I may have an Action of the Case against the Person that cozened him.

If a Servant that keepeth the Master's Shop, or useth to sell for him, give away the Master's Goods, the Master may have an Action against the Receiver.

The Master also may have an Action against one that entices away his Servant, or hires and retains him, knowing him to be his Servant.

These Actions the Master may have against others, in respect of his Servant.

2. On the other Side, The Master may be charged for the Act of the Servant, (*viz.*) by his Offence or Wrong, Contract or Negligence.

8 Rep. 32.

33.

Dr. & Stud.

Dial. 2. ch. 42.

1. As to Offences and Wrongs, An Innkeeper shall be charged to answer Damages for Theft committed by his Servant, or any other, upon one that lodgeth in his Inn as his Guest; not if the Guest is robbed by his own Servant, or Companion; for here the Innkeeper was in no fault. If a Man is robbed in a private Family, or Tavern, by one of the Servants, or by any other, the Master is not chargeable; Neither is the Master chargeable, if his Servant steals the Goods of one of the same Town that lieth in the Inn, who was not a Traveller.

Dr. & Stud.

Dial. 2. ch. 42.

8 Rep. 32.

Noy's Max.

92, 93.

3 Cro. 254.

487.

4 Rep. 18.

Dr. & Stud.

Dial. 2. ch. 42.

1 Ld. Ray.

264.

1 Rol. Abr.

95.

Kitch. 372.

Action of the Case lies against the Master for Damage done by his Dog, if the Master knew him to be accustomed to bite, or if set on by the Servant by his Master's Order.

In Trespass, or Felony, the Master shall be charged Criminally for his Servant's Act, if the Servant did it by his Master's Command.

If a Vintner's Servant sells Corrupt Wine, to the Wrong and Injury of another, an Action of the Case lies only against the Master; tho' the Master did not command the Servant to sell to that particular Person. For he acts but as a Servant.

If a Master commands his Servant to Distrain, and he rides upon the Distress, the Servant only shall answer for such Abuse of the Distress.

Noy's Max.

93, 94.

2. As to Contracts; if a Master Agrees to an Act done by his Servant, it shall be said to be the Master's Act; as in borrowing or receiving of Money; And whatsoever comes within the Compass of a Servant's usual Business, the Master shall be chargeable therewith, as of his Command, and shall likewise have Advantage of the same against others. But if a Servant borrows Money in his Master's Name, or takes it up of a Creditor of his Master's without Order, that does not bind the Master, unless it comes to the Master's Use, or unless the Servant has been used to borrow or receive Money for his Master, which the Master has afterwards paid or allowed; Or if the Servant has been used to give Notes in the Master's Name, which the Master has afterwards paid, a Note so given shall bind the Master, whether the Money for which it was given, come to his Use or not.

Dr. & Stud.

Dial. 2. ch. 42.

Kitch. 371.

1 Ld. Ray.

225.

1 Ld. Ray.

224.

1 Str. 505.

1 Rol. Abr.

95.

Kitch. 370.

So Action of Trover will lie against the Master for Goods delivered to the Servant, as such, in the ordinary Course of Dealing, whether they actually come to the Master's Hands or no.

If my servant sells my Horse or other goods in a Fair or Market with several Faults, which I knew of, the Buyer can have no Action against me the Master, unless I bid my Servant sell to that certain Person. But if a Tradesman's Servant make a special Warranty as to goods sold by him in his Master's Name, in the usual Course of that Trade, the Master is bound thereby.

1 Str. 653.

Dr. & Stud.

Dial. 2. ch. 42.

F. N. B. 120.

Kitch. 371.

If a Servant makes a Contract in his Master's Name, not in the usual Course of his Business, the Contract shall not bind his

Qui facit per alium, facit per se. 1 Inst. 258. a. 4 Inst. 109. 10 Rep. 33. *Omnis ratihabitio retrotrahitur, et mandato equiparatur.* 1 Inst. 245. a. 258. a. 9 Rep. 106.

Master,

Master, unless it were by his Master's Command or Assent. But if one hath a known Bailiff who used to sell the Beasts of his Master at the Market, and he sells several Oxen, this is a good Sale, tho' the Bailiff had no special Warrant to sell them.

* If my Servant lets a Lease of my Land for Years, reserving Rent to me, and warrants it free from Incumbrances when it is incumbered, the Action lieth against the Servant, not against the Master; for it was the Warranty of the Servant, who exceeded his Power.

^b If a Man sends his Servant to a Fair or Market to buy for him certain Things, tho' he doth not command him to buy of a certain Person, yet the Master shall be bound by the Servant's Contract, if he buys of any one; but if the Servant in that Case buys them in his own Name, not speaking of his Master, the Master shall not be charged; unless the Things bought came to his Use, and he have Notice that they do so. And though a Master gives his Servant ready Money to buy Provisions or the like, and the Servant buys them on Trust, he shall answer for what the Servant so buys: But ²⁴ if the Master has never before paid the Tradesman for Goods delivered to the Servant on Trust.

If a Man maketh another his general Receiver, and he receiveth Money of a Debtor of his Master's, and giveth an Acquittance, and doth not pay his Master the Money; yet that Payment discharge the Debtor, and the Act of the Servant shall bind the Master. But if the Debtor of the Master hath taken an Acquittance of the Servant without paying the Money, that Acquittance will be no Bar to the Master. Nor, if a Debtor delivers to a Receiver a Horse, or other Thing, in Recompence of the Debt, will that Delivery discharge the Debtor, unless it is delivered over to the Master, and he agrees to it. For the Receiver hath no Power to make such Exchange, unless his Master give him a special Authority so to do.

It is regularly true, That when a Man does less than he is commanded or authorized, there the Act is void; because the Command or Authority was not pursued. But where one doth that which he is authorized to do, and more, it is good for that which was warranted, and void for the rest: But these Rules are not without Exceptions.

3. Masters may often suffer for the Negligence of their Servants. As a Master shall be charged if his Servant, or any of his Family, cast any Thing into the Highway, to the Nuisance of the King's Subjects, or if his Servant driving his Cart do Damage therewith.

* If Goods are delivered to the Servant of a Carrier, and the Goods are lost, an Action lies against the Master.

If a Smith's Servant pricks a Horse while he is shoeing him, the Master shall answer for the Damage.

If a Servant by keeping Fire negligently, burnt his Master's House and his Neighbours, an Action lay at Common Law against the Master. But if the Servant bore Fire negligently in the Street, and thereby the House of another was burnt, there no Action lay against the Master. But,

* *Quando plus fit quam fieri debet, videtur etiam ipsum fieri quod faciendum est.*
8 Rep. 85.

By 6 A. ch. 31. and 10 A. ch. 14. No Action shall be maintained against any in whose House or Chamber any Fire shall accidentally begin: But this Act does not make void any Agreement between Landlord and Tenant.

And if any Servant, through Negligence, shall cause any House or Outhouse to be fired; such Servant being Convicted by Oath before two Justices of the Peace, shall forfeit one Hundred Pounds to the Churchwardens of the Parish, to be distributed amongst the Sufferers; or upon Non-payment, such Servant shall be committed to some Workhouse for eighteen Months, to be kept to hard Labour.

^a 1 Inst. 89. a.

If a Servant, Bailiff of a Manor, a Receiver, or a Factor, or the like Accountant, is robbed without his Default or Negligence, he must be allowed on his Account by his Master so much as he lost. But otherwise it is of a Carrier; for he hath his Hire, and undertaketh thereby the safe Custody of the Goods. [See the 9 Ann. ch. 10. Concerning the Post-Office.]

See Dr. Stud.

Dial. 2. ch. 42.

per Tot.

^b 1 Inst. 55. b.

The Discharge or Turning out of a Receiver, Factor, Attorney, in their Absence, is not sufficient in Law, till they have Notice of it.

Of Husband and Wife.

II. A Person may be *Baron* or *Feme*, (i. e.) *Husband* or *Wife*. Husband and Wife are made so by Marriage; and therefore it may be proper to set forth, 1. How, and by, and between whom, Marriages may be Contracted; 2. The Effects of Marriage, with Relation to Husband and Wife; 3. How Marriages may be dissolved; 4. What Rights do accrue to Husband or Wife after the Dissolution.

1. How, and by, and between whom, Marriages may be contracted. Espousals go before them. Espousals are a Contract or mutual Promise to marry each other hereafter. Marriage or Matrimony is an Espousal *de presenti*, and a Conjunction of Man and Woman in a constant Society of living together. Mutual Consent makes the Marriage before Consummation. And it being a Conjunction of one Man and one Woman, Polygamy is thereby excluded; as also Concubinage, because it consists in a constant Society of living together without the Liberty of parting at Pleasure. [See 1 Ja. 1. ch. 11.]

^a 6 Rep. 22.

¹ Inst. 33. a.

Where a Marriage is to be contracted, Respect ought to be had to the Age of the Parties, and the Degrees of Consanguinity and Affinity betwixt them.

^a 1 Inst. 33. a.

78. b. 79. a.

& b. 80. a.

² Inst. 182,

434.

³ Inst. 88, 89.

⁶ Rep. 22.

⁷ Rep. 43.

As to Age of Consent, the Woman may marry at twelve Years or after, and the Man at fourteen or after. And if they are married before, there needeth not a new Marriage if they agree at those Ages; for at first they were Husband and Wife in Law. But if they are married before those Ages, they cannot disagree till they come to those Ages; and then at that Time, and not before, they may disagree and marry again to others without any Divorce: But if they once give Consent at those Ages, they cannot disagree afterwards. If a Man at the Age of Fourteen marries a Woman at the Age of Ten, he may as well disagree at her Age of Twelve as the Wo-

^a Consensus, non concubitus, facit matrimonium. 1 Inst. 33. a. 6 Rep. 22.

^b Maturiora sunt vota mulierum quam virorum. 6 Rep. 71.

man, though he was at the Age of Consent. Because in Marriage, either both must be bound, or equal Election of Disagreement be given to both. And so on the contrary, if the Woman is of the Age of Consent, and the Man under that Age.

If an 'Idiot or Lunatick take a Wife, they are *Baron and Feme* ^{1 Sid. 112.} in Law, and their Issue legitimate. But it should seem that such ^{1 Roll. Abr. 357.} Marriage may be declared void by Sentence, where the Party was so much an Idiot as to be incapable of Consenting, or where the Lunatick married during his Frenzy. And by 15 G. 2. ch. 30. *If any Person found a Lunatick on Commission^b, or whose Person or Estate^c is committed to the Custody of Trustees by Act of Parliament, shall marry before he is declared to be of sane Mind by the Lord Chancellor, or the Majority of such Trustees, the Marriage is declared to be absolutely void.* ^{See ante P. 15.}

See 3 H. 7. ch. 2. and 39 El. ch. 9. For the Penalty for carrying away a Woman against her Will, and B. 3. ch. 1. *post.* Of Felonies against the Body. And see the 4 & 5 Ph. & M. ch. 8. Concerning the taking away Maidens or Women-Children unmarried within the Age of sixteen Years, and of Offences against the publick Peace, B. 3. ch. 3. *post.*

As to the Degrees, ^a all Persons may lawfully marry, that are ^{1 Inst. 24. a.} not prohibited by the *Levitical Degrees*, or otherwise by God's ^{235. a.} Law; For, ^{2 Inst. 684.}

By 32 H. 8. ch. 38. *Nothing (God's Law excepted) shall trouble or impeach any Marriage without the Levitical Degrees.* [See *Levit. 18.* and 25 H. 8. ch. 22. Where the Degrees prohibited are mentioned.] ^{Comyns 318. Bunb. 156.}

Therefore the Son of a Father by another Wife, and the Daughter of a Mother by another Husband, and so *à converfo*, may marry; as also Cousin Germans, by the said Statute. ^d So one may marry the Wife of his Great Uncle upon the same Reason. ^{4 Vaugh. 206. 2 Ventr. 9. 2 Lev. 254. 3 Lev. 364. 2 Inst. 683. 684. Hob. 181. 2 Ventr. 12. 2 Lev. 254.}

* Note, That tho' the Marriage of the Nephew with his Father's Sister and the Mother's Sister, is forbid in the 18th and 20th Chapters of *Leviticus*, and the Marriage of the Uncle with the Niece is not prohibited in exprefs Words; yet the same is implicitly prohibited, because it comes within the same Reason: Tho' it has been pretended, that it does not come within the same Reason, because where the Uncle marries the Niece, both keep the same Degree and Order according to Nature, which they had before; which the Aunt does not in respect of her Nephew, losing her Superiority by the Marriage, by being brought into Subjection to her Husband. So if you must not marry your Brother's Wife, you must not marry your Wife's Sister, *v.* 16. And thus you must conclude in like Cases, where an exprefs Prohibition is on one side only. But none of these Marriages are void in themselves, but voidable by Sentence in the Spiritual Court. ^e For if a Man takes his Sister to Wife, they are ^{1 Roll. 340. 357.} *Baron and Feme* till a Divorce, and till then the Issue are not Bastards. It is said, that no Marriage shall be impeached without the *Levitical Degrees*, ^f except where God's Law doth prohibit. ^{2 Inst. 235. a. 2 Inst. 687. 7 Rep. 44.}

Therefore where there is a perpetual *Impotency*, *Fear*, or *Imprisonment*, where there can be no Consent, or the Person is *under Age* of Consent, [or *precontracted*, *Qu.* since 26 G. 2.] or where a Woman hath a *Husband* living, or a Man a *Wife* living, in such

Q

Cases

Cases the Marriages also are to be declared void as prohibited by God's Law. In *Leviticus* it is shewn what Marriages are unlawful as to *Consanguinity*, (or Kindred by Blood) and *Affinity* (or Kindred by Marriage) only. Other Parts of Scripture are to be alledged against Marriages upon other Accounts.

^a 1 Inst. 134. a.
² Inst. 97,
99, 325.

^b 1 Salk. 119,
120.

The ^a *Loyalty* (or Lawfulness) of Marriage is always to be tried by the Bishop's Certificate, upon an Issue, *Accoupled in lawful Matrimony or not*; as in a Writ of Dower, Appeal, Bastardy; but this is seldom put in Practice. ^b But whether a Woman is a Feme Covert, or whether she is the Wife of *A.* or *B.* is triable by a Jury upon such an Issue. For the Issue is, whether there was a Marriage *de facto*, or in Reputation, that is, whether a Marriage was contracted betwixt the Parties or not, or whether the Parties lived in a married Estate, where the *Legality* of it does not come in Question. As to the Lawfulness, the Bishop's Opinion, after he hath heard the Cause, must determine it.

By 7 & 8 W. 3. ch. 35. If a Parson marries, or knowingly suffers any other Minister to marry any Persons in any Church or Chapel to such Parson belonging, without Publication of the Banns of Matrimony, or Licence, he forfeits one hundred Pounds; and the Man so married ten Pounds; and the Sexton, or Parish-Clerk, aiding and assisting, five Pounds. The said Forfeitures to be recovered by Action of Debt, one Moiety thereof to the King, and the other to the Informer. [See 10 Ann. ch. 19. §. 176.] And by 26 G. 2. ch. 33. Every Person who shall solemnize Matrimony in any other Place than a Church, or publick Chapel, where Banns have been usually published, unless by Special Licence, or without Publication of Banns, unless Licence of Marriage be first had from some Person having Authority to grant the same, shall be guilty of Felony, and transported for fourteen Years.

Though if the Marriage was once solemnized by one in Orders, it was held good, notwithstanding these outward Irregularities.

But now several Regulations as to Marriage are introduced by the Act to prevent clandestine Marriages of 26 Geo. 2. ch. 33. whereby it is enacted, That after the twenty-fifth of March one thousand seven hundred and fifty-four, all Marriages (except in Scotland, or beyond the Seas, and except the Marriages of any of the Royal Family, and of Jews and Quakers, where both the Parties are such) which shall be solemnized without Licence or Publication of Banns, or in any other Place than a Church or publick Chapel wherein Banns have been usually published (unless by special Licence, from the Archbishop of Canterbury), or solemnized by Licence without the Consent of the Father, if living, or if dead, of the Guardians, or if none such, then of the Mother of the Infant, (where either of the Parties, not being a Widower or Widow, is under the Age of twenty-one) shall be null and void to all Intents and Purposes; and where such Parents or Guardians of the Party under Age shall, at the Time of the Publication of Banns, openly declare or cause to be declared their Dissent to such Marriage, such Publication of Banns shall be absolutely void.

And in order to preserve the Evidence of Marriages, it directs the Form of the Register thereof, which is to be entered in a proper Book, to be provided by the Churchwardens, and to be signed by the Minister, the Parties, and two credible Witnesses present at such Marriage, Immediately after the Celebration thereof.

This Act also directs that all Banns of Matrimony shall be published audibly in the Church or Chapel where Banns have been usually published,

lished, belonging to the Parish or Chapelry wherein each of the Parties shall dwell, upon three Sundays preceding the Marriage, immediately after the second Lesson, in the Morning Service, or in the Evening Service, if no Morning Service; or in the Church or Chapel next adjoining, where either Party lives in an extraparochial Place; and the Parties are to give the Minister Notice of their Names, Places of Abode, and Time of Residence in the Parish, seven Days before such Publication: And the Marriage shall be solemnized in one of such Churches or Chapels, and no where else.

This Statute also enacts, That in no Case whatsoever shall any Suit be had in any Ecclesiastical Court, to compel Celebration of Marriage, by Reason of any Contract of Matrimony entered into after the twenty-fifth Day of March one thousand seven hundred and fifty-four; and also that no Licence, except Special Licences from the Archbishop of Canterbury, shall be granted, to solemnize any Marriage, but in the Church or Chapel of such Parish or Chapelry, where one of the Parties shall have resided for four Weeks before, or in some Parish Church or Chapel, where Banns have been usually published, next adjoining to the Place of Residence of one of the Parties, where such Place is extraparochial.

But in this Act there is an express Proviso, That it shall not be necessary in support of any Marriage, either after Publication of Banns, or by Licence, to prove the Residence of the Parties or either of them, in the Parish or Chapelry where such Marriage was had; nor shall any Evidence be received to prove the Contrary in any Suit touching the Validity of such Marriage.

2. The Effects and Consequences of Marriage, with Relation to Husband and Wife, are 1. That the Husband and Wife are accounted to be but ^a one Person in Law. Therefore a Man cannot ^b grant Lands to his Wife, during the Coverture, nor any Estate or Interest to her, nor enter into Covenant with her. But he may by his Deed covenant with others for her Use, and he may give to her by ^c Devise or Will; because the Devise or Will doth not take Effect till after the Death of the Devisor or Testator. And though a Feme Covert cannot, properly speaking, make a Will, because she is under the Power of her Husband, and expressly excepted out of the 34 & 35 H. 8. *ch.* 5. whereby ^d Persons seized of Estates of Inheritance are enabled to dispose of the same by Will; yet if she has a separate Estate, and a Power of Appointing reserved to her, she may, by Deed or Devise, appoint or devise Lands or Goods to her Husband or any other, and it is good in Equity. They cannot be Witnesses for or against each other, ^e except they may be Witnesses against each other in Case of High Treason for the sake of the Government, or upon the Statute of 3 H. 7. *ch.* 2. where the Wife may be Evidence ^f against her Husband for forcibly taking her away and marrying her. But she cannot be examined to prove her Husband a Bankrupt ^g; although the Commissioners are authorized to examine her touching any Concealment of his Goods, Effects, or Estate. [As to their being Witnesses for each other, it does not appear that they have been admitted in any Case, because they are considered as interested; but as to their being Witnesses against each other, they have been admitted not only in the Cases above, and also in Cases where there is no Possibility of having other Evidence ^h, or on behalf of the Crown, where he or she is the Party injured, but in some other Cases ⁱ; tho' the

Authority ^j 1 Str. 504, 527, 633.

^a Lit. 168.
^b 1 Inst. 112. a.
^c 123. a. 187. b.
^d 1 Inst. 112. a.
^e 187. b.
^f 1 Inst. 168.
^g 1 Inst. 112. b.
^h 1 Inst. 6. b.
ⁱ 2 Vern. 79.
^j Raym. 1.
^k 3 Cro. 488.
^l 1 Vent. 243.
^m State Trials, Reg. v. Swanpen.
ⁿ 1 Wms. 611.
^o Rex v. Reading, Mich. 8 G. 2. K. B.
^p 1 Str. 504, 527, 633.

Authority of some of those Cases may be questioned.] 2. The Husband hath *Power* over his Wife's *Person*, but cannot confine her without Cause^a: She is so much under his Power, that she is disabled to ^b *Contract* with any Person without his Consent, precedent or subsequent, express or presumed. For though our Law does not exclude the Wife from *using* the Goods of her Husband, (nay it is ^c not Felony if she takes them away) yet she may not dispose of them, nor pawn them. ^d If the Wife plays and loses her Husband's Money, the Husband may recover it. But if she win at Play, and gives Trust for the Money won by her, the Husband may recover the Debt. She cannot bind her Husband in Strictness for *Necessaries* by any Contract, unless a precedent or subsequent Assent is proved or presumed: ^e But Cohabitation is a ground to presume such Assent, and therefore her Contracts are allowed, if she buys *Necessaries* for herself, Children or Family, as Bread, Apparel or the like. And if Goods come to the Husband's *Use*, it is Evidence to prove his Assent; but this Presumption may be contradicted by other Proof; as that he gave his Wife ready Money; or if he forbids particular Persons to trust his Wife, he shall not be charged by them after such Prohibition^f. As to a Prohibition in general not to trust a Wife, as by putting her in the *Gazette*, it cannot amount to a legal Notice. If the Husband allows the Wife a Stipend for Cloaths, and it is constantly paid, and he hath not before paid for what she hath bought on Credit, he shall not be charged. ^g The *Necessaries* bought without the Husband's Consent, must not only be according to the *Degree* of the Husband, but of his *Estate* too, or they must be *Necessaries* generally. The Husband is not chargeable for *Necessaries* for his Wife where she elopes from him^h; nor upon a Separation by Consent, where he allows her a competent Maintenance: The same being the general Reputation in the Place where the Husband livesⁱ. But if he turns her away without Cause, and allows her no Maintenance, he is liable^k for *Necessaries*. A Man shall not be charged by the Contract of his Wife in other Cases^l if he hath no Notice of it, though the Things do come to his Use; for it was not his Contract: But Cohabitation is Evidence of Notice, and if the Contract was originally made to his Use, or if the Wife has been used to make such Contracts for Goods, which he hath paid for, or if they are made in the Course of Trade which she carries on with his Consent, or in his Name, while they cohabit, he shall^m be charged with them. Neither shall a Husband be bound by the Wife'sⁿ Receipt of his Money, unless she cohabit with him, and hath been used to receive Money for him. But notwithstanding what hath been said, and though the Woman is under the Power of her Husband, and though all Power is transferred to him by the Marriage^o, yet if he threaten his Wife to beat, or to kill her, she may make him find Security for the Peace. 3. The Husband hath *Power* over the Wife's *Estate*, by the Marriage. It was formerly held, that Agreements between Husband and Wife before Marriage, were extinguished by the Marriage^p; but it has been of late Years determined^q, that Promises, Covenants and Bonds between Husband and Wife before Marriage are only *suspended* during the Coverture, tho' it is usual and the best Way to make the Husband covenant with others for the Use of his Wife. But when there are no such Agreements or Settlements before Marriage, the Husband

band gaineth by the Marriage a *Freehold* in Right of his Wife during their joint Lives, if he taketh a Woman to Wife that is seised in Fee. And he may make a Lease for twenty-one Years, or three Lives, of her Estate, and it shall be good and effectual in Law against the Wife, if it is made according to the Statute of 32 H. 8. *ch. 28.*
 But by the same Statute, he shall not, by his own Act only, dispose of, or prejudice his Wife's Freehold or Inheritance in any other Manner. If the Wife is attainted of Felony, the Lord by Escheat shall enter, and put out the Husband; otherwise if the Felony is committed after Issue had betwixt them. The Husband also gaineth a *Chattel Real* in Possession, as a Term for Years, to dispose of, if he pleases, by Grant or Lease in her Life-time, or by surviving her. Otherwise it remains with the Wife; for the Husband cannot charge it with a Rent, and can make no Disposition thereof by his last Will, if he doth not survive his Wife. If he grants away only Part of the Term, the Wife shall have the Reversion; but if he grants the whole Term of his Wife upon Condition, and the Condition is broken, the Wife is barred; for the whole Interest is passed away. Where he may dispose of the Wife's Term, he may forfeit it. Upon Execution for the Husband's Debt, the Sheriff may sell the Term during the Life of the Wife. Where the Wife is *out of Possession* during the Coverture, or hath only a *Possibility*, or is possessed of a *Chattel Real* as *Executrix*, the Husband cannot have it, though he survives her. Lastly, the Husband by the Marriage hath an absolute Gift of all *Chattels personal* in Possession of the Wife in her own Right; whether the Husband survives the Wife or no. But if these *Chattels personal* are *Choses in Action*, (*i. e.* Things to be demanded by Action) as Debts by Obligation, or Contract, the Husband shall not have them, unless he and his Wife recover them, or he survive her, and administer to her. A *Chose in Action*, though not assignable at Law, yet is so in Equity; and the Husband may assign it alone, as he may any other Part of his Wife's personal Estate: So he may a contingent Interest which he has in Right of her, or a Possibility, which though not strictly good by Way of Assignment; yet will operate as an Agreement in Equity, when there is a valuable Consideration. And Debts of the Wife contracted *dum sola*, are discharged by the Bankruptcy of the Husband, as on the other Hand, Debts due to the Wife are assignable by the Commissioners on the Husband's Bankruptcy. Personal Goods, which the Wife has as *Executrix*, or *in autre droit*, are not given to the Husband by Marriage, though he survives his Wife. But they shall go to the Administrator *de Bonis non*. For should they go to the Husband, the Creditors of the deceased would be wronged. Thus it is concerning the *Estate in Fee*, *Chattels Real* and *Personal* of the Wife, which the Husband gains by Marriage.
 4. The Wife is disabled to bring an *Action* without her Husband for any Wrong done to her, or for Recovery of her Estate; except when the Husband is banished for Life by Statute, which is a civil Death, in which Case she may act as a *Feme Sole*, and make a Will, Contract, sue or be sued. [And *2y.* if not the same Case when the Husband is transported for Life.] (* But by the Custom of London, a Feme Covert shall sue and be sued alone, if she is a sole Merchant or Trader, and where the Husband does not inter-

meddle.) So the Wife cannot be sued or impleaded without the Husband. And therefore in Actions of the Case for scandalous Words, Trespafs, &c. by the Wife, the Husband must be made Defendant with her; but an Alien living here as a *Femme Sole*, shall not be allowed to give in Evidence against her Creditors, that she has an Husband alien resident beyond Sea. If the Wife before Marriage was in Debt, the Husband and Wife must be sued for this Debt, living the Wife. But if the Wife dies, the Husband, as such, shall not be charged either in Law or Equity, for the Debt of his Wife after her Death, if the Creditor of the Wife doth not get Judgment during the Coverture, even though he had a large Fortune with her; as on the other Hand he is, during the Coverture, liable to all her Debts, although he did not get a Shilling with her. But if he take out Administration to his Wife, he is liable to her Creditors, so far as he hath Assets of his Wife arising from *Choses in Action* which belonged to her, and which were not recovered during the Coverture. A Woman, for her own Offence, may be indicted or convicted without her Husband; and she only shall be Party to the Judgment, and fined, and committed till it is paid. If she steals by the Compulsion of her Husband, or with him, it is not Felony in her. But this Privilege does not extend to Treason or Murder. And she may sue and be sued in Court-Christian without her Husband. And in Courts of Equity they may sue each other.

3. Marriages may be dissolved by the natural Death of Husband or Wife, or by Divorce.

Divorce is two-fold, (*viz.*) 1. *à Mensâ & Thoro*, from Bed and Board, and 2. *à Vinculo Matrimonii*, from the very Bond of Matrimony. 1. A Divorce *à Mensâ & Thoro* dissolveth not the Marriage; for it is subsequent to the Marriage, and supposes it to be a just and lawful Marriage. This Divorce *à Mensâ & Thoro* may be by Reason of Adultery in either of the Parties, for Fear of Death, or for Cruelty. But as it doth not dissolve the Marriage, so it doth not debar the Woman of Dower, or bastardize the Issue afterwards, or make void any Estate for Life of the Husband and Wife. But Dower may be lost in the Case of continual Elopement, by Force of the Statute of *West. 2. ch. 34.* And tho' the Sentence of Divorce doth not of itself bastardize the Issue, yet as Obedience to the Sentence shall be intended, unless the contrary be proved, the Children of a Woman so divorced shall be deemed Bastards *prima facie*. If a Woman is divorced *à Mensâ & Thoro*, she must sue by her next Friend, and not with her Husband. And she may sue the Husband in her own Name for *Alimony*, (or Maintenance out of the Husband's Estate, during the Separation) either in the *Chancery* or the Spiritual Court. And it will be allowed except in the Case of Elopement or Adultery. The innocent Party in Case of Adultery, by an Act of Parliament may be enabled to marry again. 2. A Divorce *à Vinculo Matrimonii* may be by Reason of Impuberty, [Pre-contract in both or one of the Parties with some other, *Quia* since 26 G. 2.] [See 2 & 3 Ed. 6. ch. 23. and 1 El. ch. 1.] Impotency or Frigidity, Consanguinity or Affinity within the *Levitical* Degrees. Here the Marriage is absolutely dissolved as void from the Beginning. And if the Divorce is by Reason of Pre-contract, or Consanguinity, or Affinity, the Children gotten betwixt the Parties are Bastards. But if a Man is divorced by Reason of *Frigidity*, It shall not bastardize

bastardize the Issue by another Wife. For he may be *Habilis* and *Inhabilis* at different Times.

^a A Sentence in the Spiritual Court may dissolve a Marriage, by ⁴ Rep. 29. Reason of a *Pre-contract*, though the Husband *de facto* is not Party to the Suit or Sentence.

^b If a Marriage *de facto* be voidable by Divorce, yet if the Husband dies before any Divorce, the Wife *de facto* shall be endowed. ¹ Inst. 33. a. & b.

^c Sentence must be given in the Spiritual Court in the Life of the Parties, and not afterwards: (For it is in Effect to bastardize the Issue, of which that Court hath no Cognizance;) though a Sentence of Divorce given in the Spiritual Court in the Life-time of the Parties, may be repealed after the Death of the Parties. ¹ Inst. 33. a. ^{244. a.} ² Inst. 614. ⁵ Rep. 98. ⁷ Rep. 44. ³ Lev. 410.

A Divorce shall be tried by the Bishop's Certificate, and not by a Jury.

4. The Marriage being dissolved by Death of either Party, several Rights do accrue to the Survivor.

1. If a Husband hath married a Wife ^a seised of Lands or Tenements in Fee-simple or in *Fee-tail* general, or seised as Heir in Special Tail, and hath Issue by her born alive, he shall be Tenant for Life by the *Courtesy of England*. And if a Husband seised in Fee, or for Life, in Right of his Wife, do sow the Land, and his Wife dies before Severance, he shall have the Corn. Or if he himself dies before his Wife, his Executors shall have it. ⁴ Lit. 35. 52. ^{Dr. & Stud.} ^{Dial. 1. ch. 7.} ² See post. ^{B. 2. ch. 1.} ¹ Inst. 55. b. 2. *Chattels Real*; as ^a the Term of the Wife, or a *Lease* for Years of the Wife, are a Gift in Law to him if he doth survive her; and so it is of her other Chattels Real in Possession, as Estates by Statute Merchant, Staple and *Elegit*. But if a Woman grants a Term to her own Use, and taketh Husband and dieth, the Husband surviving shall not have this Trust; but the Executors or Administrators of the Wife. The Husband shall have all Chattels Real that are of a ^b mixed Nature, (partly in Possession, and partly in Action) as Rents in Arrear incurred before the Marriage or after; [See 32 H. 8. ch. 37.] Also a Presentation of a Church being void during the Coverture, if he survives his Wife, though he reduces them not into Possession in her Life-time. But of Things merely in Action (as of an Obligation or Bond) the Husband can claim them only as Administrator to his Wife, if he survives her. ¹ Inst. 351. a. ^{Doct. & Stud.} ^{Dial. 1. ch. 7.} ⁴ Rep. 51. ¹ Inst. 351.

2. As for the Wife; ^a if she hath married a Man seised of Lands or Tenements in Fee-simple, Fee-tail General, or as Heir in Special Tail, the Wife, after the Husband's Decease, shall be endowed of the third Part. A Wife also after the Death of her Husband, may claim her ^m *Paraphernalia*, (*παρά* besides, and *οὐκ ἐν* Dower) or necessary Apparel for her Body, and Cloth given her to make a Garment, besides her Dower or Jointure. So that the Husband cannot give them away by his Will. But she shall not have excessive Apparel beyond her Rank or Degree. Pearl Necklaces, Chains of Diamonds, Gold Watches, may be included under *Paraphernalia*, if they were usually worn by the Wife, and were suitable to her Degree, according to the Fashion of the Times, if there are Assets to pay Debts and Legacies, provided the Husband does not give these away by Will. Sometimes, by Custom, she may have the Furniture of her Chamber. ^a If she survives her Husband, she shall ¹ Lit. 36. ^{Doct. & Stud.} ^{Dial. 1. ch. 7.} ¹ See of Dower, post, B. 2. ch. 1. ¹ Roll. Abr. 911. ³ Cro. 343. ^{Noy's Max.} 168. ^{Kitch. 369.} ^{370.} ^{Pr. Ch. 27.} ^{295.} ² Wms. 79. ¹ Inst. 351. a.

^a *Sententia contra matrimonium nunquam transit in rem judicatam.* 7 Rep 43.

shall have her *Term* for Years again, if the Husband hath not altered the Property, or hath not made any Disposition of it in his Lifetime. And so it is of other Chattels Real in Possession. And if the Husband charges the Chattels Real of his Wife with a Rent, it shall not bind her, if she survives him; for her Right is paramount the Charge. Chattels Real of a *mixed* Nature, as Rents and Advowsons, will come to the Wife again, if she survives. And if a Church becomes void during the Coverture, the Wife shall present to her Advowson, if she survives her Husband. Chattels Real or Personal *in autre Droit*, in the Right of another, as Executrix or Administratrix, she may retain; and so *Choses in Action*, or Things recoverable by Action, remain to her, if they were not recovered during the Marriage. If a Lease for Years, Statute, or Obligation is made to Baron and Feme, the Feme shall have it by Survivorship, or if they jointly recover Judgment, or obtain a Decree, the Feme surviving shall have the Benefit thereof. But if personal Goods are given to Baron and Feme, she cannot have them by Survivorship.^b

^a 1 Inst. 120. a.
351. a. & b.
² Wms. 496,
497.

^b See of Administration, post.
B. 2. ch. 6.

Parent and
Child.

III. A Person also may be a *Parent* or *Child*.

The Law takes Notice of the *Power* of Parents over their lawful Children, the reciprocal *Interest* in each other's Estate, and the Case of *Bastards*.

1. The Parents have such *Power* as is given to them by the Law of Nature, and the Divine Law. By those Laws the Parents must educate, maintain, and defend them. [See for Statute Law the 4 and 5 Ph. & M. ch. 8. and of Offences against the publick Peace B. 3. ch. 3. and see the 12 Car. 2. ch. 24. and of Guardians *infra*.]

^a 1 Inst. 8. a.

If a Man hath a Wife, and dieth, and within a very short Time after, the Wife marrieth again, and within nine Months hath a Child, so as it may be the Child of either the one or the other, this Child may chuse either of them for his Father.

2. The Father hath *Interest* in the Profits of the Childrens *Labour* while they are under Age, if they live with him, and are maintained by him. But the Father has no Interest in the *Estate* of the Children, either Real or Personal, otherwise than as their Guardian. For he must account to them for it, and for the Profits received, when they come of Age.

The Father alone hath a Right to the *Administration* of his Child's Goods and Chattels, if the Child dieth Intestate and unmarried, and hath no Children of his own. The Mother's Interest, if she survives the Father, in her Childrens Personal Estate, if they die Intestate, is settled by 1 Jac. 2. ch. 17.

The eldest Son is Heir to his Father, and if there be no Sons but Daughters, then all the Daughters shall be Heirs. As for the Childrens Right in the Father's Personal Estate. [See 22 and 23 Car. 2. ch. 10. And of Administration, B. 2. ch. 6. *post*.]

^a 2 Inst. 564.

^d Parents and Children may maintain each others Suits, and may justify the Defence of each others Persons.

By 43 El. ch. 2. Father and Grandfather, Mother and Grandmother, and the Children of every poor and impotent Person of sufficient Ability, shall maintain every such poor Person as the Justices at Sessions shall appoint, upon pain to forfeit twenty Shillings per Month.

^a Dalton. ch.
73. § 26.
² Bull. 346.
Foley 39. 42.

44.
¹ Str. 190.
² Str. 955.
Contra.

A Grandfather or Father in Law married to the Grandmother or Mother (of Ability) is, during the Wife's life, within this Clause of the Statute. *Sed Qu.*

[See 11 and 12 W. 3. *cb.* 4. As to the Protestant Children of Popish Parents; and 1 Ann. St. 1. *ch.* 30. To oblige the Jews to maintain and provide for their Protestant Children.]

* A *Bastard* is he that is born out of lawful Marriage. He shall never inherit or be Heir to any one. He cannot be of kin to one in the ascending or collateral Line, but he may, in the descending Line. For in Law he is *Quasi nullius Filius*, and no Man's Issue, and he can have no Heir but of his own Body. A Child born in lawful Marriage, whether Son or Daughter, is sometimes termed *Mulier, quasi melior*.

It was formerly held that if the Husband was within the four Seas, (the Jurisdiction of the King of England) so that by Intendment of Law he might come to his Wife, and the Wife had Issue, no Proof could be admitted to prove the Child a Bastard; but that Notion is now exploded, and though the Husband be in England, the Courts admit Proof that he had no Access to his Wife, (but of this the Wife cannot be Evidence) and in such Case, or if there is an apparent Impossibility that the Husband should be the Father of it, as if the Husband is but eight Years old, then such Issue is a Bastard, tho' born within Marriage. But if the Issue is born within a Day after Marriage between Parties of full Age, where the Husband is under no apparent Impossibility, the Child is legitimate, and is to be supposed the Child of the Husband. If the Woman is delivered after forty Weeks from the Death of the Husband, the Child is a Bastard, unless some probable Reason can be given for the greater length of Time.

A Bastard having got a Name by Reputation, may purchase by his reputed Name to him and his Heirs, though he can have no Heir but of his Body. He can have no Name of Reputation as soon as he is born. But after a Bastard is born, and he hath gained by Time a Reputation that he is the Son of B. or known by the Name of a Son, then a Remainder limited to him by the Name of the Son of his reputed Father is good. He cannot take by the Name of Issue before he is born, tho' the Limitation is to the Illegitimate Issue, because he could not take at the Time when he was born by that Limitation. * But tho' a Bastard may be a reputed Son, yet he is not such a Son, in Consideration whereof, or of natural Affection towards him, an Use may be raised. He is not a Child within the Statute of Wills, (*viz.*) the 32 H. 8. *cb.* 1. which speaketh of Children; and the Bastard of a Woman is no Child within that Statute, where the Mother gives Lands to him as such.

* General Bastardy, or whether the Father and Mother were ever joined in lawful Matrimony, is triable by the Bishop's Certificate after Examination in Court-Christian. [See 9 H. 6. *cb.* 11.] But not Special Bastardy, or whether the Defendant was born before Matrimony; for that is a Matter of Fact triable in the Temporal Courts.

The Learning concerning *Bastard Eigne*, who is one born before Marriage, whose Mother is afterwards married to the Father, and *Mulier Puisse*, is out of Use.

S

By

* *Semper presumitur pro legitimatione puerorum.* 5 Rep. 98.

Filiatio non potest probari. 5 Rep. 98. 1 Inst. 126. a. 244. b.

* *Qui ex damnato coitu nascuntur, inter liberos non computantur.* 1 Inst. 3. b. 8. a.

See of Murder
post. B 3. ch. 3.

By 21 Ja. 1. ch. 27. It shall be esteemed Murder for a Mother to Conceal the Death of the Bastard-Child when she is delivered of it, unless she can prove by one Witness at least, That it was Still-born.

By 18 El. ch. 3. The two next Justices of the Peace, (one Quorum) may take Order as well for the Punishment of the Mother and reputed Father of a Bastard-Child; as also for the Relief of that Parish where it is born.

^a 2 Inst. 733.
³ Cro. 436.

But corporal Punishment of the reputed Father or Mother is seldom inflicted, where the Parish is saved harmless, tho' it may be inflicted.

^b 1 Vent.
^{173.}
¹ Mod. 287.

The Sessions may make an Original Order in Bastardy. For the 3 Car. 1. ch. 4. which gave the Sessions that Power, is not expired, as some have said by Mistake, but continued by 16 Car. 1.

^c 1 Salk. 122.
² Ld. Ray.
^{1157.} S. C.

By 7 Ja. 1. ch. 4. Justices of Peace shall commit to the House of Correction lewd Women that have Bastards, which may be chargeable to the Parish, there to be punished, and set at Work one whole Year.

² Inst. 733.
See Burn's
Just. Tit.
Bastard.
^d See ch. 7.
post.

So that if the Mother will discharge the Parish from keeping the Bastard, she cannot be punished by this Statute. But in Strictness she may be punished by 18 El. before-mentioned. *Qu.*

By the 13 and 14 Car. 2. ch. 12. Church-wardens and Overseers of the Poor, where any Bastards shall be born, may seize so much of the Goods and Profits of the Lands of the putative Father and lewd Mother that run away, and leave their Bastards upon the Parish, as two Justices of the Peace shall order toward Discharge of the Parish.

But the Sessions must make the Order to sell the Goods.
[See 6 Geo. 2. ch. 31. for Relief of Parishes from Charges arising from Bastard Children.]

Of Ancestor
and Heir.

IV. Because many Persons are *Ancestors* as to Hereditary Succession, that are not Parents, and may inherit as Heirs who are not Children of those to whom they inherit, this Head may be considered as a distinct Capacity.

^a 1 Inst. 78. b.
^{113.} b.

Ancestor is different from *Predecessor*; for Ancestor is applied to a natural Person, as J. S. and his Ancestors. But *Predecessor* is applied to a Body Politick or Corporate, as the Bishop of L. and his Predecessors.

¹ Inst. 11. a.

A Son, as such, cannot be an Ancestor to transmit an Estate to his Father or Grandfather by Hereditary Succession. For an Inheritance may lineally descend, but not ascend.

^b 1 Inst. 7. b.
^{237.} b.

He is only *Heir* That is born in Lawful Matrimony, and succeedeth by Descent, Right of Blood, and by the Act of God, to Lands, Tenements, or Hereditaments, being an Estate of Inheritance.

^a 1 Inst. 9. a.

Under the Word *Heirs* the Heirs of Heirs are comprehended in *infinitum*. So that if Lands are given to a Man and his Heirs, all his Heirs are so totally in him, that he may give his

^b 1 Inst. 22. b.

^a Solus Deus heredem facere potest, non homo. 1 Inst. 7. b.

Lands

Lands to whom he will. But one cannot be Heir till after the ¹ Inst. 8. a. Death of the Ancestor. He is in his Life-time only Heir apparent. ² & b. ¹ One that is born deaf, dumb and blind, Idiots, Madmen, Outlaws ¹ Inst. 8. a. in civil Actions, Persons excommunicate, attainted in a *Præmunire*, may be Heirs. An Hermaphrodite may be Heir according to the Prevalency of the Sex. ¹ Bastards, Monsters, that have ¹ Inst. 3. b. not human Shape, Aliens, (though Alien Friends,) [See the 11 and ⁸ a. 12 W. 3. ch. 6. 7 Ann. ch. 5. 4 G. 2. ch. 21. 5 G. 1. ch. 27. See P. 23 ante. and 25 G. 2. ch. 39.] a Man attainted of Treason or Felony, or whose Blood is corrupted, cannot be Heir.

By 11 & 12 W. 3. ch. 4. Papists, who shall not within six Months ¹ Wms. 353. after they attain the Age of eighteen Years, take the Oaths of Allegi- ² Wms. 3. 6. ance and Supremacy, and make and subscribe the Declaration in the ^{132, 361.} 30th Car. 2. St. 2. ch. 1. are in respect of themselves only, but not ³ Wms. 43. their Heirs or Posterity, incapable of taking by Descent or Purchase ¹ Str. 167. any real Estate. And the next of Kin that is a Protestant shall hold ^{Com. 207.} the same to his own Use, until such Papist shall take the Oaths, &c. ^{570.} [See 12 Ann. S. 2. ch. 14. 1 Geo. 1. St. 2. ch. 55. 3 Geo. 1. ch. 18. 8 Geo. 2. ch. 25. 9 Geo. 2. ch. 26. 11 Geo. 2. ch. 17.]

A Man by the ¹ Common Law cannot be Heir to Goods and ¹ Inst. 8. a. Chattels, but an Heir-loom by ¹ Custom may go to the Heir. The ¹ Inst. 18. b. Ancient Jewels of the Crown are Heir-looms, and shall descend to ^{185. b.} the next Successor, and are not deviseable by Testament. For the ¹ Ld. Ray. Law preferreth the Custom before the Devise. Obligations and ^{728.} Specialties in the Case of the King may go to Heirs. [See 33 H. 8. ch. 39.] ¹ And an Heir may have an Action against one that de- ³ Inst. 202. faces the Monument, Court-Armour, or Penon with the Arms of ^{203.} his Ancestor in a Church, though the Freehold is in the Parson ² Cro. 367. ¹ The dead Body belongs to no one; but the Coffin, Shroud, &c. ¹ See P. 32 ante. belong to the Executors or Administrators. ¹ Also the Ornaments ^{12 Rep. 105.} of the Chapel of a Bishop shall go in Succession, not to Executors.

¹ A natural Person cannot be bound by Act of his Ancestor, with- ¹ 2 Inst. 700. out a Binding and Affets. Affets are either Real or Personal. ^{701.} Real, which come to the Heir by Descent in Fee-simple; not by Purchase. And by 29 Car. 2. ch. 3. Trusts in Fee-simple, and Estates *pur Auter vie*, are declared to be Affets. Personal Affets are Goods and Chattels which come to the Hands of an Executor or Administrator.

[But see *post* of Heirs, Tit. Fee-simple, and of Estates upon Condition, B. 2. ch. 1. and of Descent, Warranty, Covenant, Obligations, B. 2. ch. 3. Whether Heirs are chargeable with the Debt or Covenant of the Ancestor or no? See also the 3 & 4 W. & M. ch. 14. Where Lands descending to the Heir shall be aliened before Action brought. See likewise Of Actions, B. 4. ch. 4.]

I have hitherto spoken of Heirs that succeed by Right of Blood.

¹ But one may in a large Sense be called an Heir, who has an ¹ Inst. 7. b. Estate given him by Testament; but even then the Word in ^{237. b.} the Common Law hath not altogether so large a Signification as in ² Inst. 97. the Civil Law. For by that Law one may be Heir to Goods and Chattels.

¹ *Nemo est heres viventis.* ¹ Inst. 8. b. 378. a.

Landlord and
Tenant:
a F.N.B. 135,
136.

b 1 Inst. 65. a.

c 1 Inst. 1.
a. & b. 65. a.

d 2 Inst. 296.

Of Guardian
and Minor.

e See P. 14. ante.
f Noy's Max.
49.
2 Inst. 13,
305. 390.

g 1 Inst. 88. b.
Lit. 114, 123.
3 Rep. 37.
2 Inst. 305.

See of Te-
nures, post.
B. 2. ch. 2.

See of Admi-
nistration, post.
B. 2. ch. 6.
2 Ld. Ray.
1334.
2 Str. 982.

V. The *Landlord*, or Lord, is he of whom the Land is holden. He is either *Mesne* Lord or *Paramount*; *Mesne* Lord (*Medius*, mean) is he that is Lord of a Manor, and hath Tenants holding of him, yet he himself holds of a superior Lord. The Lord *Paramount* (*per* and *monter*, to ascend) is the superior Lord. But all Lands are originally derived from the Crown, and therefore the King is Lord *Paramount*, either mediately or immediately, of all and every Parcel of Land in *England*; and cannot be a Tenant. His Lands are called the *Demesne* Lands of the Crown, or the *Doman* Lands, i. e. Lands (*Domini*) of the supreme Lord.

The *Tenant* (*a tenendo*, from holding) is one that occupieth Land, held of some Lord by Rent, or Fealty at least. No Subject hath properly *Allodium* or free Lands. For all Lands, in the Hands of a Subject are or were holden of some Lord or Landlord by some Tenure or Service.

A Tenant is either *Very* Tenant, that holds immediately of the Lord; or *Paravail*, that hath Profit and *Avail* of the Land holden of one that holdeth of another.

The Word *Tenant* is used with divers Additions, as Tenant in Fee-simple, Fee-tail, for Life, for Years, at Will, Tenant in Dower, Tenant by Copy of Court-Roll, Tenant in Mortgage, Tenant by Statute Merchant, &c.

Now the Law concerning Landlord and Tenant will be set forth, when I speak in Order of *Estates*, *Tenures* and *Services*, *Rents*, *Distresses*, *Waste*, *Escheats*, &c.

VI. A *Guardian* is he that hath the Custody and Education of such a Person as is not of sufficient Discretion to guide himself and his *Estate*; as Minors, Idiots, and Lunaticks; but it is generally understood of him who hath the Care of the first of these: As to Idiots and Lunaticks, I have spoken before of them and their Committees. A Guardianship then of a *Minor* is an Interest in the Body or Lands of one within Age, that is under twenty-one Years, who is called an Infant. There is a Difference betwixt a *Guardian* and a *Committee* of the King. Oftentimes a *Guardian* is taken for *Prochein Amy*, and a *Prochein Amy* for a *Guardian*.

But there are *Three* Manners of Guardianship, (*viz.*) By the *Common Law*, by *Statute Law*, and by particular *Custom*.

1. By *Common Law*, there are, 1. *Guardian in Chivalry* or *Knight-Service*; but this by the 12 *Car. 2. ch. 24.* is taken away. 2. *Guardian by Nature*, as the Father or Mother. 3. *Guardian in Socage*, who is the next of Blood to whom the Inheritance cannot descend. This continues till the Heir accomplishes the Age of fourteen Years, and then the Minor may choose his *Guardian* before a Judge at his Chamber, or in Court, or in the Chancery. 4. *Guardian because of Nurture*, which is when the Father by his last will and Testament, appoints one to be *Guardian* of the Body of the Child. The *Ordinary* may appoint a *Guardian* over the Body and the *Personal Estate* of the Minor, till he is fourteen Years of Age.

2. By *Statute Law*. For, By 4 & 5 P. & M. ch. 8. A Father, or Mother (after the Father's Death) without *Assignment*, are *Guardians* of Women Children, for the Purposes of this Statute.

By 12 *Car. 2. ch. 24.* A Father under Age, or of full Age, by Deed in his Life-Time, or by Will, in Presence of two Witnesses, may

may dispose of the Custody of his Child under twenty-one Years of Age, and not married at the Time of his Death, whether then born, or in *Ventre sa mere*, during his Non-age, to any in Possession or Remainder, other than to Popish Recusants. Which Persons may maintain an Action of Trespass against wrongful Takers away or Detainers of such Child, and recover Damages for the Child's Use, and may take into their Custody his Lands and Personal Estate, according to such Disposition, and bring Actions as Guardian in Socage might do.

This Act shall not prejudice the Custom of London, nor of any other City or Town Corporate.

This Act doth not extend to Copyhold Lands. So that a Copyholder cannot thereby dispose of the Custody of his Children's [Copyhold] for That belongs to the Lord, according to the Custom, where there is a particular Custom for the Lord to have the Custody. But the Testamentary Guardian takes Place of all other Guardians, except such customary Guardians.

Where the Person appointed by the Father's Will becomes disabled, as by Attainder, the Care of the Infant devolves on the Great Seal; and where there are more Guardians than one appointed, the Guardianship will survive.

3. By particular Custom, the Tuition and Custody of Orphans, Children of Citizens and Freemen, is committed to the Mayor and Aldermen of the City of London, and of other Cities and Boroughs.

But now observe in general, That Guardians shall not take any Profits of the Minor's Lands, to their own Use, but only to the Use and Profit of the Minor; and of this they shall render an Account to him. Yet a Guardian on his Account shall have Allowance of all reasonable Expences. And if he is robbed of the Rents and Profits of the Land without his Default or Negligence, he shall be discharged thereof upon his Account. The same is to be understood of all other like Accidents.

Guardians of great Estates usually pass their Accounts yearly in the Court of Chancery, which is a safe Way to justify themselves, when the Minor at his full Age calls them to a general Account.

See *West. 2. ch. 23. 25 Ed. 3. St. 5. ch. 5. 31 Ed. 3. ch. 11. By 4 & 5 Ann. ch. 16. Actions of Account may be brought against the Executors or Administrators of any Guardian, Bailiff or Receiver.*

See 6 *Ann. ch. 18. Concerning the Concealment by Guardians of Infants believed to be dead, from those in Remainder, and the Method of Enquiry and Discovery, and concerning Guardians holding over after the Death of Infants.*

I go on to treat of other Persons in Civil Capacities, (*viz.*) Of Publick Officers, and Bodies Politick, or Corporations.

CHAP. VII.

Of Publick Officers, as Sheriffs, Justices of the Peace, Coroners, Treasurers of the County, Constables, Churchwardens, Overseers of the Poor, Surveyors of the Highways, Clerks of the Market, and Governors of Houses of Correction.

Publick Officers are Persons in Civil Capacities.

Of Publick
Officers.

I do not intend to speak here of the Lord Chancellor, or Lord Keeper of the Great Seal, the Lord High Treasurer, the Lord President of the Privy Council, Lord Privy Seal, the Lord High Constable and Earl Marshal, Lord High Admiral, the Judges in the Courts at Westminster, &c. These will come in more properly when I treat of the Courts of Justice, or Jurisdiction of Courts. At present I shall point out only such Publick Officers with whom we have daily Business in the Country, as the Sheriffs, Justices of the Peace, Coroners, Treasurers of the Counties, Constables, Churchwardens, Overseers of the Poor, Surveyors of the Highways, Clerks of the Market, and Governors of Houses of Correction.

The Sheriff.

¹ Inst. 168. a.
² Inst. 174.
559.

I. The Sheriff, (or Shire-Reeve, i. e. Governor of the Shire, otherwise Vice-Comes in the Stead of the Earl of the County; for Countes or Earls heretofore had the Custody of Counties) is a yearly Officer to whom the Government of a Shire or County is committed.

⁴ Rep. 32.

The Sheriff at the Common Law was to be chosen by the County, but now by Statutes the Lord Chancellor, Treasurer, &c. and the Judges nominate three Persons of every County yearly, at the Exchequer, on the Morrow of St. Martin, to be presented to the King, that he may choose one of them. He is created by Letters Patent for a Year. The King cannot restrain any Part of the Sheriff's Power as to any particular Town or Hundred, (unless he make that Town, &c. a County by itself, and appoint a Sheriff there) nor abridge the Sheriff in any Thing that is incident to his Office. For the Office is one entire Thing, and cannot be divided but by Act of Parliament. [See 9 Ed. 2. St. 2. 14 Ed. 3. St. 1. ch. 7. 12 Rich. 2. ch. 2. 23 H. 6. ch. 7. and 3 Geo. 1. ch. 15. where see his Oath.]

³ Rep. 71, 72.

The new Sheriff being elected and sworn, he ought at or before the County-Court next succeeding his Election to deliver a Writ of Discharge to the old Sheriff, who is to set over all the Prisoners in the Gaol severally by their Names, (together with all his Writs) precisely by View and Indenture between the two Sheriffs; wherein must be comprehended all the Actions which the old Sheriff hath against every Prisoner, tho' the Executions are of Record. And till the Delivery of the Prisoners to the new Sheriff, they remain in the Custody of the old Sheriff, notwithstanding the Letters Patents, the Writ of Discharge, and the Writ of Delivery. The new Sheriff

riff is obliged to receive the Prisoners at the Gaol only. But the Office of the old Sheriff ceases, when the Writ of Discharge cometh to him.

The Lord Mayor and Citizens of *London* have the Shrievalty of *London* and *Middlesex* in Fee by Charter; and two Sheriffs are annually elected by them, for whom the Mayor and Commonalty must answer, because they have the Shrievalty in Fee. When one of the Sheriffs of *London* dies, the other cannot act till another is made; for there must be two Sheriffs of *London*, which is a City and County; but they both make but one Sheriff of the County of *Middlesex*.

One may be Sheriff of two Counties at the same Time.

The Sheriff hath a *Judicial* and *Ministerial* Power.

His *Judicial* Authority and Power consists in hearing certain Causes in his *Torn* and *County-Courts*, and in preserving the Peace of the County, for he is the principal Conservator of the Peace there. Therefore by the Common Law, he may upon Request cause one to find Sureties of the Peace, and may take the same Sureties by Recognizance. He may (to assist the Justices of the Peace of his County) charge any Number of Men (called the *Posse Comitatus*) to attend him to suppress Riots, and such as go about to disturb the publick Peace, and record it. Such as do refuse to assist him, when required, may be fined and imprisoned. [See 13 H. 4. ch. 7. 2 H. 5. St. 1. ch. 8 & 9. 1 Geo. 1. ch. 5.]

But this Judicial Authority of Sheriffs as Conservators of the Peace of the County is seldom put in Practice. It is usually executed by the Justices of the Peace.

His *Ministerial* Power consists in executing all the Writs issuing out of the King's Courts. For no Process is served but by the Sheriff from the Beginning of the Suit to the Execution. [See West. 2. ch. 39. 12 Ed. 2. St. 1. ch. 5. 2 Ed. 3. ch. 5. 23 H. 6. ch. 9. Concerning the Return of Writs by Sheriffs and Bailiffs of Liberties.] A Sheriff ought not to dispute the Validity of the Writ; but must execute it. If the Court goes beyond their Jurisdiction, an Action will lie against the Sheriff, otherwise not, though the Writ was illegal. He or his Officers, upon an Arrest, ought to shew at whose Suit it is, out of what Court, for what Cause; and if he does not make a Return, the Court will *amerc* him, and order an *Attachment* against him for his Contempt; or if he makes an insufficient Return, he may be *amerc*d; but if he makes a false Return, the Party grieved may have his *Action* against him. The *Return* is the Certificate of the Sheriff made to the Court of what he hath done touching the Execution of the Writ directed to him.

In all Cases where the Process concerns the King, as in a Writ of *Quo minus* out of the *Exchequer-Court* in a Civil Cause, or other

¹ Quicumque jussu judicis aliquid fecerit, non videtur dolo malo fecisse, quia parere necesse est. 10 Rep. 70, 76.

² Judicium a non suo iudice datum nullius est momenti. 10 Rep. 76.

³ Domus sua cuique est tutissimum refugium. 5 Rep. 91. 11 Rep. 82. 3 Inst. 162.

^a 3 Rep. 72.

^b Shower's

^c Rep. 289.

^d 3 Rep. 34.

^e 1 Inst. 168. a.

^f See B. 4.

^g 2 Inst. 175.

^h F. N. B. 81.

ⁱ 82.

^j 1 Inst. 193.

^k 19.

^l See post.

^m B. 3. ch. 3.

ⁿ 10.

^o 1 Geo. 1.

^p 1.

^q 1.

^r 1.

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other Action, where the King is Party, and in Criminal Causes, as Treason, Felony, &c. the Sheriff or other Officer (after a Demand to open the Door, and signifying the Cause of his Coming, and a Refusal) may break open the Door of a *House* to execute his Process: But at the Suit of a Subject only, he cannot do it, even upon Execution, unless it be upon *Ejectment* to deliver Possession of a House. For by Colour of a Suit, the House of any Man might be broken open by his Bailiffs.

* Hob. 62.

* A Sheriff knock'd gently at the Door with Design to arrest one upon mean Process, and the Wife opened the Door a little to see who it was; whereupon the Sheriff forced his Way with his Sword drawn, and broke open the Door where the Defendant lay, and arrested him; this was held to be unlawful. ^b But if upon such Process, he catches the Defendant by his Hand as he holds it out at a Window, this is such a Taking that he may justify the Breaking open of the Door.

^b 1 Ventr. 306.

⁵ Rep. 93.
¹¹ Rep. 82.

The Privilege of a House extends to a Man and his own Family only, not to others that fly thither, or remove their Goods thither in a fraudulent Manner to avoid Execution.

* Dr. & Stud. Dial. 2. ch. 41.

If the Party arrested makes *Resistance*, or makes an Assault upon the Sheriff or Bailiff, he may justify the Beating of him; and if the

⁴ 9 Rep. 67.
⁶⁸ See of Murder, post. B. 3. ch. 1.

Party is slain, it is justifiable. ^d But if any Sheriff, &c. who hath Execution of Process, is slain in doing his Duty, it is Murder in him that kills him, though there was not any precedent Malice between them. For the Law presumes Malice, though none is proved, and though the Process was apparently erroneous. If a Sheriff is opposed

² Inst. 193.
¹⁹⁴ 454.

in executing the King's Writs, ^e He cannot make a *Return* of such Resistance; [See *West. 2. ch. 39.*] for he may by the Common Law take a *Posse Comitatus* to suppress such Force and Resistance, tho' a Rescous upon a mean Process before he could summon the County to his Assistance might be pardonable.

¹ 5 Rep. 66.

He or his Officers may arrest any one by *Night* or by *Day*, at the Suit of the King or a Subject.

He ought also, as a Ministerial Officer, to proclaim such *Statutes* as are ordered to be proclaimed by him; return indifferent *Juries* for the Trial of Men's Lives, Liberties, Lands, or Goods; and upon Delivery of the Writ to choose *Knights* of the Shire, to make Proclamation at the next County-Court, of the Day and Place of Election ^f; and he must make out his Precepts to every Mayor of Cities, and Bailiffs of Boroughs, to choose *Citizens* and *Burgesses*. But he cannot be chosen himself.

^g See post. B. 4. ch. 1.

It is his Duty also to preserve the *Rights* of the *King* within his County, and to enquire what Lands are concealed from him, to collect his Rents and Dues, and to seize to the King's Use the Profits of such Lands as come to him by Attainder or Escheat, (for the Office of *Escheator*, having its Dependence on the Court of Wards, is now in a Manner out of Use) and likewise the Goods of any Felon, Fugitive, Outlaw, Wreck of the Sea. And he must levy his Majesty's Debts, and be accountable to the King for all Issues and Profits of his County; and upon Process out of the *Exchequer*, he is to gather and bring into the *Exchequer* such Issues and Profits, and likewise those growing by Fines and Amerciaments in Respect of the Non-appearance of Defendants and Jurors, and all forfeited Recognizances. But these must be first *extreated* (or extracted)

tracted) by Copies of the Originals into the Court of *Exchequer*, and from thence Proceſs muſt be awarded to levy the ſame to the King's Uſe. [See 22 & 23 Car. 2. ch. 22. 4 & 5 W. & M. ch. 24. 3 Geo. 1. ch. 15.]

He muſt alſo ſee that *Criminals* be executed, and muſt ſee that he obſerves the Order of Law in putting *Criminals* to Death; elſe he will be guilty of *Homicide*. Dr. & Stud. Dial. 2. ch. 21. See of Execution, poſt. B. 4. ch. 5.

Laſtly; he muſt give up his *Accompts* in the *Exchequer*, and ſue out his *Quietus*. [See 21 Ja. 1. ch. 5. 13 & 14 Car. 2. ch. 21. and 3 Geo. 1. ch. 15, 16. For the better regulating the Office of Sheriffs, and aſcertaining their Fees, and the Fees for ſuing out their Patents, and paſſing their Accounts.]

By Demiſe of the King, the Authority of Sheriffs doth determine. 3 Rep. 72. See of Offices poſt. B. 2. ch. 2.
[But See 1 Ann. ch. 8.]

By 14 Ed. 3. St. 1. ch. 7. 23 H. 6. ch. 7. No Sheriff ſhall continue in his Office above one Year, except in London and Middleſex, and Towns being Counties of themſelves, and Counties where the Office is inheritable; upon the Penalty of two hundred Pounds yearly, to be divided betwixt the King and Proſecutor.

And by 1 R. 2. ch. 11. None that hath been Sheriff ſhall be ſo again within three Years, if there be others ſufficient. [See 28 Ed. 3. ch. 7. 42 Ed. 3. ch. 9. 1 H. 5. ch. 4. 23 H. 6. ch. 8.]

But by 12 Ed. 4. ch. 1. 17 Ed. 4. ch. 6. Every old Sheriff may execute his Office during Michaelmas and Hillary Term, if he hath not before a Writ of Diſcharge.

By 23 H. 6. ch. 10. Sheriffs muſt make Deputies in the King's Courts at Weſtmiſter to receive Writs.

By 4 H. 4. ch. 5. and 23 H. 6. ch. 7. Every Sheriff ſhall abide in proper Perſon within his Bailiwick, and ſhall not let his Bailiwick or Hundred to Farm.

The Profits whereof were very conſiderable heretofore, when moſt Law-Suits were tranſacted there.

By 3 Geo. 1. ch. 15. If any Sheriff ſell or lett the Office of Under-Sheriff, Gaoler, or Bailiff, or any other Office under him, or take any Reward for the ſame, directly or indirectly, he forfeits five hundred Pounds. And ſee 5 & 6 Ed. 6. ch. 16. Againſt buying and ſelling of Offices.

By 1 Mar. Seſſ. 2. ch. 8. No Sheriff can act as a Juſtice of Peace during his Shrievalty, notwithſtanding the 1 Ed. 6. ch. 7.

By 3 Geo. 1. ch. 15. If any Sheriff dies before the Expiration of his Year, the Under-Sheriff ſhall execute the Office in the Name of the de-ceaſed, till another is appointed and ſworn.

By 20 Geo. 2. ch. 37. Sheriffs ſhall, at the Expiration of their Office, turn over to the ſucceeding Sheriff by Indenture and Schedule all Writs unexecuted, who ſhall execute and return the ſame. And no Sheriff ſhall be liable to make a Return to any Writ, unleſs required ſo to do within fix Months after the Expiration of his Office.

The Sheriff hath for his Aſſiſtance under him a County-Clerk or Under-Sheriff, Bailiffs, and a Gaoler.

1. The Under-Sheriff, (or County-Clerk) is the Sheriff's Deputy, and acts in his Stead; except in ſome particular Caſes which are to be done by the Sheriff himſelf; as when a Writ ſaith, That the Sheriff ſhall go in Perſon. The Sheriff, (not the King) hath Power to delegate the Office to whom he pleaſes, tho' there is no particular 9 Rep. 49.

U

Power

Power given in his Patent to make a Deputy. For this is an Incident to the Sheriff's Office. And it would be very inconvenient that the Sheriff should be responsible for his Deputy that is to be chosen by another. The High-Sheriff cannot abridge his Power, or restrain him by Covenant to act for him in Part only. Therefore the High-Sheriff ought to be very cautious in taking Security of the Under-Sheriff, to save him harmless from Escapes, &c. The Covenants to this Purpose are allowed to be good, as being made to prevent Escapes, &c. [See his Oath, 3 Geo. 1. ch. 15.]

The High-Sheriff may execute his Office himself if he pleases. All Returns made by the Under-Sheriff, must be made in the Name of the High-Sheriff; for the High-Sheriff only is sworn to execute the Office of Sheriff, and therefore he must answer for all.

Dr. & Stud.
Dial. 2. ch. 42.
2 Inst. 452,
466.
4 Inst. 114.

The Power of the Under-Sheriff (where he may act) is the same with that of the High-Sheriff, because he acts in his Stead.

He is, as other Deputies or Attornies, removeable at Pleasure. And tho' the Sheriff should make him irrevocable, yet he may displace him. He is but in the Nature of a general Bailiff Errant to the Sheriff through the whole County, as other Bailiffs are over a particular Hundred.

Hob. 13.

By 42 Ed. 3. ch. 9. and 23 H. 6. ch. 7. No Under-Sheriff shall continue in his Office above one Year, except in London, on pain of forfeiting two hundred Pounds Yearly.

Yet the same Persons often continue to exercise the Office in other Men's Names for many Years together.

By 1 H. 5. ch. 4. An Under-Sheriff cannot execute that Office and practice as an Attorney at the same Time.

For it would be a Cause of encreasing Suits, a Temptation to Partiality, and an Hindrance in Dispatch of his proper Business. But notwithstanding that Act, the Under-Sheriffs (being usually bred Attornies) practice in the Name of other Attornies.

By 29 El. ch. 4. No Sheriff, Under-Sheriff, or Bailiff of a Liberty, shall take more for serving an Extent or Execution than twelve-pence for every Pound levied under a Hundred Pounds; and six-pence for every Pound levied above a hundred Pounds; in Pain of treble Damages to the Party grieved, and forty Pounds betwixt the King and the Prosecutor.

And by 3 G. 1. ch. 15. and 8 G. 1. ch. 25. s. 5. He shall not take Poundage, on executing a Capias ad Satisfaciendum, on more than the Sum then remaining due, which shall be indorsed on the back of the Writ; nor upon an Elegit, Habere facias Possessionem, or Seisnam, Extent, or Liberate upon any real Estate, more than one Shilling for every twenty Shillings of the yearly Value of such Estate, where it is under one hundred Pounds per Annum; and six-pence for every twenty Shillings, if of one hundred Pounds or upwards per Annum.

But in some Cases you must compound with the Sheriff, as upon Writs of Enquiry for Waste, Damages, &c.

By 5 Ann. ch. 31. No Sheriff of London and Middlesex shall take directly or indirectly any Sum or Present for the Execution of the Place of Under-Sheriff, or oblige him by Covenant or otherwise to be at any Expence or Charge which ought to be, and hath been usually paid by the High-Sheriff.

By

By 3 Geo. 1. ch. 15. No Person shall buy, or take to Farm the Office of Under-Sheriff; nor give any Reward for the same, directly or indirectly, on Forfeiture of five hundred Pounds.

By 6 Geo. 1. ch. 21. § 53. No Sheriff, or Under-Sheriff, shall make out any Warrant before they have in their Custody the Writs upon which such Warrants ought to issue, on pain of ten Pounds.

2. A Bailiff is a Servant and Minister of the Law, and a Servant to the Party who employs him, to summon, arrest, distrain, &c. The Sheriff himself is called *Ballivus*, and his County *Balliva*. But there Bailiff signifies an Officer concerned in the Administration of Justice. But by Bailiffs in this Place, I mean those Under-Officers that more immediately belong to the Sheriff, and are appointed by him as his Servants; such are Bailiffs of *Hundreds*, and *Special Bailiffs*. Bailiffs Errant or Itinerant are out of Use. Bailiffs of *Hundreds* are Officers to execute Writs, to collect the Post-Fines, Fee-Farms of the King, &c. for the Sheriff; to attend the Justices of Assize and Gaol-Delivery, and Justices of the Peace, in their Courts. The Execution of all Writs which come to the Sheriff, or his Under-Sheriff, ought to be by Bailiffs of *Hundreds*, though now the Use is to put in *Special Bailiffs* with them. A *Special Bailiff* is an Officer of the Sheriff to execute some particular Writ, and for that Time only. His Arrest is the Arrest of the Sheriff; and if he suffers a Prisoner to escape, an Action lies against the Sheriff: And if the Prisoner is rescued, the Return of the Rescous shall be, *That it was done to the Sheriff himself*. 1 Inst. 61. b.
168. b.
2 Inst. 19. 44.

The 27 El. ch. 12. Directs that Bailiffs shall, before they act, take the Oath of Office there prescribed before the Judge of Assize, Custos Rotulorum, or two Justices (1 Qu.) under the Penalty of forty Pounds; and if they commit any Act contrary to their Oaths, they shall forfeit to the Party grieved his treble Damages. But this Act does not extend to special Bailiffs, so that in Effect the Design of that Statute is evaded, and too loose a Restraint laid upon those who are usually a great Grievance to the People. However, the Sheriff shall answer for the Misdemeanors of his Bailiffs, if they offend in their Office, though he may have his Remedy over against them. Dr. & Stud.
Dial. 2. ch. 42.

Every one is bound by the Common Law to assist not only the Sheriff in his Office for the Execution of the King's Writs according to Law, but also his Bailiff that hath the Sheriff's Warrant and his Authority in that Case. If he refuses to do it, being required, he shall be fined and imprisoned. 2 Inst. 193.

A Bailiff ought to shew his Warrant when the Party submits Himself to the Arrest, if required. [See Of Murder in Respect of the Person killed, B. 3. ch. 1. Of Arrest, B. 4. ch. 4. See also Of Bailiffs of Liberties, B. 2. ch. 2. Bailiffs of Lords of Manors, B. 4. ch. 1.] 6 Rep. 54.
9 Rep. 69.

By 1 H. 3. ch. 4. They who have been Sheriffs Bailiffs, except where the Sheriffwick is inheritable, for one Year shall not bear that Office for three Years next following.

By 23 H. 6. ch. 9. The Bailiff's Fee for an Arrest is Four pence. See Title
Writs, post;
B. 4. ch. 4.
By

By 3 G. 1. ch. 15. *None shall take to Farm or buy the Office of Bailiff, in Pain of five hundred Pounds.*

3. The next Officer under the Sheriff is the *Gaoler* (from *Geol* a *Prison*) or Keeper of his Prison. ^a *Feme Coverts* or *Infants* may be Keepers of Gaols, and are liable to be charged for Escapes.

The Custody of County Gaols is ^b incident to the Office of the Sheriff, and inseparable from it, [See 19 H. 7. ch. 10.] tho' the Gaol itself does belong to the King, and is to be repaired at the common Charge of the County. The Sheriff being the immediate Officer of the King's Courts, shall be ^c answerable for all Escapes, and be subject to *Amerciaments*; and therefore he shall put in such Gaolers as he will answer for; from whom he ought to take good Security to indemnify him. [See 14 Ed. 3. ch. 10.]

The ^d Custody of Gaols may be *granted* to one in Fee, and may be held by *Prescription*, and yet the Prison itself is the King's, as before observed.

Where there is no publick Gaol, the Sheriff may remove his Gaol from one Place to another within his County; but cannot demand a particular Place without *Prescription*. ^e New Gaols cannot be erected without an Act of Parliament. In many Places the Gaol of a Town, which is a County of itself, or a Place privileged from the County, is yet a Gaol of the County, and serves for the County at large. As *Newgate* in *London* serves as well for the County of *Middlesex* as *London*; which was so ordered when *London* was taken out of *Middlesex*, and made a County by itself.

Tho' the Sheriff must make such Gaolers for which he will answer; yet if there is a Default in the Gaoler, an Action does lie against him. And ^f he who hath the Custody of the Gaol wrongfully, or of Right, shall be charged with the Escape of Prisoners. And if he who hath the Custody of a Gaol in ^g Fee, doth substitute another at Will, or for Life, under him; he shall be charged by Action upon Escape, that hath the actual Possession, if he is sufficient. But if he is not sufficient, *Respondeat Superior*. This is to be understood when one hath the Custody of a Gaol of Freehold or Inheritance. In common Cases, the Sheriff or the Gaoler are chargeable at the Discretion of the Party. But the Sheriff is most usually charged.

An *Escape* is when one, that is imprisoned, gets his Liberty before he is delivered by Order of Law. ^h An Escape is either negligent or voluntary. *Negligent*, when one is arrested and in Prison, and afterwards escapeth against the Will of him that had him in Custody, and is not freshly pursued and taken. *Voluntary*, when one hath another under an Arrest or in Prison, and afterwards consents to let him go whither he will, and he goeth accordingly.

If after a *Negligent* Escape, the Gaoler at any Time retakes the Prisoner upon fresh Pursuit, (*i. e.* upon a ^k speedy and continual Pursuit) he shall be excused, and the Prisoner shall be said to be in Execution again. Under this Pretence of Re-taking, or fresh Pursuit, Gaolers frequently protect themselves, when they are sued for letting Prisoners go at large. If a Prisoner of his own Wrong escapes and flies into another County, the Sheriff or his Officers, upon

^a 2 Inst. 382.
³ Rep. 44.

^b 2 Inst. 100,
589.
⁴ Rep. 34.

^c 4 Rep. 34.

^d 2 Inst. 589.

¹ Id. Ray.
136.

^e 2 Inst. 705.

^f 2 Inst. 382,

592.

³ Inst. 91.

⁴ Dr. & Stud.

Dial. 2. ch. 42.

⁹ Rep. 98.

² Inst. 382,

466.

⁴ Inst. 114.

^h Terms of
the Law, v.
Escape.

¹ 3 Rep. 52.

H.P.C. ch. 52.

^k 2 Inst. 319.

upon such Pursuit, may retake him; and though he is out of the View, yet if fresh Pursuit is made, and the Prisoner is retaken a long Time after, he shall still be said to be in Execution, if he was re-taken before any Action brought against the Sheriff, &c. If Traytors and Rebels break the Prison, by which the Prisoners escape, the Gaoler may be charged with the Escape and punished; for he may have his Remedy over against them; not if they are the King's Enemies that break the Gaol. On a negligent Escape, in criminal Cases, either the Gaoler or Sheriff may be fined or imprisoned. But in such Cases the Judges usually make favourable Constructions on the Behalf of the Gaoler.

A *Rescous* of a Prisoner upon an Arrest or Mean Process before he is brought to Gaol may excuse the Sheriff in an Action for the Escape, because he is not obliged to have a *Posse Comitatus* ready to attend him in the Service of every Mean Process. But otherwise when the Prisoner is taken upon Execution, or when the Prisoner is in the Gaol and is rescued.

But now for *Voluntary Escapes*. A Prisoner in Execution ought not to be allowed to go out of the Gaol, for it is an Escape. The Sheriff ought to keep him *in arcta & salva Custodia*. [See *West. 2. ch. 11.*] If he is removed by the Gaoler from County to County, by Virtue of an *Habeas Corpus*, it is no Escape; though he does not go the direct Way to that County. If a Man escapes with the Consent of the Gaoler in Civil Cases, or with the Consent of the Plaintiff, he cannot retake him. If he doth, the Prisoner may have an *Audita Querela*. If a Woman is Warden of the Fleet Prison, and a Prisoner in the Fleet marrieth her, this is a voluntary escape in the Woman; for now the Prisoner cannot be under her Power. Thus if the Sheriff or Gaoler marrieth a Woman that is in Execution for Debt, she cannot be a Prisoner to her Husband. If the Sheriff, &c. consents that one in Execution shall go out of the Gaol for a while, this is an Escape, tho' he returns at the Time appointed.

It is often to be considered, Whether an Escape is upon a *Mean Process*, (*i. e.* after one is committed to Prison upon the first Arrest) or upon an *Execution*, which is by Process after Judgment. Now Gaolers are more cautious of voluntary Escapes, after Execution, than upon Mean Process: Because upon Execution, the Debt and Damages will appear upon Record, and so are more easily recovered against them, than upon Escapes on Mean Process, where there is a greater Liberty to make an artful Defence.

Voluntary Escapes in Criminal Cases (as Treason or Felony) are very dangerous to the Sheriff or Gaoler. The Sheriff or Gaoler is esteemed to be guilty of the Crime, for which the Prisoner escaping was committed, if he was committed by lawful Warrant. If he was committed for Treason or Felony, the Sheriff or Gaoler who permitted the Escape shall answer for Treason or for Felony, and suffer the Punishment. For though the Sheriff is responsible for the Gaoler in Civil Cases, yet in Criminal Cases it is only Treason or Felony in him that was immediately trusted with the Custody. But the Sheriff may be indicted for it, so as to subject him to Fine and Imprisonment for the Offence of his Gaoler. If a Prison be set on Fire, unless it be by Privy of the Prisoner, he may break Prison to save his Life. If a Constable brings a

^a H. P. C. Person to Gaol, and the Gaoler refuseth to take him, the Vill where the Constable liveth shall be charged with him, and the Gaoler fined ^b.

^c By 8 & 9 W. 3. ch. 27. If the Keeper of any Prison suffers any Prisoner committed on Mean Process, or Execution, to be out of the Rules, except by virtue of a Habeas Corpus, or Rule of Court, it shall be deemed an Escape.

Every Person obtaining Judgment in an Action of Escape against the Marshal of the King's Bench, or Warden of the Fleet, shall have not only the Remedies allowed by Law, but the Profits of the said Marshal and Warden, or some fit Part thereof; which shall be sequestered towards Satisfaction of the said Debt, with Costs and Damages. [And by 27 G. 2. ch. 17. The King's Bench Prison, and the Power of appointing the Marshal, is revested in the Crown, and the Mortgage thereon directed to be paid off; and the Saving Clauses relating thereto in that Act are repealed.]

And if the Keeper of any Prison take any Gratuity or Security for the same, to procure or permit any Escape, he shall forfeit five hundred Pounds, and his Office.

And no Re-taking, or fresh Pursuit shall be given in Evidence in an Action of Escape, unless especially pleaded, and Oath made by the Defendant that such Escape was without his Consent. But if such Affidavit prove false, he shall forfeit five hundred Pounds.

Likewise, if any Prisoner in Execution escapes, the Creditor may re-take such Prisoner by any new Capias, or may sue forth any other kind of Execution.

And if any Keeper refuses after one Day's Notice, to shew the Prisoner in Execution to the Creditor, or his Attorney, it shall be judged an Escape.

By 1 Ann. St. 2. ch. 6. If any Prisoner in the King's Bench or Fleet in Execution, or on any Mean Process or Process of Contempt, shall escape or go at large; upon Oath thereof made in Writing before any Judge of the Court where the Commitment, Action, Judgment or Execution was, such Judge may grant a Warrant for the Re-taking such Prisoner; and for the Commitment of him to the Common Gaol of the County where retaken, there to remain without Bail, till discharged by Law. And if the Sheriff suffers such Prisoner, so retaken, to escape, he shall be liable as in the Case of any other Escape.

But by 5 Ann. ch. 9. One that escapes, (being taken by Virtue of the 1 Ann.) shall be committed to the Prison where the Sheriff keeps Debtors, instead of the common Gaol. And if the Prisoner escapes, the Sheriff shall be answerable as in other Escapes. And the Judge may grant his Warrant upon Oath made in Writing before Commissioners empowered to take Affidavits in the Country; and the Prisoner may be retaken upon the Lord's Day.

If any Person in Custody for not performing any Decree of Chancery or Exchequer, whereby Money is decreed, shall escape; the Person to whom the Money is decreed, shall have the same Remedy against the Sheriff, as if the Person escaping had been in Custody upon Execution; and recover the Money decreed with Costs, in any of the Courts at Westminster.

By 5 H. 4. ch. 10. None shall be imprisoned by any Justice of Peace, but only in the common Gaol. But by 6 G. 1. ch. 19. Jus-

tices may commit Vagrants, and Persons charged with small Offences, either to the common Gaol or House of Correction.

By 7 H. 4. ch. 4. In an Action of Debt brought against a Gaoler which letteth a Prisoner escape, a Protection shall not lie.

By 23 H. 6. ch. 9. The Gaoler's Fee for a Commitment is four-pence. And if he doth any Thing contrary to this Act, he forfeits treble to the Party grieved, besides forty Pounds to be divided betwixt the King and Prosecutor.

By 3 H. 7. ch. 3. Those that have the Custody of Gaols must certify the Names of all Prisoners to the Justices of Gaol-Delivery, in pain of five Pounds for every Default.

By 8 & 9 W. 3. ch. 27. If the Keeper of any Prison take more than two Shillings and six-pence by the Week for Chamber Rent, he shall forfeit twenty Pounds.

By 11 & 12 W. 3. ch. 19. 6 G. 1. ch. 19. The Justices of the Peace, upon Presentment of the Grand Jury at the Assises, may assess the County for building or repairing County Gaols.

All Felons shall be imprisoned in the Common Gaols only, whereof the Sheriff shall have the Keeping.

This Act shall not prejudice such as have any common Gaols by Inheritance, for Life, or Years; nor charge any Person in any City, Town, &c. which have common Gaols for Felons taken in the same, with any Assessment to the County Gaol.

By 3 Geo. 1. ch. 15. None shall take to Farm or buy the Office of Gaoler, in pain of five hundred Pounds.

[See the 5 Geo. 2. ch. 30. Concerning the Gaoler's Duty in the Custody of Bankrupts.]

By the Common Law, no Sheriff, Gaoler, or other of the King's Ministers, ought to take any Reward for doing his Office, only of the King. But since the Common Law has been altered, incredible Extortions and Oppressions have ensued. 1 Inst. 74

II. Justices of the Peace are those that are appointed by the King's Commission to keep the Peace of the County where they dwell. Justices of the Peace. Of whom some are made of the Quorum, (from the Words in the Commission, Quorum A. B. C. D. E. F. unum esse volumus) because some Business of Importance shall not be dispatched without the Presence of them, or one of them.

Heretofore there were Conservators of the Peace at Common Law, elected by the County, upon a Writ directed to the Sheriff. 1 Inst. 174 But the Election of Conservators was transferred by Statutes from the People to the King; and at last Justices of the Peace were created Conservators of the Peace by Commission or Letters Patent under the Great Seal. The Power of constituting them is only in the King, though they are usually made at the Discretion of the Lord Chancellor or Lord Keeper; not that the Power can be transferred or lodged in a Subject: The King may appoint in every County in England and Wales as many as he shall think fit. 175

They are Justices of Record; for none but Justices of Record can take a Recognizance of the Peace. Their Power arises from their Commission, or from Statutes.

1. By Virtue of some Words in their Commission, (viz. Sciatis quod assignavimus vos conjunctim & divisim & quolibet vestrum Justices of the Peace.)

Iusticiarios nostros ad Pacem nostram in Comitatu nostro B. Conservandam, &c.) every Justice is appointed *Conservator* of the Peace, and hath a separate Power, and may do all Acts concerning it apart and by himself, and even commit a Fellow-Justice upon Treason, Felony, or Breach of the Peace. This is the ancient Power touching the Peace, which a Conservator of the Peace had at Common Law. As such, every Justice of the Peace may bind to the Peace or good Behaviour at Discretion; and for Defect of Sureties may commit to the common Gaol, or House of Correction.

By Virtue of another *Assignavimus* or Clause in the Commission, two Justices of the Peace, (one *Quorum*) have a joint Power, 1. To enquire by Jury of all Offences mentioned in the Commission. 2. To take Indictments. 3. To grant Process thereupon. 4. To hear or try the Offence upon Indictment. These are Matters that are to be transacted at the General Quarter-Sessions^{*}.

* See of this Court, post. B 4. ch. 1.

2. By *Statutes*, Power is given to Justices of the Peace, to which their Commission does not reach. And the Statutes of 4 H. 7. ch. 12, and 37 H. 8. ch. 7. give a further general Power than is expressed either in their Commission, or in any particular Statute. There are also several Statutes which are not mentioned in their Commission, and yet the Execution thereof is committed to the Care of the Justices by express Words in the Statutes. But all such Statutes which do give Authority to the Justices, are a sufficient Commission of themselves, though those Statutes are not referred to in their Commission. These Statutes are to be executed as they direct; wherein if no express Power is given to any *one* Justice, he can admonish only; and if not obeyed, may make Presentment of it upon the Statute, and with his Fellow-Justices hear and determine it in Sessions; or he may bind the Offender to the Peace, or the good Behaviour.

See Dalton and Burn's Justice.

Some Statutes empower *one* Justice of the Peace alone to act. Some Statutes require *two, three, four, six*. Of which Statutes where one, &c. may act, there are several Collections in Print.

The *Authority* that they usually exercise from *Statutes*, is concerning Ale-houses, Apprentices, Badgers, Bail, Bakers, Bastards, Beer and Ale, Carriers and Prices of Land-Carriage, Church-wardens, Constables, Cottages, Cursing and Swearing, Drunkenness, Excise, Felonies, forcible Entry and Detainer, Forefallers, Games not lawful, the Game, (and in relation to it concerning Gamekeepers, Guns, Greyhounds, Setting-Dogs, Ferrits, Snares, Nets, Hares, Partridges, Pheasants, Pigeons, Hawks, Fish, Deer, &c.) Gaols, Gun-powder, Hackney-Coaches, Hedge-Breakers, Highways, and Surveyors of Highways, Houses of Correction, Labourers, Leather, Lord's Day, Defaults about Money, Poor (as setting them to Work, settling them in a Parish, or removing them from a Parish) and Overseers of the Poor, Papists, Plague, Quakers, Rates and Parish Taxes, Regrators, Riots, Robbing Orchards, &c. Servants, Soldiers, and providing Carts and Carriages for them upon their March, Tithes, Treasurers of the County, Vagabonds and Vagrants, Wages, Weights and Measures, Woodstealers, and Destroyers of Timber, or other Trees, &c.

Dalton, ch. 192.

Several Statutes do empower Mayors and other Magistrates in Corporations to act as Justices of the Peace within their particular Precincts,

Precincts, who, besides what the Justices of the County may do, take especial Care concerning the Assise (or Ordinance) of Ale and Beer, the Assise of Wood Billet and Faggot, Artificers and Victual-
lers, Beer-Vessels, Vessels for Salmon, Herrings and Eels, Dying, and of many other Matters relating to Trade.

The Power executed by the Justices out of Sessions is chiefly by *Warrant*, *Recognizance* and *Mittimus*.

A *Warrant* is a Precept to some Officer to bring an Offender before the Justice, or to levy a Penalty by Distress, and must be under the Hand and Seal of the Justice, or his Hand at least. If it issues out for the Peace or good Behaviour, it must contain the special Matter.

[By 27 G. 2. ch. 20. *Justices, in all Warrants of Distress for levying any Penalty, or Sum of Money, in Pursuance of any Act of Parliament, may limit the Time for Sale of the Distress, not less than four, nor more than eight Days; and the Officer distraining may, out of the Money arising from the Sale, deduct the reasonable Charges of taking, keeping and selling such Distress; and shall return the Overplus on Demand to the Owner of the Goods.*]

A *Recognizance* is a Bond of Record acknowledged to the King, upon Condition to pay a certain Sum of Money if the Condition is not performed, as to appear at the Assises or Quarter-Sessions, to be of the good Behaviour, &c. If a Justice compounds Recognizances, and does not return them to Sessions, an Information lies against him. ^{1 Sid. 192.}

A *Mittimus* is a Precept in Writing directed to the Gaoler under the Hand and Seal of the Justice, (containing the Cause of the Commitment) for the Receiving and safe Keeping of an Offender in Prison until he is delivered by Law. A *Mittimus* need not be under Hand and Seal, if it is made by Order of Sessions. ^{2 Inst. 52, 590, 591. 592. H. P. C. ch. 50.}

The Power to demand Security for the Keeping of the Peace or for the good Behaviour, and for Want of Security to commit to Prison, prevents a World of Mischief. [See 21 Ja. 1. ch. 8.] The Wife may have it against the Husband, and the Husband against the Wife. But Female Coverts and Infants ought to find Security by their Friends, and not be bound themselves. A Justice may not only grant it at the Request of any Person, but he may demand it *ex Officio* at Discretion. But he ought not to demand Surety for the good Behaviour against one for Defaming another. It may be granted against any Person whatsoever, being of sane Memory, whether he be a Magistrate or private Person, and whether of full Age or under Age; tho' it may be the safest Way to proceed against a Peer by Complaint to the Court of Chancery or King's Bench. Breaches of the Peace or the good Behaviour may be in many Instances. But he that demands Security for the Peace, must make Oath before the Justice of Blows, or Threats, given, and that he stands in Fear of his Life or some Bodily Hurt, or that he fears that another will burn his House, before the Justice can grant his Warrant. ^{1 Inst. 293. b. 4 Inst. 180. &c. Dalton, p. 268, 269, ch. 117. 2 Str. 1207. Dalton, p. 270, 271. ch. 117. See B. 3. ch. 3. post.}

If one makes an Assault upon a Justice of Peace in the Execution of his Office, he may not only defend himself, but may also apprehend the Offender, and send him to Gaol till he find Sureties for the Peace. And he may likewise record a forcible Entry upon his own Possession. In other Cases he cannot be Judge in his own Cause in any Thing relating to himself. Here therefore it would ^{1 Salk. 396. 2 Salk. 607. 2 Str. 1173.}

would be advisable to act in Conjunction with another Justice. [See 43 *El. ch. 7.*] If one abuseth him by Words before his Face, in relation to his Office, he may be bound to the good Behaviour for his Sawciness to a Magistrate; and if he is abused in the Execution of his Office, the Offender may be also indicted at the Quarter-Sessions and fined. To speak contemptibly of his Warrant, or to cast it into the Dirt, is a Contempt against the King's Process. But if one abuses a Justice of Peace by Words that do not relate to his Office, it seems to stand only as in the Case of other Persons that are not Magistrates. And for Slandering a Justice in Relation to his Office, an Action may lie where no Indictment lies.

^a Crompt 149.
¹ Sid. 144.
Dalt. ch. 114.
p. 258. ch.
269. p. 445.
² Roll. Abr.
78.

¹ Lev. 52.
Dalt. ch. 124.
p. 295.
² Salk. 698.
² Str. 1157.
¹ Str. 617.

^{420.}
^b 4 Inst. 176,
177, 178.
⁵ Rep. 91, 92.

See of Process,
post. B. 4.
ch. 5.

^b One or more Justices of the Peace cannot make a Warrant upon a bare *Surmise*, to break open any Man's House to search for a Felon or stolen Goods, tho' commonly the Houses of poor People are often searched by Virtue of such Warrants for stolen Goods. But for Breaches of the Peace, Doors may be broke open to take an Offender. And a Sworn Officer need not to shew his Warrant, unless required, but he ought to tell the Contents of it.

The Power of Justices of the Peace is *determined*, 1. By the Death of the King [or at the End of six Months after, by 1 *Ann. ch. 8.*] 2. By Discharge under the Great Seal. 3. By a *Superfedeas*. 4. By granting a new Commission, of which they that are left out, must take Notice after Publication at the next Sessions. [See 2 & 3 *Pb. & M. ch. 18.*] 5. By Accession of an Office, as by being made Sheriff or Coroner, the Power of acting is suspended during the Continuance of the Office.

^c 4 Inst. 163.

^d 4 Inst. 181.

^d By 34 *Ed. 3. ch. 1.* Authority is given to Justices for preventing Offences, as to bind to the good Behaviour, &c.

By 2 *H. 5. ch. 4.* Justices of the Peace in every Shire named of the Quorum, ought to be resident in the same; except Lords, Justices of the King's Bench and Common Pleas, the Chief Baron of the Exchequer, Serjeants at Law, and the King's Attorney.

[By 9 *Geo. 1. ch. 7.* Justices residing in a City, or Town that is a County of itself, and within the County for which they are Justices, may act at their Dwelling-Houses.]

By 15 *Geo. 2. ch. 24.* Justices of Liberties or Corporations may commit Offenders, liable to be committed, and apprehended within such Liberty, where Inhabitants are contributory to the Support of the House of Correction in the County, to be dealt with as if committed by a Justice of the County.

By 25 *G. 2. ch. 55.* If any Person against whom a legal Warrant is issued, shall escape, go, or be, either before or after the issuing it, out of the Jurisdiction of the Justice who granted such Warrant, any Justice for the County or Place where such Person shall so escape or be, upon Proof on Oath of the Hand-writing of the Justice granting such Warrant, shall indorse his Name thereon, which shall be a sufficient Authority for the Executing the same in such other County.

By 16 *G. 2. ch. 18.* Justices may Act in Execution of the Laws relating to the Poor, Vagrants, Highways and parochial Taxes, tho' chargeable themselves, but not to extend to impower them to act in the Determination of any Appeal relating to any Parish or Place where they are chargeable

By

By 26 G. 2. ch. 27. No Act or Order of two or more Justices shall be set aside, for want of Expressing that one or more of them is of the Quorum.

By 18 H. 6. ch. 11. None shall be Justices of the Peace for a County, unless they have Lands of the Value of twenty Pounds a-year. But by 5 Geo. 2. ch. 18. and 18 Geo. 2. ch. 20. No Person shall be capable of being, nor upon pain of one hundred Pounds shall act as, a Justice of the Peace for any County, unless he have to his own Use in Possession a Freehold or Copyhold Estate, for Life, or for some greater Estate, or an Estate for some long Term of Years, determinable upon one or more Life or Lives, or for a certain Term originally created for twenty-one Years, or more, in Lands, Tenements or Hereditaments, in England or Wales, of the clear yearly Value of one hundred Pounds, over and above all Incumbrances and Rents; or who shall not be seised of or intitled unto, for his own Use, the immediate Reversion or Remainder of and in Lands, &c. lying as aforesaid, which are leased for one, two or three Lives; or for any Term of Years determinable upon the Death of one, two or three Lives, upon reserved Rents, and which are of the clear yearly Value of three hundred Pounds; and take and subscribe the Oath of such his Qualification in the Act mentioned at the County Sessions. But this Act shall not extend to any City, Town or Liberty, having Justices of their own; nor to any Peer, Privy Councillor, Judge, Attorney or Solicitor General, or the Justices of the great Sessions in Cheshire or Wales, or the eldest Son or Heir Apparent of a Peer, or of a Person qualified to serve as Knight of a Shire. And,

By 5 G. 2. ch. 18. No Attorney, Solicitor, or Proctor, shall be a Justice of the Peace during the Time he shall continue in the Practice of that Business.

By 3 H. 7. ch. 1. Justices of the Peace at the next General Sessions shall certify Recognizances taken for keeping the Peace, &c.

By 3 H. 7. ch. 3. Two Justices (one Quorum) have Power to let See of Bail, to Bail Persons bailable by Law; and shall certify the same at the B. 4. ch. 4. next Quarter-Sessions or Gaol Delivery, in Pain of ten Pounds. post.

See 13 H. 4. ch. 7. 5 El. ch. 1 & 4. 13 El. ch. 2. 3 & 4 W. & M. ch. 12. For Forfeitures incurred by Justices for Neglect of Duty.

By 7 Ja. 1. ch. 5. If an Action is brought against a Justice of the Peace, he may plead the general Issue, and give the special Matter in Evidence; and he shall be allowed double Costs. And by 21 Ja. 1. ch. 12. Such Action shall not be laid but in the County where the Fact was committed.

And by 24 G. 2. ch. 44. The Action must be brought within six Months, and Notice of the Cause of Action in Writing, with the Attorney's Name and Place of Abode endorsed thereon, be given to, or left at the House of, the Justice, one Month before the suing out or serving the Writ; within which Time he may tender Amends, and if the same is not accepted, may plead such Tender in Bar; and Plaintiff at Tryal shall not give Evidence of any Cause of Action but what is contained in such Notice.

III. * The Coroner (Coronator à Coronâ) is an Officer of the King, that hath Cognisance of some Pleas of the Crown. He is to

Of the Coroner.

2 Inst. 31.

32, 176.

4 Inst. 271.

^a 2 Inst. 174. be ^a elected in full County, (*i. e.* at the County-Court) by the Free-
^{175. 549.} holders, upon the King's Writ *De Coronatore eligendo*: [See 28 Ed. 3.
^{F. N. B. 163.} *ch. 6.*] and ought to have Lands in Fee in the County to answer
all People, [See 3 Ed. 1. *ch. 10.* 14 Ed. 3. *St. 1. ch. 8.*] though
now mean Persons execute the Office. But if the Coroner is
insufficient, the County, as his Superior, shall answer for him.
He ought to execute his Office in Person, for he is a Judicial Of-
ficer, tho' Deputies are too often appointed. The Number of Co-
^b 2 Inst. 175. roners is not fixed. ^b In some Counties there are four, besides
^{549.} several special Coroners in divers Liberties and privileged Places,
^{4 Inst. 271.} as the Coroner of the ^c Verge, &c. [See 28 E. 1. *ch. 3.*] and by
^{* 2 Inst. 549,} Charter several Corporations have Power to choose Coroners for their
^{550.} Precincts.
^{4 Rep. 46.}

^a 4 Rep. 57. The Lord Chief Justice of the King's Bench is ^a the Sovereign
Coroner, and he may view a Body, and record it where-ever he is.
^{* 8 Rep. 126.} ^c The Lord Mayor of London is Coroner of that City; but the
^{1 Inst. 288. b.} Recorder pronounces the Judgment upon Outlawries there by
^{4 Inst. 247,} Custom.
^{250.}

The Power of Coroners is either *Judicial* or *Ministerial*.

^{4 Inst. 271.} The ¹ *Judicial* Authority (both of general and special Coroners) is
^{9 Rep. 119.} in Case one comes to a violent Death by Felony or Mischance, to in-
^{2 Inst. 32.} quire thereof, to pronounce Judgment upon Outlawries in the County-
^{See of his} Court, to take and enter Appeals of Murder, &c. tho' he cannot
^{Court, post.} proceed any further, but must deliver them over to the Justices. He
^{B. 4. ch. 1.} may also enquire of the Escape of the Murderer, Treasurer-Trove,
Wreck of Sea, Deodands, &c. but of no Felony, except of the Death
of a Man, and upon View of the Body. [See 4 Ed. 1. *St. 2.* 14
Ed. 1. and 1 H. 8. *ch. 7.*]

^{* 4 Inst. 271.} ² The *Ministerial* Power of a Coroner is exercised when Procefs
^{3 Lev. 399.} is ordered to the Coroner to execute the King's Writ, upon a
^{1 Mod. 199.} just Exception made against the Sheriff; as that the Sheriff is a
Party. One cannot return the Procefs, if there are more in the
County.

The Justices of Assize and of the Peace have Power to punish
the Defaults of Coroners.

^{b F. N. B. 163,} A Coroner may be *discharged* of his Office by the King's Writ,
^{8 Rep. 41.} *de Coronatore exonerando*. But a Coroner remaineth, tho' the
^{2 Inst. 175.} King dieth, because he is chosen by the County, and his Election
returned of Record in Chancery.

See 25 Geo. 2. *ch. 29.* An Act for giving a proper Reward
to Coroners, for the due Execution of their Office; and for the
Removal of Coroners upon a lawful Conviction, for certain Mis-
demeanors.

Of the Trea-
surer of the
County.

IV. The Treasurer of the County is he that keeps the County-
Stock. There are two of them in each County, to be chosen
by the major Part of the Justices of the Peace, at *Easter Sessions*.
They must have ten Pounds a Year in Land, or one hundred and
fifty Pounds in Personal Estate, and shall not continue in their
Office above a Year. By 11 G. 2. *ch. 20.* They must, *within thirty*
Days after their Election, transmit their Names and Places of Abode
to the Clerk of the Crown, in the Court of King's Bench. The Trea-
surer that refuses to execute the Office, may be fined by the Jus-
tices three Pounds at the least. The County-Stock is raised by ra-
ting

ting every Parish yearly at *Easter Sessions*; and is to be disposed of to charitable Uses, as for the Relief of maimed Soldiers and Mariners, Prisoners in the *King's Bench* and *Marshalsea*, and in the County-Gaol, for paying the Salary of the Governors of Houses of Correction, as also for the Relief of poor Hospitals and Alms-houses, situate within their several Jurisdictions, &c.

The Treasurers are to *Account* yearly at *Easter Sessions*, or within ten Days after, to their Successors, in pain of five Pounds at least, to be imposed by the Justices in Sessions.

Their *Duty* is set forth, the Manner of raising a *Stock*, how it shall be disposed of, and how they shall *Account*, &c. in the Statutes of 43 *El. ch. 2.* 43 *El. ch. 3.* 14 *El. ch. 5.* 7 *Ja. 1. ch. 4.* 5 *Ann. ch. 32.* 11 *G. 2. ch. 20.* and 17 *G. 2. ch. 5.* [See of the Receiver of Monies collected for building Gaols 11 & 12 *W. 3. ch. 19.* and of the Treasurer of Monies collected for the Repair of Bridges, 1 *Ann. ch. 18.* and for his Duty concerning Transportation of Offenders, 6 *Geo. 1. ch. 23.*]

But by 12 *G. 2. ch. 29.* [which by 13 *G. 2. ch. 18.* is extended to Liberties] There is to be one general *Assessment* instead of the several Rates directed by the above Acts. The Justices at the General or Quarter-Sessions shall appoint one or more Treasurers, being Persons resident in the County or Division, who shall give Security to be accountable, and for the due Execution of their Office, and keep Books for Entry of their Receipts and Payments, and account upon Oath, if required, at every General or Quarter-Sessions; and they may continue such Treasurers or remove them at their Pleasure; and may allow each Treasurer a Salary, not exceeding twenty Pounds a Year, to be paid out of the County Rates.

V. * *Constables* (anciently written *Coningstables*, from *Coning* a *Of Constables* Saxon Word, signifying *King*, and *Staple*, Stability or Safeguard) * 4 *Inst. 123.* are Officers appointed for the Preservation of the Peace in Hundreds, Parishes, and Towns.

A Constable is either a *Chief* or *Highb Constable*, or a *Petty Constable*.

1. The * *Highb Constable* is an Officer over the whole Hundred, * 4 *Inst. 267;* and is usually appointed and sworn before the Justices of the Peace *Dalton, ch. 28. §. 1. §. 5.* at their Quarter-Sessions. He is sometimes chosen by the Justices in their several Divisions; tho' by the Common Law he ought to be chosen in the Turn or Leet. He is forced to serve, if legally nominated and chosen. [See 34 *H. 8. ch. 26.* for *Wales.*]

This Chief Constable is as it were the Overseer and Director of the Petty Constables, Headboroughs, and Tithing-men within his Hundred. His Duty is chiefly contained in his Oath, which is in Effect to see the Peace kept, to apprehend Felons, Rioters, &c. or to make Hue and Cry, to see the Watch duly kept in his Hundred, to see that the Statutes made for the Punishment of Rogues and Vagabonds be duly executed, to have a watchful Eye on unlawful Gaming-Houses, to prevent all inordinate Tippling and Drunkenness, Blood-sheddings and Affrays, and Popish Recusants within his Liberty; to execute Precepts and Warrants to him directed from the Justices of the Peace, &c. He ought to make Returns before the Justices of Peace in Sessions, or in the monthly Meetings of their Divisions, and to cause the Petty Constables to make Returns

to all the Articles contained in their Oath, or that concern their Office. Besides what is expressly contained in their Oaths, they are to return all Victuallers and Ale-house-keepers that sell without Licence, all such Persons as divide their Houses into several Tenements, and entertain Inmates to the Annoyance of the Neighbourhood, and who are likely to be a Charge to the Parish; the Defaults of Petty Constables, Tithing-Men, &c. for neglecting to apprehend and punish Beggars, Vagabonds, idle and suspicious Persons, Whores, Night-walkers, Mothers of Bastards who are like to be chargeable to the Parish; those that refuse to take poor Apprentices; all Defects in Highways and Bridges, with the Names of such as ought to repair them; all Scavengers that neglect their Duty; and all common Nuisances in Streets, Lanes or Alleys; Bakers selling Bread short of Weight; Brewers selling Beer and Ale to unlicensed Ale-houses; Regrators, Forestallers, Ingrossers of any dead Victual, &c. and at every Quarter-Sessions to pay over to the Treasurers of the County, or one of them, all such Sums as have been levied by Church-wardens in their Parishes towards the Relief of Prisons, Hospitals, Alms-houses, &c.

The Chief or High Constable may be Removed by the same Authority which appointed him.

By 5 El. ch. 4. *The High Constable may hold a Petty Sessions (otherwise called Statute Sessions) for Hiring Servants.* [See 43 El. ch. 2 & 3.]

2. A *Petty Constable* is an Officer appointed in each Town, Village or Parish of every Hundred to assist the High Constable. The Choosing and Swearing of him does properly belong to the Court-Leet. But now he is chosen by the Parishioners; and a Justice of Peace usually swears him, and upon just Cause removes him. He is to be chosen every Year, but must execute the Office till another is appointed, or till he is discharged. ^a A Custom for every Inhabitant to serve by Turns according to their Houses, is good; and if it happen upon a Woman, she must hire one to serve in the Office of Constable, according to that Custom. But *Respondet Superior* upon any Miscarriage; unless the Deputy is sworn and allowed in the Court; for then he is Constable. The Oath of the Petty Constable is in general Terms to execute the Office. ^c But if he refuses to serve, he may be bound over to the Assises or Sessions, and indicted and fined.

^a 8 Rep. 38.
^{41.}
Dalton, ch.
28. §. 5.
^b 1 Sid. 355.
^c Dalton, ch.
28. §. 5.

There is frequently a *Tithingman* in the same Town with a Petty Constable; who is in the Nature of a Deputy to execute the Office in the Petty Constable's Absence.

The *Duty* of a Petty Constable is to execute the Office of the High Constable in his Absence, to keep the Peace, to aid and assist the High Constable, to make Presentments at every Assises and Quarter-Sessions of every Thing that is amiss under his Cognizance. But they usually make formal Returns, (tho' upon Oath) that all Things are well, and get a Justice of Peace to sign their Presentments. More particularly, the Duty of Petty Constables arises from the *Common Law* and by *Statutes*.

1. By *Common Law* the Petty Constable is ^d Conservator of the Peace, and in the King's Name may command Affrayers to keep the Peace and depart. He may without a Warrant commit to the Stocks, &c. any that make an Affray, or assault others, or threaten

^d Dalton, ch.
1. §. 7. ch. 8.
§. 6.
H. P. C. ch.
21. §. 4.

to beat or kill another, or are about to break the Peace in his Presence, till he can get Assistance to carry the Offender before a Justice of the Peace to be committed to Prison, if he will not find Sureties. But if the Affray is over, some say, he must have a Warrant to carry the Offender before a Justice of the Peace. If the Affray is in a House, the Constable may break into the House to see the Peace kept. If such Offenders fly into another County, or into some Franchise in the same County, he may make fresh Pursuit, and take them there. If an Assault is made upon the Constable, he may defend himself and justify the Beating of another. And if he happen to be killed in doing his Duty, it is construed to be premeditated Murder. He may command all Persons to assist him to prevent a Breach of the Peace; and if any one refuses, he may be bound over to the Sessions and fined.

It is moreover the Duty of the Petty Constable by the Common Law to execute Warrants directed to him, with Speed and Secrecy, and not to dispute the Authority, if the Justice of Peace has Jurisdiction. But if any Justice sends his Warrant to a Constable, to bring one before him to answer all such Matters as shall be objected against him by A. and doth not set forth the special Matter in the Warrant^d, the Warrant is unlawful; and therefore the Officer is liable to an Action of false Imprisonment if he executes it; tho' such Warrants are commonly issued forth. So if a Justice of Peace sends a Warrant to a Constable to take up one for Slander, the Justice hath no Jurisdiction in such Cases, and the Constable ought to refuse the Execution of it. As he is a sworn Officer he need not shew his Warrant. But by 27 G. 2. ch. 20. Constables and other Officers executing Warrants of Distress, issued by any Justice of the Peace, must, if required, shew their Warrant to the Person whose Goods they distress, and suffer a Copy thereof to be taken. If a Constable lets one go upon his Promise to return, and he fails of his Promise at the Time appointed, the Constable cannot retake him by Virtue of the same Warrant; because he was released by his Consent. He is not bound to go up and down with an Offender to get Sureties, but he may keep him till Sureties come to him; and then he is at Liberty to go to any Justice of Peace, provided it is not too far off, and the Constable consents to it. It is at the Election of the Constable before what Justice he will carry the Offender, if the Warrant is not special, (*viz.*) To bring the Party before the Justice who signed the Warrant. But if a Constable has a Warrant to execute, and afterwards a *Writ of Superfedeas* (being a Command to stay or stop) comes from another Justice, to whom the Party hearing of the Warrant offered Sureties before an Arrest, the Constable must not then execute his Warrant. If he does, it is false Imprisonment. The Constable may justify the detaining of an Offender for a Day, by verbal Order of a Justice, without a Warrant; the Justice then not having an Opportunity to examine him.

This is the Power and Duty of a Petty Constable by the Common Law.

2. He hath much Power and Duty also by several Statutes, as concerning Ale-houses, Arms, Drunkenness, and Tippling, Beggars, Bridges, Carts and Carriages for the King's Use, or the March of Soldiers, Cattle imported, Deer-stealers, Dogs, Guns, Nets, &c. Excise,

Lamb. 125;

Dalt. ch. 8.

§. 6.

H. P. C. ch.

11. §. 4.

Dalt. ch. 8.

§. 6.

F. N. B. 81;

10 Rep. 76.

3 Cro. 395.

2 Inst. 591;

5 Rep. 591

Moor 408;

H. P. C. ch.

11. §. 4.

Excise, Fish, Forcible Entries, unlawful Games, Game, (as Pheasants, Hares, &c.) Hedge-Breakers, Highways, Hue and Cry, Labourers and Servants, Malt-making, Militia, carrying Offenders to Prison, Popish Recusants, Poor, Quarterly Money to be levied for maimed Soldiers, Mariners and Prisoners, Distresses for Rent and for Forfeitures, Rogues and Vagabonds, Sabbath-breaking, Swearing and Cursing, Night-Watches from *Ascension-Day* till *Michaelmas*, Weights and Measures, Wood-stealers, &c.

1 Sid. 355.
Mo. 845.
Dalt. ch. 1.
§. 7.
1 Roll. Abr.
591.

* It has been doubted whether a Constable may make a Deputy; but now it is agreed that he may.

There are other Officers of like Authority with Constables; as the *Borsholders* in *Kent*, the *Third-borough* in *Warwickshire*, the *Tithingman*, *Borough-head* or *Head-borough*, or *Chief Pledge* in other Places. But yet a *Petty-Constable* seemeth to have greater Authority in some Cases. If there is a Constable in the same Parish, he is the *Head-Officer*; but where there is no Constable, the Office and Authority seems to be all one under another Name.

If a Constable does not do his Duty, he may be indicted and fined by the Justices.

By 7 Ja. 1. ch. 5. and 21 Ja. 1. ch. 12. *An Action brought against him for any Thing done in his Office must be laid in the County where the Fact was committed, and he and his Assistants may plead the General Issue, and give the special Matter in Evidence, and shall have double Costs.*

And by 24 G. 2. ch. 44. *No Action shall be brought against him or his Assistants for any Thing done under the Warrant of a Justice, notwithstanding any Defect of Jurisdiction in the Justice, till after Demand of Perusal and Copy of such Warrant, and the same hath been refused or neglected for six Days after such Demand, and Action must be brought within six Months after the Fact.*

By 13 & 14 Car. 2. ch. 12. *Constables, Headboroughs and Tithing-men, out of Purse, may, together with the Churchwardens, Overseers and other Inhabitants, make a Rate, and tax all Persons who are chargeable by 43 El. ch. 2. (as every Occupier of Lands, Tithes, Woods, &c.) which Rate being confirmed by two Justices, such Constable, Headborough or Tithing-man may levy it by Distress and Sale of Goods. And if Constables, Headboroughs or Tithing-men die or go out of the Parish, two Justices of the Peace may make and swear new ones till the Lord of the Manor hold a Court-Leet, or till the next Quarter-Sessions; who shall approve of them, or appoint others; and if any of them continue above a Year, the Justices of the Peace may discharge them, and put in others till the Lord of the Manor holds a Court.*

And by 27 G. 2. ch. 3. *They shall be paid by the Treasurer of the County, for carrying to Gaol Offenders who have not sufficient within the County to bear the same, such reasonable Expenses as one Justice shall order by Warrant under Hand and Seal.*

Comyns 312.

By 5 H. 8. ch. 6. and 32 H. 8. ch. 40. *Physicians and Surgeons of London shall be excused from bearing the Office of Constable or any other Parish-Office.*

By 1 W. & M. 8. 1. ch. 18. *Dissenting Teachers qualified according to the Act, are freed from Parish Offices. And all Dissenters may*

may execute the Office of High Constable, Petit Constable, or any other Parochial or Ward Office, by Deputy.

By 6 W. 3. ch. 4. and 9 G. 1. ch. 8. Apothecaries are exempted from serving Parish-Offices.

By 10 & 11 W. 3. ch. 23. A Person that hath taken and prosecuted any Felon to Conviction, or be to whom such Prosecutor shall assign the Certificate thereof, shall be excused from Parochial and Ward Offices in the Parish or Ward where the Felony was committed.

VI. Church-wardens are ancient Officers yearly chosen by the Consent of the Ministers and Parishioners, to look to the Church, Church-Yard, and the Things that belong to both, to provide what is necessary for the Performance of Divine Service, and to observe the Behaviour of the Parishioners concerning such Faults as belong to the Ecclesiastical Jurisdiction. If one sits with his Hat on in Time of Divine Service, and refuses to be uncovered, the Church-wardens may take it off. For tho' they may present it in the Spiritual Court, yet they ought not in the mean Time to suffer such Irreverence.

They are Temporal Officers in the Parish employed in Ecclesiastical Affairs, (as Constables are in Civil) to be chosen in Easter Week by the joint Consent of the Minister and Parishioners, if it may be; in which Case the Minister has only a single Voice, as every other Parishioner. But by Custom, the Minister shall chuse one, and the Parishioners another. And by Custom the Parishioners only may chuse both. Which Custom must prevail against a Canon. An Attorney, being chose Church-warden, may have a Prohibition, by Reason of his Attendance on the Courts at Westminster. They are to be sworn by the Ordinary; and when they are chosen by Virtue of any Custom, if the Ordinary refuses to swear them, a Mandamus may compel him to it; tho' they may execute their Office before they are sworn.

The Authority and Duty of Church-wardens is either by Common Law, or by Statutes.

1. By Common Law, Churchwardens, as soon as they are sworn, are a Corporation enabled to sue and to be sued for the Goods belonging to the Church; and if a Suit is begun in their Year, they may proceed in it after the Year is out. The Church Goods ought to be in their Custody. They are not capable of Purchasing Lands for the Use of the Church, except in London by Custom; but they may purchase Goods and Chattels. Lands must be purchased in the Name of Trustees. They may have an Action of Trespass for such Goods or Utensils, taken out of the Church, as belonged to the Parishioners, tho' the Trespass was committed in the Time of their Predecessors. They are a Corporation only as to the moveable Goods for the Use of the Church; but not to have an Action for Goods of which they were never possessed. Chancery only can relieve them in that Case. Therefore Church-wardens are not enabled to take a Feoffment, a Lease for Life, or for Years; or such other Things as have Continuance. Neither can they make a Lease of Lands, given to the Use of the Church, or act as Church-wardens, in any Thing concerning them. A Bond for the Parish-Money lent out at Interest, or to secure a Parish from keeping a

A a

Bastard-

Bastard-child, should be made to the Churchwardens (or to them and the Overseers) by Name ^a [and not to them and their Successors] and they will be Trustees for the Parish. It is said that Church-wardens are a Kind of Corporation enabled to sue for any Thing belonging to the *Poor* of the Parish, as well as for any Thing belonging to the *Church* ^b. But they have no such Property in the moveable Goods belonging to the Parish as to ^c sell them, without the Consent of the Parishioners and the Ordinary. For they are a Corporation for the Advantage of the Church, not to its Prejudice. If they waste the Goods of the Church, the new Church-wardens may call them to an Account before their Ordinary, or bring their Action at Common Law. And the Release of one of the new Churchwardens will be no Bar to the Action. Both of them together cannot release to the Prejudice of the Church.

^d 2 Roll. Abr. 337. If any Thing belonging to the ^d Freehold of the Church is broken down, or if the Trees in the Church-yard are cut down, the Parson or Vicar (not the Church-wardens) shall have the Action.

Further, Their Duty by *Common Law* is to *repair* the Church, to make *Rates*, to make *Presentments*, and to pass their *Accompts*. These Things indeed are of Ecclesiastical Cognizance, but necessary to be known by every one.

^e 2 Inst. 489, 653. 1. As to *Repairs*, ^e They must keep the Body of the Church in Repair, and the Seats belonging to it, as also repair the Mounds of the Church-yard, and see that all be kept in good Order. ^f Ld. Ray. 59. For of common Right this ought to be done at the Charge of the Parishioners, because they have the Benefit of worshipping God in the *Church*, and of Burying their Dead in the *Church-yard*; though they may by Prescription charge the Repair of the Mounds of the Church-yard, on a particular Person, by Reason of his Estate. ^g 2 Cro. 367. The Parson only hath Power to give leave to bury in the Church; but the Church-wardens must be paid for repairing the Floor, if the Grave is made in the Body of the Church. If any one claims an *Isle* for a Burying-place, he only must make good the Pavement.

If a Church falls down, the Parishioners are not bound to rebuild it. Neither are the Church-wardens bound to repair the *Ways* which lead from the Parishioners Houses to the Church; except there is a Custom for it. [See for *London*, 22 Car. 2. *cb.* 17.]

As they must *repair* the *Seats* in the Body of the Church, so with Consent of the Minister, they may place the Parishioners in those Seats; reserving still to the Ordinary (because the Church-wardens are Officers under him) a Power to correct the same. For ^h 3 Inst. 202. they are supposed to act by his Authority; because he ⁱ originally hath the Disposition of all the Seats in the Church and Chancel. The Church-wardens may have this Authority in themselves by Custom, as in *London*; and particular Persons may ^j prescribe to have a Seat, as belonging to them by Reason of their Estates, which have been constantly repaired by them: The Repairing of them is necessary to support the Claim. One may prescribe to an *Isle* in a Church, to sit there with his Family to hear Divine Service, and to bury there. But the constant Sitting and Burying there, without using to repair it, does not gain any peculiar Property therein. If the *Isle* hath been used to be repaired at the Charge of the Parish

in common, the Ordinary may appoint whom he pleases to sit there, notwithstanding any Usage to the contrary. So one cannot prescribe to a Seat, or to Priority, or a Place in a Seat in the Body of the Church generally, without shewing, that he and all those that lived in his House have Time out of Mind sat there, and also repaired it. No one can claim a Seat in a Church by Prescription as appendant or belonging to Land, but it must be laid as belonging to a House, in Respect of the Inhabitaney thereof; tho' it hath been adjudged, that a Seat in an Isle may be prescribed for by an Inhabitant of another Parish.

If the Church-wardens erect or add any new Thing, either as to the Fabrick of the Church, Utensils, or Church-yard, they must have the Consent of the Parishioners. And if the new Additions are in the Church, the Licence or Faculty of the Ordinary is requisite, as well as the Consent of the Parishioners; for he is the Judge in Law of what is proper and decent there; and in this Case, the major Part of the Parishioners cannot conclude him. In Matters of necessary Repairs, the greatest Part shall bind the least: But if the major Part will not consent where the Repairs are necessary, the Church-wardens may repair without their Consent, if upon Notice of Time and Place to meet, they refused to meet; or meeting, refused to make a Rate. And as the Churchwardens are to lay out the Money, they are answerable only for Deceit, not for Indiscretion, if they lay out more Money than was needful.

The Chancel is to be repaired by the Rector or Impropiator, by the Custom of England; unless the Vicar is obliged to it by Composition, &c. But a Rectory impropriate (being a Lay Fee) cannot be sequestred by the Court-Christan for the Repair of the Chancel. By Immemorial Custom the Parishioners in the City of London repair the Chancel as well as the Body of the Church. Such a Custom also is in other Cities and large Towns, where there are no Tithes to be charged for the Repair of the Chancel.

2. Rates and Levies also are to be made by Church-wardens to defray the Charge of Repairs. The Rate ought to be laid upon every Occupier of Lands within the Parish, tho' the Occupier lives in another Parish; for he is a Parishioner for this Purpose, and may come to the Assemblies or Vestries of the Parishioners when they meet to make a Rate. A Person living in one Parish, and occupying Lands in another, shall not be charged for the Ornaments of the Church or Utensils, Bells, Repair of Seats, for Bread and Wine for the Sacrament, Clerk's Wages, Visitation-Charges, by Reason of those Lands: for the Personal Estates of the Inhabitants are chargeable for every Thing that cannot be referred to the Fabrick of the Church, or the Repairs of the Church-yard, or other Matters which may concern the Freehold. Therefore some are of Opinion that Church-wardens should make two Rates, one upon Lands and Houses, for what concerns the Freehold of the Church, and another upon Personal Estates and Stock, to defray other Expences. But as this Method creates Confusion, so it is seldom practised.

A Hamlet having a Chapel of Ease, must pay to the Repairs of the Mother-Church.

The

^a 5 Rep. 67. ¹ Ventr. 367. The Rates must be made with the Consent of ^a the major Part of the Parishioners, House-keepers, or Occupiers of Land. In Order to which, they must have Notice of a Vestry (a Place so called from the *Vestments* of the Minister kept there) and then all that are absent are to be concluded by the Majority of those that are present; who in Construction of Law are the whole Parish ^b. And if no Parishioners at all appear after convenient Notice given, the Churchwardens alone may make the Rate, and recover it in the Ecclesiastical Court, if the Defendant cannot shew that he is illegally or unequally taxed, in ^c Respect of the *Quantity* of his Land, as being rated for more than he has; or that the Land which he hath is *over-rated*; or that the Rate was *needless*; or that some Lands in the Parish are *omitted* in the Rate. Some pretend that the Confirmation of the Archdeacon is necessary, when the major Part of those present will not agree to the Rate.

^d 2 Str. 728. ¹⁰ ^d By Custom there may be *Select Vestries*, or a certain Number of Persons chosen to have the Government of the Parish, to make Rates, to take the Accompts of Church-wardens.

^b Those that pay no Church Rates, have not any Vote in Affairs relating to it; except the Rector or Vicar, because they, having the Freehold of the Church and Church-yard in them, have a special Interest to see that Rates be made to enable Churchwardens to repair it.

A Taxation by the Pound Rent is the most equitable Way, and not according to the Quantity of the Land.

² Inst. 489. By the Statute of Circumspecte agatis or 13 Ed. 1. Rates for repair of Churches, Church-yards, providing decent Ornaments for the Celebration of Divine Service, are allowed to be of Ecclesiastical Cognizance.

By 4 & 5 W. & M. ch. 12. Where Churches in Cities and Towns Corporate are united by Virtue of the Statute of 17 Car. 2. ch. 3. and one of them is demolished, the Parishioners of the demolished Church shall pay to the Repair of the other Church, and the Ornaments thereof, in Proportion as the Archbishop or Bishop that made the Union shall direct; and for Want of such Direction, shall bear one third Part. [See 10 Ann. ch. 11.]

By 7 & 8 W. 3. ch. 34. Where a Quaker refuses to pay any Church-Rates, two next Justices of the Peace may summon him before them, and settle what is due, and make Order for Payment thereof if the Sum be under ten Pounds; and upon Refusal to obey the Order, one of them may by Warrant levy the Money by Distress. [See 1 Geo. 1. ch. 6.]

3. The Duty of Church-wardens also is to present or certify to the Ordinary all Things presentable by the Ecclesiastical Laws, which relate to the Church, the Parson, and the Parishioners. The Articles delivered to the Church-wardens are for the most part founded upon the Book of Canons agreed on in the Year 1603, and the Rubricks of our Liturgy. They are bound to present Crimes and Offences, not only from their own Knowledge but common

³ Cro. 291. ² Fame; that so every Scandal that gives Offence may be punished.

¹ Ventr. 114. The Ordinary tendered an Oath to a Churchwarden, to present according to the *Articles*, which he refusing to take was excommunicated; upon which a Prohibition was granted, because some of the Articles might comprehend Things out of the Ecclesiastical Jurisdiction.

dition. But if the Oath is * *To make Presentments according to the* ^{1 Vent. 129.}
King's Ecclesiastical Laws, and the Articles are offered by Way of
 Charge and Direction, no Prohibition ought to be granted. In larger
 Parishes, *Sidesmen* (anciently *Synods Men*, otherwise called *Quest-Men*)
 are annually chosen to assist the Churchwardens in their Enquiries
 and Presentment of Offenders to the Ordinary. A Rector, Vicar (or
 Curate in their Absence) may make Presentments, but they ought
 to be upon their * Oaths.

4. Lastly; By the *Common Law* Church-wardens are at the End
 of the Year, or within a Month after at most, upon Notice before-
 hand, to give an * *Account* of their Receipts and Disbursements to ^{Can. 89.}
 the Minister and Parishioners, and deliver what remains in their
 Hands to the Parishioners, or to the new Church-wardens. If they
 refuse, they may be presented at the next Visitation, or the new Of-
 ficers, or any of the Parish that have Interest, may, by Process, call
 them to Account before the Ordinary, and may there make their
 Exceptions against it; ^{1 Roll. Abr.} or the succeeding Church-wardens may sue
 them by Writ of Accompt at Common Law. If their Receipts fall ^{121.}
 short of their Disbursements, the succeeding Church-wardens are ^{1 Mod. 65.}
 bound to pay what is due to them, and account it amongst their
 Disbursements to the Parishioners at the End of the Year. When
 they have faithfully accounted, and their Account is allowed by the ^{Str. 974.}
 Minister and major Part of the Parishioners present, it shall not after-
 wards be in the Power of any to make them account again, unless
 some Fraud in their Accounts is afterwards discovered.

Note, That tho' a Parish stands in two or more Counties, yet the
 Authority of Church-wardens is the same in every Part of it, as if
 the Parish had been only in one County. For they being Officers
 in Ecclesiastical Affairs must follow the Division of the Ecclesiasti-
 cal Jurisdiction into Dioceses, Archdeaconries, Deaneries, Parishes,
 And consequently must attend at the Visitation (whether of the Bi-
 shop, Archdeacon, or other Ordinary) to give an Account of the
 due Execution of their Offices to that Bishop or Archdeacon, &c.
 in whose Diocese or Archdeaconry, &c. the Parish-Church does
 stand; that being the Place where the Parishioners are united, and
 to which the Business of Church-wardens does almost wholly re-
 late. But Constables and Tithingmen belonging to the Temporal
 Jurisdiction, must follow the Division of that Jurisdiction into Coun-
 ties, Hundreds, Tithings. And therefore where there is a Hundred
 or Tithing in two Counties, there must be different Constables and
 Tithingmen, though in the same Parish; and they must account
 for the Discharge of their Offices at different Assizes and at different
 Sessions. *Overseers of the Poor* and *Surveyors of the Highways*
 are not Officers at *Common Law*; but placed in Parishes and Towns
 by *Statutes*.

By 3 W. & M. ch. 11. *In all Actions to be brought in the Courts*
of Westminster, or at the Assizes for Money mis-spent by Church-war-
dens or Overseers, the Evidence of the Parishioners (other than such as
receive Alms) shall be admitted.

2. The Authority of Church-wardens by *Statutes* is to present
 Recusants, to levy by Distress one Shilling to the Use of the Poor of
 the Parish for every Offence upon all such as come not to Church on
 every *Sunday* or other Days appointed to be holy, (except *Dissenters*
 qualified according to 1 W. & M. Sess. 1. ch. 18.) and on all those that

do not abide there till Divine Service and Sermon is ended; and on all those that do not behave themselves orderly and soberly while they are in the Church. [See 1 *El. ch. 2.*] To apprehend those that disturb the Minister, and bring them before a Justice of the Peace, to execute *Warrants*, and levy *Forfeitures* against those that profane the Lord's Day in Pastimes, Travelling, Tippling; and for Drunkenness, Cursing and Swearing, seditious Conventicles, and for not Reading Prayers once a Month; or against those that do not bury in Woollen; to join with the Overseers of the Poor in making Rates for the Relief of the Poor, and to set poor People to work, and to register their Notices of Settlement in a Parish; to take Order about Bastard-Children, to collect the Charity Money upon Briefs or Letters Patent, and to attest them, to sign (together with the Minister) Certificates of Receiving the Sacrament of the Lord's Supper by Persons bearing Offices civil or military; to make a Tax for the Destruction of noisom Vermin, &c.

Note, That notwithstanding this Authority of Church-wardens by *Statutes*, yet *Warrants* are generally executed by the Petty Constables.

[See who are exempted from Serving in Parochial Offices, *supra* Tit. *Constables*, at the End.]

3 Cro. 285. By 7 Ja. 1. ch. 5. and 21 Ja. 1. ch. 12. Church-wardens and Overseers of the Poor and their Assistants, in Actions brought against them for any Thing done in the Execution of their Office, may plead the General Issue, and give the special Matter in Evidence, and shall be allowed double Costs; and the Action must be laid in the County where the Fact was committed.

Of Overseers
of the Poor.

VII. Overseers of the Poor are publick Officers created by Statute, (*viz.*) the 43 *El. ch. 2.* to provide for the Poor of every Parish, and are nominated yearly in *Easter Week*, or within a Month after, by two Justices of the Peace; (one *Quorum*.) They must be substantial House-holders, and are sometimes two, three, or four, according to the Largeness of the Parish. ^a If a Parish extendeth into two Counties, the Overseers shall not divide themselves, but shall execute their Office in all Places within the Parish; tho' the Justices within their several Jurisdictions shall respectively nominate them, give Warrants to levy Taxes unpaid, &c. Before the Reformation, the Poor were maintained by Offerings and Oblations of pious Men and by the religious Houses.

^a 2 Ld. Ray.
1394.
^b Dalt. ch. 73.
§. 25.

Church-wardens by this Statute are called Overseers of the Poor, and are to join with the Overseers to make a Poor's Rate. But the Church-wardens having distinct Business of their own, do usually leave the Care of the Poor to the Overseers only; tho' anciently they were the sole Overseers of the Poor.

¹ Str. 512.
² Str. 1143.
1004, 1071. And by 13 and 14 Char. 2. ch. 12. Two or more Overseers of the Poor shall be appointed in every Township or Village, and such Township or Village shall provide for their own Poor; and the Powers given by 43 *Eliz.* to be executed in Parishes, are extended to all Townships and Villages, whether parochial or extraparochial, not only within the Counties therein particularly named, but also in all other Counties.

For the better Understanding the Nature of this Office, let us examine what Sort of Poor the Overseers are to provide for; their Duty

Duty in setting the Poor to *Work*, and in making *Rates*, as also their Duty in passing their *Accompts*.

1. It may happen that the Overseers are to provide for *three* Sorts of Poor; 1. ^a By *Impotency*; as Infants, the Aged, the Decrepid, the ^a Dalt. ch. 73. Blind, the Sick, the Lunatick or Idiot. These the Overseers are to ^b 35. provide for. 2. By *Casualty*; as House-keepers ruined by Fire, Water and Robbery, Suretiship, or by Decay or Losses in Trade, or a poor Man overcharged with a Number of Children. These, having Ability, are to be set to Work; but if not able to live on their Work, they are to be relieved with Money. 3. By *Prodigality* and Debauchery; as idle Persons, Pilferers, and Strumpets. These are to be sent to the House of Correction to be put to hard Labour to maintain themselves, without being chargeable to the Parish. However, if they are not sent to the House of Correction, they are not to perish for Want; but Work must be provided for them. And if they become impotent by Sicknes, or if their Work will not maintain them, there must be an Allowance by the Overseers for their Support.

The Overseers are to provide an House for Habitation for the ^a Dalton, ch. 73. ^b 28. impotent Poor only. But if others want Houses for Habitation, the Justices usually make them weekly such Allowances in Money, as may supply that Want; thereby forcing the Overseers to provide them an Habitation to lessen the Allowance.

Overseers ought to be very careful in inquiring whether the Poor that demand Relief of them are *settled* within their Parish, or within their Jurisdiction. If not, they must endeavour to *remove* them to their proper Parishes.

Poor Persons gain a *Settlement* in a Parish, 1. By *Birth*, if Bastards or Vagrants; but the Settlement of a legitimate Child is that of its Father (or Mother, if the Father's Settlement is unknown) until such Time as the Child gains a Settlement of its own; and this as well after the Death as during the Life of its Parents. ^a But ^a 1 Str. 580. if the Settlements of its Parents are unknown, it then gains a Set- ^a 2 Ld. Ray. tlement by its Birth. ^a A *Bastard* must be with the Mother at ^a 1332, S. C. the Charge of the Parish, whilst a Nurse-Child, till seven Years old, ^a 2 Str. 746. and afterwards be sent to the Parish where born to be provided for; ^a 2 Ld. Ray. ^a 1473, S. C. the Mother or reputed Father not being able. ^a As for Children ^a Dalt. ch. 73. born in common Gaols and Houses of Correction, their Parents being Prisoners, they are to be maintained at the Charge of the County. ^a Resolutions of the Justices, ^a 1633. But this can only mean during the Confinement of the Parent, ^a 2 Sess. Caf. 90. and so long as it is necessary for the Child to remain with her for ^a Dalt. ch. 73. Nurture; for they do not by such Birth gain a Settlement there, ^a p. 159. 167. even if Bastards: ^a And so the Place of the Mother's Settlement, ^a 2 Bull. 358. and not of the Birth, is the Settlement of a Bastard born in a Place ^a 1 Sess. Caf. 94. by Collusion, or born after the Order for Removing the Mother is made out, or born while the Mother is removing under an Order, or born after the Mother's Removal, and before or pending an Appeal therefrom, or born in a State of Vagrancy by 17 Geo. 2. ^a ch. 5. See Barn's and *Observe* there, ^a who are to be accounted Vagrants; the Manner of ^a Just. Tit. their *Conveyance* to the Place of their Birth, &c; 2. By Continu- ^a Poor. ance for *forty* Days in a Parish, to be accounted from Publication of Notice in Writing, which he or she shall deliver to the Churchwarden or Overseer of the Poor, with Notice of the House of his or her Abode, and Number of his or her Family; which Notice ^a suc'l

such Church-warden or Overseer shall read or cause to be read immediately after Divine Service in the Church or Chapel of the Place the next Lord's Day, and shall register in a Book kept for the Accounts of the Poor, on Pain of forty Shillings to the Use of the Party grieved. [See 13 & 14 Car. 2. ch. 12. 1 Ja. 2. ch. 17.

^a 2 Salk. 536.

¹ Str. 411.

544.

^b 2 Str. 1023.

² Salk. 478.

523.

^c 2 Str. 849.

^d 2 Str. 1131.

¹ Str. 97. 608.

² Str. 983.

^e Marwood

and Kentisbu-

ry, K. B. Hil.

29 G. 2.

^f St. John,

Wapping, and

St. Buttolph,

Bishopgate,

Hil. 28 G. 2.

in point.

^g 2 Str. 1131.

983.

¹ Str. 608.

^h 2 Str. 1156.

¹ Str. 57.

3 W. & M. ch. 11.] 3. By executing a publick Annual Office in a Parish or Town on his own Account, during one whole Year.

4. By being rated and paying a Share to the publick Taxes or Levies of a Town or Parish^b [not to the Scavenger or Highway,

9 G. 1. ch. 7. nor to the Duty on Houses and Windows, 21 G. 2. ch. 10.] 5. If any unmarried Person, not having Child or Chil-

dren, shall be lawfully hired, unless to a Certificate Person who has not gained a fresh Settlement there, for a Year, and shall continue in such Service for a Year, it shall be deemed a good Settlement.

6. Being bound an Apprentice, unless to a Certificate Person, &c. and inhabiting in a Town or Parish^c. [See 8 Ann. ch. 9. and 9 Ann. ch. 21.] 7. Renting a Tenement of the Value of ten Pounds a Year. 8. Having a House or Land of their own, tho' under ten

Pounds a Year^d, [Not by Purchase, i. e. if bought by the Pau-

per^e; unless the Consideration amount to thirty Pounds, 9 Geo. 1. ch. 7.] 9. By Wandering and Begging in a Parish without being

apprehended, where the Place of their last legal Settlement or Birth cannot be discovered. [See 17 G. 2. ch. 5.] 10. A Woman by

Marriage to a Man makes his Settlement, if he has one, her own; and she cannot, during the Coverture, gain any Settlement distinct

from her Husband, even tho' he have none; but if the Husband has no Settlement, her Settlement before Marriage stands^f.

All these Cases gain a legal Settlement; so that if any poor Person was settled in a Parish by any such Means, not having come into

such Parish with a Certificate as after-mentioned, and hath not gained a Settlement elsewhere since that Settlement, he is under the Care

of the Overseers of the Poor of that Parish where he last gained such a Settlement, if he falls into Poverty, and wants Relief.

And where he himself is settled, his Family must follow him. But in the Case of Apprentices and Servants, their last Settlement

is in the Place where they served the last forty Days. And observe, That in all the above Cases, except the 1st, 9th, and 10th, there

must be Residence within the Place in order to gain a Settlement; and that for forty Days, unless the Person reside on an Estate of

his own^g, or rent a Tenement of ten Pounds a Year^h. For,

By 13 & 14 Car. 2. ch. 12. Upon Complaint by the Churchwar-

dens or Overseers within forty Days after any Person shall come to settle in any Parish, on any Tenement under ten Pounds a Year, two Ju-

stices (one Quorum) may by Warrant remove him (that is likely to become chargeable to the Parish) to that Parish where he was last

legally settled, either as a Native, Householder, Sojourner, Apprentice or Servant, for the Space of forty Days at the least, unless he give Se-

curity to discharge the Parish. Persons grieved may appeal to the Quarter-Sessions. [See 9 Geo. 1. chap. 7.] And,

By 1 Ja. 2. ch. 17. and 3 W. & M. ch. 11. The said forty Days are to be reckoned not from the Time of his coming to inhabit, but from

the Time of the Publication of Notice in the Church (as before-men-

tioned.) But the Executing a publick Annual Office in the Town or Parish, Payment of publick Taxes in the Town, Hiring of an un-

married

married Person for a Year, with Continuance in such Service accordingly, and being bound an Apprentice, [by 31 G. 2. ch. 11. by any Deed, Writing or Contract legally stampd, altho' not indented] are declared to be Settlements, tho' no such Notice in Writing be delivered and published.

But tho' poor Persons have gain'd a Settlement in a Parish, none are to be relieved whose Names are not registered in the Parish-Book, with the Time when they were first admitted to have Relief, and the Occasion of their Necessity. And no other shall be allowed to receive Collection, but by Authority under the Hand of one Justice of the Peace, or by Order of Sessions; except in Cases of pestilential Diseases, Plague, or Small Pox, happening upon them or their Families; where such Authority is not requisite. But,

By 9 Geo. 1. ch. 7. No Justice shall order Relief, until Oath be made of some reasonable Cause, and that the Person has applied to the Parish; and until the Justice hath summoned the Overseers. And such Person shall be entred in the Parish Book, and receive Collection so long as the Cause for Relief continues, and no longer.

By 8 & 9 W. 3. ch. 30. Poor Persons that receive Relief shall, on the right Shoulder of the upper Garment, wear a large Roman P. with the first Letter of the Name of the Parish or Place where the said Person inhabits; the poor Person refusing to wear such Badge, may by order of one Justice be suspended from his Allowance, or committed to the House of Correction: And if any Churchwarden or Overseer relieve any such poor Person not wearing such Badge, and be thereof convicted on the Oath of one Witness, before one Justice, he forfeits twenty Shillings, to be levied by Distress and Sale of Goods, one Moiety to the Informer, the other to the Poor of the Parish.

And if any Person shall come into a Place to inhabit, and deliver a Certificate to the Church-wardens or Overseers of the Poor of the Place where he comes, under the Hands and Seals of the Church-wardens and Overseers of any other Place, or the major Part of them, attested by two Witnesses, thereby owning the Person mentioned in the Certificate to be an Inhabitant legally settled in that Parish or Place, such Certificate being allowed and subscribed by two Justices of the Peace, shall oblige such Parish or Place to receive and provide for him and his Family whenever they shall become chargeable to the Parish or Place to which such Certificate was given; and then, and not before, he and his Children, not having otherwise acquired a legal Settlement there, may be removed to the Place from whence such Certificate was brought. [See 3 G. 2. ch. 29.] But,

By 9 & 10 W. 3. ch. 11. No Person, who shall come into a Parish by a Certificate, shall by any Act whatsoever gain a Settlement in such Parish, unless he shall bona fide take a Lease of a Tenement of the Value of ten Pounds a Year; or execute some annual Office in such Parish, being legally placed in such Office.

And by 12 Ann. St. 1. ch. 18. Apprentices or hired Servants to Persons coming into a Parish by Certificate, and not afterwards having gained a legal Settlement there, shall not gain Settlements by such Apprenticeships or Services.

The Overseers having been informed what Sort of Poor are to be provided for, and what Things are requisite to make such Poor capable of Relief; It is,

C c

2. The

1 Str. 502,
529.
2 Str. 849.
1199.

2. The Duty of Overseers to provide for the Poor by setting them to Work, by making Rates for that Purpose. For,

By 43 El. ch. 2. Overseers must set the Poor to Work by a Taxation, or by making a Rate upon every Inhabitant, Parson, Vicar or other, and upon every Occupier of Lands, Houses, Tithes, Coal-Mines, or saleable Underwood, within the Parish, to raise a convenient Stock of Flax, Hemp, Wool, Thread, Iron, &c. to set the Poor to Work; to relieve the Impotent and other Poor not able to work; to put out Children to be Apprentices, &c.

2 Ld. Ray.
1009.
Salk. 531. S.C.
2 Ld. Ray.
1280.
Salk. 452. S.C.

In which Statute, the Manner of the Taxation, the Assessment of the Father, Grandfather, Mother, Grandmother, and Children of every poor Person, the Manner of levying the Tax, the Power of Justices of the Peace in Corporations, the Liberty of Appeal to the Quarter-Sessions upon Grievance, the Power of erecting Cottages for the Poor that are aged and impotent, are set forth.

By 17 Geo. 2. ch. 3. The Church-wardens and Overseers of the Poor are to give publick Notice in the Church, of every Rate for the Relief of the Poor, allowed by the Justices, the next Sunday after the same shall be allowed, and no Rate shall be esteemed valid, so as to collect the same, unless such Notice be given. The Inhabitants may inspect the Rates, and have Copies of them paying Six-pence for every twenty-four Names. Penalty of twenty Pounds, for refusing Inspection or Copy.

By 17 G. 2. ch. 38. Succeeding Overseers are to levy all Arrears, and thereout reimburse their Predecessors. Persons occupying any House, out of which another has removed, or which at the Time of the Making the Rate was empty, the Person removing and the Person occupying shall pay in Proportion to the Time they respectively occupied; to be ascertained by two Justices in case of Dispute. Rates may be levied in any other County into which a Parishioner shall remove.

By 5 Geo. 1. ch. 8. Where any Wife, Child or Children are left by their Husbands, Fathers or Mothers, upon the Charge of the Parish, the Church-wardens or Overseers of the Poor of such Parish, by Warrant from any two Justices of the Peace, may seize so much of the Goods and Chattels, and so much of the annual Profits of the Lands and Tenements of such Husband, Father or Mother, as such two Justices shall direct, for the Discharge of the Parish, and for the Providing for such Wife or Child. Which Warrant being confirmed at the next Quarter-Sessions, the Justices there may make an Order for the Church-wardens or Overseers to dispose of so much of such Goods and Chattels by Sale, and to receive so much of such Rents and Profits, as such Justices shall think fit.

By 3 Car. 1. ch. 4. The Church-wardens and Overseers of the Poor, with the Consent of two Justices of the Peace (one Quorum) within their respective Liberties may set up any Trade for setting the Poor to Work. Where there is no more than one Justice of the Peace, it may be done with the Assent of that one Justice.

And by 9 G. 1. ch. 7. Church-wardens and Overseers may, with the Consent of the major Part of the Parishioners assembled in Vestry, purchase or hire any House or Houses in the Parish, and contract with any Person to lodge, maintain and employ the Poor, or contract with the Church-wardens or Overseers of any other Parish for the Lodging, Maintenance and Employment of the Poor of such other Parish,

Parish; or two Parishes or Townships may, with the Approbation of one Justice, signified under his Hand and Seal, unite in Purchasing or Hiring a Poor-house, and there Lodging and Employing their Poor. And if any poor Persons refuse to be kept in such Houses, they are to be put out of the Parish Book, and not intitled to receive Relief. [See 13 & 14 Char. 2. ch. 12. ante.]

For the further Maintenance of the Poor, there are Fines and Forfeitures payable to their Use in the Statutes concerning Ale-houses, Ale-house-keepers, Tippling and Drunkenness, Clothiers, Excise, unlawful Games, taking and killing the Game, Sabbath-breaking, the Poor, profane Cursing and Swearing, Highways, Weights and Measures, Burying in Woollen, &c.

By 14 El. ch. 5. and 43 El. ch. 3. A Tax is to be made for poor Soldiers and Mariners, Prisoners, &c.

By 43 El. ch. 4. Commissioners are authorised to inquire of Mis-employment of Lands or Goods given to Hospitals, or for Relief of poor People, Schools of Learning and other charitable Uses.

[See 4 Ann. ch. 14. An Act for the better Collecting Charity-Money on Byles by Letters Patents, and preventing Abuses in Relation to such Charities.]

3. It is the Overseer's Duty to pass his Accounts.

By 43 El. ch. 2. The Overseers must within four Days after the End of their Year, and after other Overseers nominated, make and yield up to two Justices of the Peace (one Quorum) an Account, and pay the Money in their Hands to their Successors, in pain of twenty Shillings, and Commitment to Gaol. [See 30 Car. 2. ch. 3. For their Account concerning Burials in Woollen, &c.] When one Parish extends into several Counties or Liberties, the Overseers shall render an Account to the Justices or head Officers of both Places.

By 17 Geo. 2. ch. 38. Churchwardens and Overseers of the Poor, within fourteen Days after other Overseers shall be appointed to succeed them, shall, upon pain of Commitment, deliver to the succeeding Overseers a true Account signed by them of all Sums received, or rated and not received, and of all Goods and Materials in their Hands or in the Hands of the Poor in order to be wrought, and of all Monies paid by them, and pay and deliver over all Sums, Goods and Things, in their Hands, to the succeeding Overseers; the Account to be verified on Oath before a Justice. Parishioners paying Six-pence may inspect the Account, and paying Six-pence for every three hundred Words may have Copies.

By 3 W. & M. ch. 11. The Evidence of Parishioners, except such as receive Alms, shall be admitted on Actions for Money mis-spent by Overseers.

VIII. Surveyors of the Highways and Bridges are created by Statute, and are Officers of a Parish or Place appointed to repair and keep in Repair the Highways, &c. There are three Kinds of Ways. *Iter*, a Footway only. *Actus* (from *Agendo* to drive) a Foot and a Horse-way too. This is vulgarly called a Pack and Prime or Drift-way. *Via* or *Aditus*, a Foot-way, Horse-way, and Cart-way. Now any one of the Ways before-mentioned may properly enough be called the Highway, if common to all the King's People. And so may a River that is common to all Men; and a private Way that leadeth from Town to Town,

Town, and is a Thoroughfare: But not such a private Way as leadeth to a Church, a private House, or to the Fields, and terminates there, and is for the particular Benefit of the Inhabitants of such a Parish, &c. These ought to be repaired by the Village or Hamlet, or sometimes by a particular Person. A common Street in a City is a Highway, and is to be repaired by the City in which it lies. [See 1 Geo. 1. ch. 52. §. 9.] But with regard to the Duty of Surveyors * those Highways only that are Drift-ways or Cart-ways, that lead from Market to Market, that are Ways for all Travellers, and are great Roads, or do communicate with them, are under the Surveyor's Care. Highways depend much upon Reputation, so that nothing more particularly can be determined about them.

* 1 Vent. 189.

* 2 Inst. 705.
* 1 Roll. Abr. 392.

The Freehold of Highways and Bridges is in him that hath the Freehold of the Soil; either the Lord of the Manor as Part of his Waste, or the Land-Owners on both Sides of the Way. For the Law presumes, that the Way was at first taken out of the Lands of the Party, that hath other Lands adjoining to it. It is called the King's Highway, not that he hath any Property in the Soil, but because of the Privilege which he hath of a free Passage for all his People. The Freehold of a High-Street is in the Lord of the Manor; and the People have nothing there but a Liberty of Passage.

The Freehold and Profits of a Way that leadeth into the Fields, are in him that hath Land next adjoining.

* 3 Cro. 266, 267.

* An ancient Highway cannot be changed without the King's Licence, upon a Writ of *Ad quod Damnum*. [See 8 & 9 W. 3. ch. 16.] But though I say that Drift-ways and Cart-ways are under the Surveyor's Care, it must be understood that he is not bound to repair them, * if any are obliged by *Prescription* generally in respect of the *Tenure* of their Lands, or by *Enclosure* of Lands adjoining, to repair them or any Part of them. By *Enclosure*, the Subject is hindered from going upon the Land when the Ways are bad. For if there is a Highway, and the Way is miry and deep, the King's Subjects may go upon the Ends and Outlets of Lands adjoining (the Way lying in an open Field, without being enclosed) for these Outlets are adjudged to be Parcel of the Highway. The King's Subjects must have a Passage, and are not forced to go upon the miry Track; from whence it follows, that if the Lands adjoining are sown with Grain, the King's Subjects, in this Case may go upon the Corn.

* 1 Roll. Abr. 390.
* 1 Vent. 90, 183, 189, 256.

Of Common Right, or by Common Law, the Occupiers of Lands in the Parish ought to repair the Highways; and no Agreement with any Person can take off this Charge, which the Law lays upon them.

The Statutes in Aid of the Common Law set forth the Manner of *Choosing* Surveyors, and their *Qualifications*; their Duty in *Repairing* Highways and Bridges; their Duty in gathering a *Rate* for that Purpose, and their Duty in passing their *Accounts*.

1. As to the Manner of *Choosing* Surveyors and their *Qualifications*.

By 3 W. & M. ch. 12. The Constables, Church-wardens, Surveyors of the Highways, and the Inhabitants in every Parish are to meet on the twenty-sixth of December in every Year (unless it happens on

on a Sunday, and then on the twenty-seventh) to return a List of Persons qualified to be Surveyors to two or more Justices of the Peace at a Special Sessions, to be held the third of January, or within fifteen Days after; who are to appoint by Warrant under their Hands and Seals out of such List (on pain of twenty Shillings) one or more to be Surveyors. A Copy of which Warrant is to be served on the Person so appointed, within six Days after such Appointment; and if he refuses to serve, he forfeits five Pounds to be levied by Distress and Sale, by Warrant of two Justices; one Moiety of the Forfeiture to go to the Informer, the other to the Repair of the Highways; and then another to be appointed, upon like Forfeiture if he refuses to serve. If the Constables, &c. shall not return the said List of Names, every of them so neglecting shall forfeit twenty Shillings, to be levied and employed in like Manner.

The Persons qualified must have an Estate of ten Pounds a Year, either in their own Right, or in the Right of their Wives, or they must be worth a hundred Pounds in Personal Estate, or rent thirty Pounds per Annum. If none in the Parish are thus qualified, a List must be made of the most sufficient Persons.

2. As to Repairs of Highways and Bridges.

The Statutes relate to the Preventing Obstructions and Decays in Highways, and to those that are to work and repair the Highways.

For Preventing Obstructions and Decays in Highways and Bridges belonging to them,

By 3 W. & M. ch. 12. None shall lay in the Highway (not twenty Foot broad) any Obstruction or Annoyance, in Pain of five Shillings, to be levied by Distress and Sale, and the Possessors of Lands next adjoining shall remove and dispose of what shall be so laid in the Highway, to their own Use. And if they neglect to clear the Way, and to cleanse their Ditches and Drains adjoining thereunto, and to lay sufficient Trunks or Bridges, where there are Cart-ways into their Grounds, by the Space of ten Days after Notice given by the Surveyor, they forfeit five Shillings for every Offence, to be levied by Distress and Sale.

No Tree, Bush or Shrub, shall be permitted to grow in any Highway not twenty Foot broad, but must be cut down by the Owner of the Land where it stands, within ten Days after Notice given by the Surveyor, in Pain of five Shillings for every Offence, to be levied as aforesaid. [See 13 Ed. 1. St. 2. ch. 5.]

The Possessors of Lands adjoining to Highways not twenty Foot broad, shall keep their Hedges pruned right up from the Roots.

Surveyors may make Drains thro' the Lands adjoining; and shall make every Cart-way leading to any Market-Town eight Foot broad at least; and as near as may be upon the Level.

Causeways for Horses must be three Foot broad.

And by 1 G. 1. St. 2. ch. 52. If any Person who ought to remove such Annoyances shall neglect to do the same within thirty Days after Notice, he shall forfeit not exceeding five Pounds, nor under twenty Shillings, by Warrant of Justices at Special Sessions.

By 30 G. 2. ch. 22. If any Person set or leave any empty Carriage in the Highway, so as in any Manner to interrupt the Passage, except during the Time of Loading or Un-loading, he shall forfeit not exceeding twenty Shillings.

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By 7 G. 2. ch. 9. Surveyors may make Presentments of Hedges annoying the Roads to the Justices at Special Sessions, who shall summon the Occupier of the Land before them at the next public Meeting, and may then direct the same to be new made or cut down; and the Surveyor may cut such Hedge within three Feet of the Bank, on Owner's Refusal after thirty Days Notice; but such Notice must be given between the thirtieth of September and first of February. The Surveyor to be repaid all reasonable Expenses by the Owner.

By 7 & 8 W. 3. ch. 29. He that removes any Post or Block, set up for securing Horse and Foot Causeways from Carriages, shall, upon Proof by one Witness before a Justice of Peace, forfeit twenty Shillings.

By 8 & 9 W. 3. ch. 16. Five Justices of the Peace at their Quarter-Sessions may widen any Ways to eight Yards in Breadth; and by a Jury assess a Recompence to the Owners, and make an Assessment not exceeding Six-pence in the Pound for raising the same. But they cannot pull down any House, or take away any Ground from a Garden, Orchard, Court or Yard. Persons aggrieved may appeal to the Judges at the next Assizes.

Justices at their special Sessions may direct their Precepts to Surveyors to erect Stones or Posts where Cross-ways meet, with Inscriptions directing to the next Market-Town; under the Penalty of ten Shillings on the Surveyors Neglect.

By 5 El. ch. 13. Surveyors may turn a Water-Course hurtful to the Highways into any Man's Ditch, take Rubbish or small Stones in any Quarry ready digged in any Man's Ground within the Parish; and for Default of Rubbish, may dig for Gravel, Sand, Cinders, and likewise gather Stones lying upon any Man's Lands within the Parish, for the Amendment of the Highways; provided they do not dig in the House, Garden, Orchard or Meadow of any Person, or in any more Pits than one in any inclosed Ground; and not above ten Yards over at the most; and that they cause the Pit to be filled up with Earth, at the Charges of the Parishioners; upon pain of five Marks to the Owner of the Land to be recovered by Action of Debt. [And by 26 G. 2. ch. 28. Pits upon Commons must be fenced during the Time they are kept open, and shall be within fourteen Days after digging filled up, sloped down, or fenced-off, on Penalty of Forfeiting not exceeding ten Pounds, nor less than forty Shillings.] The Presentment of Default by one Justice of the Peace in Sessions upon his own Knowledge, shall be a good Conviction. And any two of them (one Quorum) may assess a Fine. However, the Delinquent shall be admitted to his Traverse, as in other Cases.

* 2 Saund.
160.
Kelynge 34.
1 Ventr. 256.

* He cannot take a Traverse to the Want of Repair of such Highway, &c. but he may traverse or controvert his own Obligation to it.

[See 1 Geo 1. St. 2. ch. 52. Concerning the Appointment of Scavengers to cleanse the Streets in Cities, which by 9 G. 2. ch. 18. is extended to Market-Towns.]

By 1 Geo. 1. St. 2. ch. 52. The Surveyors must within fourteen Days after the Acceptance of their Office, and so from Time to Time every four Months (or oftener, if required by Warrant of two Justices) View the Roads, common Highways, Bridges and Causeways, belonging to such Highways, with all Nuisances and Encroachments made upon them, and give an Account in Writing upon Oath to the Justices at their

their next special Sessions of the State of the Highways, upon pain of forfeiting five Pounds to be levied by Warrant of two Justices.

And every Person (who ought to scour Ditches, and usual Water-Courses adjoining to Highways) that shall for thirty Days after Notice neglect to do the same; or leave the Earth of the Ditches in the Highways for eight Days; on Oath of Surveyor before the Justices at their Special Sessions, shall for every eight Yards not scoured forfeit two Shillings and Six-pence, and the Surveyor shall scour them, and make new Ditches thro' the Lands adjoining, where the old ones are not sufficient.

By 6 Ann. ch. 29. 9 Ann. ch. 18. and 1 Geo. 1. St. 2. ch. 11. No Travelling Waggon, Cart, or Carriage with any Burthen (other than Carriages employed about Husbandry, and in Manuring of Land, and for carrying of Hay, Straw, Corn unthrashed, Chalk, Timber for Shipping, Materials for Building, Stones of all Sorts, Ammunition and Artillery of the King) shall go upon the Common Highway with above five Horses in Length, upon pain of five Pounds, to be levied by Distress of the Horses, by any Person whatsoever without any Warrant, to be delivered to the Surveyor or other Parish Officer; and if the Penalty is not paid within three Days, the said Surveyor or Parish Officer may by Warrant of one Justice sell the same, rendering the Overplus; and be that assists in the Driving any Travelling Waggon, &c. with more than five Horses, forfeits five Pounds in like Manner. And Surveyors, wilfully suffering them to travel with more, in like Manner forfeit five Pounds.

If the Person seizing the Cattle, shall neglect to deliver them to the Surveyor, he shall forfeit twenty Pounds.

By 5 Geo. 1. ch. 12. No Waggon Travelling for Hire [See 15 G. 2. ch. 2.] shall be drawn with more than Six Horses; and no Cart Travelling for Hire shall be drawn with more than Three Horses [enlarged to four, by 16 G. 2. ch. 29.] upon Forfeiture of all the Horses above the Number allowed in each Case, with all Accoutrements, to the Use of the Distrainer.

The Distrainer must deliver the Horses, and other Things so seized, to the Constable, or other Parish-Officer of the same, next or adjacent Town or Parish, till the Distrainer shall make Proof on Oath before some Justice of the Peace of the Offence committed; and then the Justice is to issue his Precept to the Constable, to deliver the Horses so forfeited to the Party, who seized, for his sole Use and Benefit; paying the Charge of Keeping and Securing the same, as the Justice shall allow.

No Waggon Travelling for Hire having the Wheels bound with Streaks or Tire of less Breadth when worn than two Inches and an Half, or set on with Rose-headed Nails, shall be drawn with more than Three Horses, upon Forfeiture of all the Horses above three, with all Accoutrements, to be seized and applied as aforesaid.

If any Person shall obstruct the Execution hereof, upon Oath thereof by one Witness, before one Justice, he shall be committed to the common Gaol for three Months without Bail, and forfeit ten Pounds, to be levied on his Goods and Chattels by Warrant from such Justice. And if the Penalty is not paid within three Days, the Distress to be sold.

Provided,

Provided, That this Act shall not extend to such Carriages as are employed about Husbandry, or in carrying Cheese, Butter, Hay, Straw, Corn unthrashed, Coals, Chalk, or any one Tree or Piece of Timber, or any one Stone, or Block of Marble, Carravans, and the covered carriages of Gentlemen for private Use, or to Timber, Ammunition, or Artillery for the King's Service.

But by 14 G. 2. ch. 42. Farmers may carry Goods for Hire from the fifteenth of April to the twenty-ninth of September, with Wheels bound with Streaks of any Breadth.

By 24 G. 2. ch. 43. The aforesaid Acts shall not extend to restrain the Drawing with as many Horses up any steep Hills as the Justices at Quarter-Sessions shall order.

And by 26 G. 2. ch. 30. Any Waggon or other four Wheel Carriage, having the Fellies of the Wheels nine Inches broad, may pass on any Highway, with any Number of Horses not exceeding eight; and any Cart or two Wheel Carriage, having the like Wheels, with any Number not exceeding five, without being subject to any of the Penalties.

By 14 Geo. 2. ch. 42. 21 G. 2. ch. 28. and 24 G. 2. ch. 43. Trustees by Statute for Repair of Roads, or five of them, may, at Toll-Gate, or any other Part of the Road within their Jurisdiction, erect a Machine for weighing Carriages and Goods, and may take twenty Shillings a hundred for every hundred which such Carriage with Loading shall weigh above sixty hundred Weight.

But by 26 G. 2. ch. 30. Waggon, with nine Inch Wheels, drawn with not more than eight Horses, and Carts, with like Wheels, drawn with not more than five, are not liable to be weighed, and are exempted from the additional Toll.

[See also 5 G. 2. ch. 33. 8 G. 2. ch. 20. 24 G. 2. ch. 43. 26 G. 2. ch. 30. 28 G. 2. ch. 17. 30 G. 2. ch. 28. Which contain several Regulations which relate to such Roads only, or principally, as are Turnpike, and are too long to be here inserted. See also Burn's Justice, Tit. Highways, per Totum. See also 6. G. 1. ch. 6. For preventing the Carriage of excessive Loads of Meal, Malt, Bricks and Coals, within ten Miles of London; and 1 G. 1. ch. 57. and 18 G. 2. ch. 33. For Regulating Hackney-Coaches, Carts, &c. within the Bills of Mortality; and also 1 G. 2. ch. 57. 24 G. 2. ch. 43. and 30 G. 2. ch. 22. As to Drivers riding upon Carriages.]

Now having seen how Decays and Annoyances in the Highways are to be prevented: Let us consider who are obliged to work and repair the Highways where they want to be amended and repaired.

The Work and Repairs are to be in the following Manner:

By 2 & 3 Ph. & M. ch. 8. Every Surveyor is to appoint four Days (six Days by 5 El. ch. 13.) to all Persons that are liable to attend and work, for providing Materials for the Amendment of the Highway, giving Notice in the Church the Sunday after Easter of the several Days by him appointed.

Persons liable to work, are every one that hath a Draught or Plough or Plough-Land in Arable or Pasture, and every Householder, Labourer or Cottager.

Therefore by the same Statute, Every one having a Team, or occupying a Plough-land either in Arable or Pasture (interpreted by 7 & 8 W. 3. ch. 29. to be fifty Pounds per Annum in Woodland, or any other Land within any Statutes concerning the Highways,) and every other Person keeping a Draught or Plough, is chargeable to send a Team, and two able Men, with Tools convenient, to work eight Hours every Day, in pain to forfeit ten Shillings for every Day that Default is made.

If a Man has eight Plough-lands, tho' 'tis all Pasture, he ought to find eight Teams for six Days, whether he keep any Draught or no. So if he hath several Draughts, he is bound to send a Team for each Draught, tho' he hath no Land. Again,

Every Householder, Labourer, and Cottager, able to work, being no hired Servant for a Year, must either work himself or hire one to work on each of the six Days. And all of them must work eight Hours every Day, under the Penalty of one Shilling a Day. [By 22 Car. 2. ch. 12. The Penalty is one Shilling and Six-pence.]

By 18 El. ch. 10. Every Person (except such as dwell in the City of London) that shall be assessed in the Payment of any Subsidy to the King to five Pounds in Goods, or forty Shillings in Lands, or above, during all such Time as he shall stand so assessed, and being none of the Parties chargeable for the Amendment of the Highways by any former Law, but as a Cottager, shall find two able Men yearly to labour in the Highways at the Times appointed.

And every other that shall occupy a Plough-land in Tillage or Pasture, lying in several Parishes, shall be chargeable to the Mending of the Ways within the Parish where he dwelleth, as if the Plough-land had lain all in the same Parish.

By 22 Car. 2. ch. 12. In such Places where Carts are not used, the Inhabitants must send Horses and such Carriages as are there used, to carry Materials to amend the Ways, with able Persons to work with the same, under the like Directions, Forfeitures and Penalties, as for Carts and Teams. But the Penalty for every Man and Horse that shall make Default is limited to three Shillings. Any one convicted before a Justice of Peace by the Oath of one Witness, or View of the Justice himself, to have resisted any employed in the Execution of the Statutes concerning Highways, or of Rescuing Goods distrained by Virtue of them, forfeits forty Shillings.

By 1 Geo. 1. ch. 52. Surveyors must give an Account to the Justices at the next Special Sessions in Writing, upon Oath, of the Neglects of Labourers, or of those that are to find Labourers or Teams, under the Penalty of five Pounds. [See the 3 W. & M. ch. 12.] And the Justices at their Special Sessions under their Hands and Seals may order the Repair of those great Roads which most want Repair, with the Time and Manner. And if they make no such Order, the Surveyors shall take the most convenient Time of the Year to repair them before Harvest, and summon the Teams and Labourers.

See more of the Power of the Justices in Corporations in the same Statute. And see 22 & 23 Car. 2. ch. 17. 2 W. & M. 8. 2. ch. 8. 8 & 9 W. 2. ch. 37. and 18 G. 2. ch. 33. Wherein the sole Power of Cleansing and Repairing the Streets, Lanes and Passages within the City of London, and the Liberties thereof, is in the Lord

Mayor, Aldermen, and Commons in Common-Council assembled; as also all Matters that concern the Ways, Sewers, Drains, and Vaults. Here the Manner of Taxing by Commissioners, and the Office of Scavengers (*who are in the Nature of Country Surveyors*) is set forth.

* 1 Vent. 273.

2 Lev. 139.

Note; That Persons in *Holy Orders* are adjudged to be within the Purview of these Statutes, by Virtue of the general Words, (*viz.*) every *Houfholder*, *Inhabitant*, *Parishioner*, he that keepeth a *Draught*, &c.

In the Statute of 43 *El.* concerning the *Rate* for the *Poor*, *Tithes* are expressly mentioned, to which the 3 *W. & M. ch. 12.* concerning the *Highways*, does refer.

* 2 Inst. 700.

701, 702, 705.

3 Cro. 365,

366.

1 Danv. Abr.

743.

Note, That as to *Bridges* in the *Highways*, and not belonging to the *Highways*, the whole County (not the *Parish*) is to repair them by the *Common Law*. But Owners of Land may be charged, by reason of the *Tenure* of their Lands, or by *Prescription*; but not otherwise. Persons *Spiritual* or *Temporal*, *Corporate* or not *Corporate*, are bound to repair *Bridges*, by reason that they and those, whose *Estate* they have in the Lands or *Tenements*, are bound in *Respect* thereof to repair the same. And as to *Prescription*, Bodies *Politick* are bound by a general *Prescription* only, because they are local, and have a perpetual *Succession*: But natural Persons cannot be bound by the Act of the Ancestor without *Binding* and *Assets*, or some *Special Reason*. A Man cannot be charged by a general *Prescription* to do what his Ancestors have done.

* See of Ancestor and Heir, ch. 6. ante.

* See B. 2. ch. 3. post.

So that a *private Person* may be obliged to repair a *Bridge* by reason of *Tenure*, but not by reason of *Prescription* only; whereas a *Body Politick* may be bound either by reason of *Tenure* or *Prescription*.

If Part of a *Bridge* lies in a *Franchise* out of the County, those of the *Franchise* must repair that Part, and the County the other Part. And so it is if it be in two Counties.

If a Man maketh a *Bridge* for the common Good, he is not bound to repair it; or if a *Bishop* hath of *Alms* once or twice repaired a *Bridge*, it bindeth not; but it is Evidence against him that he ought to do it of Right, until he prove the contrary. But if Time out of Mind he and his Predecessors have repaired it of *Alms*; this shall bind him to it. * If one hath *Toll* (call'd *Pontage*) for Men and Cattle passing over a *Bridge*, he must have that Right by *Prescription* or Statute; and in Lieu of the *Toll*, he ought to repair it. * None can be compelled to make a new *Bridge*, where there was never any before, but by Act of Parliament.

* 13 Rep. 33.

* 2 Inst. 701.

Thus it is by the *Common Law*. But,

2 Inst. 701, &c.

By 22 H. 8. ch. 5. Four Justices (one Quorum) shall in Sessions inquire, bear and determine the Annoyances of Bridges, and of Highways at the End of such Bridges, and shall charge such as should repair them. And where it cannot be known what Hundred, City, Town or Parish, Person certain or Body Politick, ought to repair them, they shall be repaired by the County or Riding, City or Town Corporate, wherein they are situated. And if they are situated in two such Precincts, the Inhabitants there shall repair the several Parts respectively. And the Justices may in this Case send Process out of their Jurisdiction.

No private Bridges are within that Statute, but only such as are common in the Highways, and are not to be repaired in the same Manner as Highways.

3. It is the Duty of Surveyors to gather Rates for the Amendment of the Highways, and Bridges belonging to the Highways.

By 3 W. & M. ch. 12. Upon Notice given by the Surveyors to the Justices in their special Sessions, and Oath made of what Sum they have expended for buying Materials, to repair the Highways; the Justices, or any two of them, may cause an equal Rate to be made to reimburse them, according to the Method prescribed in 43 El. ch. 2. for the better Relief of the Poor; [in which Act every Occupier of Woods, Lands, Tithes, &c. is included as aforesaid.] Which Rate being allowed by the said Justices in their special Sessions, may be levied by Surveyors on Persons refusing to pay, by Way of Distress and Sale of their Goods.

If the Justices of the Peace at their Quarter-Sessions shall be satisfied, that the Highways, Causeways, Bridges, (which ought to be repaired by a Parish, &c.) Streets, Pavements, within a Parish, &c. cannot be sufficiently amended without the Help of this Act, they may cause Assessments upon Persons usually ratable to the Poor to be made (not exceeding in one Year Six-pence in the Pound of the yearly Value of Lands, nor of Six-pence for twenty Pounds personal Estate) to be levied in such Manner as the Justices in Sessions shall direct. [And by 1 G. 1. St. 2. ch. 52. They may cause such Assessment to be made, tho' the six Days Work hath not been done; but the Assessment shall not excuse the six Days Work.]

By 7 & 8 W. 3. ch. 29. If any Inship or Vill, which uses to repair their own Highways, shall have levied and employed Six-pence in the Pound for the Repairs, and that is not sufficient, the Justices at the next special Sessions may order the whole Parish to contribute to the said Repairs.

Here the Clergy are chargeable to the Highways as well as the Laity.

And for a further help, by 3 W. & M. ch. 12. All Fines, Issues, Penalties and Forfeitures for not amending the Highways, shall be paid into the Hands of Surveyors (not returned into the Exchequer) to be applied towards the Amendment of such Highways. [But see the following Acts.] And if any such Fine, &c. imposed upon any Parish, shall be levied upon one or more of the Parishioners, any two Justices at their special Sessions, upon Complaint, may by Warrant cause a Rate to be made to reimburse them; which the Surveyors shall levy, and pay within a Month after the making thereof.

A Justice of Peace neglecting his Duty, which this Act requires, shall forfeit five Pounds; one Moiety to him that will sue for the same in any Court of Record by Action of Debt; the other Moiety to be employed for the Repair of the Highways of the Parish, where the Person suing shall inhabit.

Surveyors (after the Acceptance of their Office) neglecting their Duty, by this Act shall forfeit for every Offence forty Shillings, [By 6 Ann. ch. 29. Five Pounds] to be levied on their Goods and Chattels, by Warrant under the Hands and Seals of two or more Justices.

By 1 G. 1. St. 2. ch. 52. If any Fine shall be mis-applied by any Person, he shall, upon Conviction at special Sessions, forfeit five Pounds to the Informer, to be levied by Distress.

By 24 G. 2. ch. 43. All Penalties and Forfeitures, imposed by this or any other Act relating to Highways, are wholly given to and vested in the Informer, who may recover the same in the Manner prescribed by those Statutes, or by Action of Debt, where the Penalty is pecuniary, or of Trover, where the Forfeiture is of any Horse or other Goods, and shall recover the Value thereof in Damages without any Seizure or Demand thereof. The Plaintiff shall also have double Costs, but there shall be no more than one Recovery for the same Offence, and the Action must be brought within six Calendar Months.

As for Bridges belonging to the County.

* 2 Inst 702,
&c.

In 22 H. 8. ch. 5. By the Word *Inhabitants*, all Privileges of Exemption, tho' by Act of Parliament, from Contribution to the Repairs of decayed Bridges, are taken away. The Clergy therefore are charged in respect of their spiritual Possessions towards the Repair of Bridges to be repaired by the County, as well as toward the Repair of those Bridges which are known to belong to Parishes.

By 1 Ann. ch. 18. The Manner of raising the Tax for such Bridges is directed at large. And the Justices in Sessions, upon Presentment, (where it cannot be known who ought to repair a Bridge) may assess every Town, Parish or Place, in Proportion, as usually hath been assessed. And the Money assessed is to be levied by the Constable of each Parish, &c. or by such Person as is appointed Treasurer.

Officers neglecting their Duty, forfeit forty Shillings; and the Treasurer five Pounds, to be applied to the Repair of the Bridge.

No Fine for not Repairing such Bridges, and the Highways at the End thereof, shall be returned into the Exchequer, but shall be paid to the Treasurer, and applied by the Justices towards the Rebuilding and Repairing such Bridges and Highways at the Ends thereof.

By 12 Geo. 2. ch. 29. No Part of the County Rates shall be applied to the Repairs of any Bridges, until Presentment of a Grand Jury of the Want of Repairs; and then the Justices may contract with any Person for the Rebuilding, and Repairing such Bridge for any Term of Years not exceeding seven, at a certain annual Sum. The Contractor to give Security for the Performance; and the Justices to give publick Notice of their Intention to contract.

By 14 Geo. 2. ch. 33. The Justices at Sessions may purchase any Piece of Land adjoining or near to any County Bridge, not exceeding one Acre, for the more commodious Enlarging and Rebuilding the same, to be paid for out of the County Rates.

4. It is the Duty of Surveyors to pass their Accounts. Therefore,

By 3 W. & M. ch. 12. The Surveyor, before he is discharged his Office shall at some special Sessions give an Account upon Oath of all Moneys received, which ought to be employed in Amending the Highways, and how it was disposed of. And if any remain in his Hands, he shall deliver it to his Successor; and in Case of Failure, shall forfeit double the Value, to be levied by Warrant of two Justices.

By 1 Geo. 1. ch. 5. No Justice's Clerk, &c. shall receive any Money for the Oath or Account, on Forfeiture of ten Pounds, to be recovered in any Court of Record.

By 1 Ann. ch. 18. The Money received for Repair of Bridges [intended by the Act] is to be accounted for according to the Order of the Justices in Sessions.

Justices may allow Persons concerned in the Execution of this Act, Three-pence in the Pound.

[See 43 El. ch. 4. Concerning Commissioners authorized to inquire of the Misemployment of Lands or Goods, given for Repair of Bridges and Highways. And see 22 Car. 2. ch. 12. Concerning Lands given for Repairing Bridges and Highways.]

So much concerning the Duty of Surveyors, as to Repairs, Rates, and their Accounts.

There are some Statutes concerning the Courts which have Cognizance of these Matters.

By 2 & 3 Ph. & M. ch. 8. Stewards in Leets may inquire concerning Highways, and impose Fines upon Defaulters.

By 3 W. & M. ch. 12. All Matters concerning Highways shall be determined in the County where they lie, and not elsewhere. And no Presentment, Indictment or Order, made by Virtue of those Acts, shall be moved by Certiorari out of the County, (provided the Justices act within their Power, and the Right or Title to repair do not come in Question, see 5 W. & M. ch. 11.) And in Actions commenced against any Persons authorized to put this Act in Execution, the Defendants may plead the General Issue, and if Judgment be for them they shall have double Costs. ^{2 Str. 849, 944, 1209.}

By 1 Ann. St. 1. ch. 18. All Matters concerning the Repairing of such Bridges (as are intended by the Act) shall be determined in the County, and not be removed by Certiorari. ^{2 Str. 900.}

Persons authorized by this Act may plead the General Issue, and give this Act and 22 H. 8. ch. 5. in Evidence; and if Judgment be for them, they shall have double Costs.

In all Informations or Indictments in his Majesty's Courts of Record at Westminster, Assizes or Quarter-Sessions, the Evidence of the Inhabitants of the Town or County, in which such decayed Bridges or Highways lie, shall be admitted.

Note, That the Statutes which concern Highways and Bridges in particular Places, must be exactly pursued, as being different from the Statutes made for the Repair of Highways and Bridges in general.

IX. The Clerk of the Market is an Officer that hath Cognizance of Weights and Measures. ^{Of the Clerk of the Market.} The King's Clerk of the Market executes his Office only within the Verge. Head-Officers of Corporations, Lords of Liberties, or their Deputies, execute this Office in other Places by Grant or Prescription. He doth keep a Court, and inquireth of Weights and Measures, whether they are according to the Standard or no. His Fees for Sealing are settled in 8 H. 6. ch. 5. and 11 H. 7. ch. 4. ^{2 Inst. 543. 4 Inst. 273. See post. B. 4. ch. 1.}

[See 16 Car. 1. ch. 19. 22 Car. 2. ch. 8. 22 & 23 Car. 2. ch. 12. For Regulation of his Office, for Reformation of Weights and Measures, and for limiting his excessive Fees.]

F f

[See

[See also 31 G. 2. ch. 29. (which repeals the former Statutes relating to Bread) To regulate the Price and Affize of Bread; 7 Ed. 6. ch. 7. 43 El. ch. 14. 9 Ann. ch. 15. and 10 Ann. ch. 6. Concerning the Affize of Fuel, Billet, &c. and 31 G. 2. as to the Weight and Soundness of Trusses of Straw and Hay within London and thirty Miles thereof.]

^a 4 Inst. 275. The Clerk of the Market cannot set a ^a Price upon any Thing saleable in the Market; for that does not belong to Weights and Measures. He cannot take any Fee for ^b View and Examination only of Weights and Measures; for the Statutes allow a Fee only for Sealing. If they are false Weights and Measures, they ought to be burnt. But if they are true and sealed, they ought not to be charged again.

^b 4 Inst. 274.
Dalt. ch. 112.
p. 251.

By 22 & 23 Car. 2. ch. 12. *Where there is no Clerk of the Market, be that hath the Profits of the Market shall seal Measures duly gauged.*

^c 4 Inst. 273. ^c There is now no great Need of the Clerk of the Market; for the Justices of Assize, Oyer and Terminer, and of the Peace, Sheriffs in their Torns, and Lords of Leets, may and do enquire of false Weights and Measures ^d.

^d See B. 3.
ch. 2. post.

Of Masters or
Governors of
Houses of
Correction.

X. *Governors of Houses of Correction* are to set Rogues and other idle Persons to Work. This Officer and his Prison does not belong to the Sheriff. His *Nomination, Duty and Allowance* are settled by Statutes. For,

By 39 El. ch. 5. *Houses of Correction may be founded and endowed by private Persons, and be incorporated.* [See 43 El. ch. 4.]

By 7 Ja. 1. ch. 4. [the 39 El. ch. 4. being repealed] *There is to be a House of Correction in every Shire to set Rogues and other idle Persons at Work. And the Justices in Sessions shall appoint a Governor for the said House who hath Power to set Rogues and idle People at Work, to punish them with moderate Whipping, to fetter them if they are unruly.* [See West. 2. ch. 11.] *They are to have no other Allowance than what they shall deserve by their Labour. And for this Trouble, the Justices shall at Sessions appoint the Governor a yearly Sum, to be paid quarterly before-hand by the Treasurers of the County; the Governor giving security for his Continuance in the said Office. And if the Governor shall not every Quarter-Sessions yield to the Justices, a true Account of all such Persons as shall be committed to his Custody, or if he suffer them to escape, the Justices may fine him.*

² Inst. 728, &c.

And by 17 G. 2. ch. 5. *On Presentment of the Grand Jury the Justices in Sessions have Power to build or enlarge Houses of Correction, or to buy or hire Houses for that Purpose; and the Justices in Sessions are to take care that Houses of Correction be properly fitted up and supplied with Furniture and Materials for Keeping, Employing and Correcting all Persons sent thither; and shall make Orders for the better Government of such Houses, and Employing and Punishing the Persons therein; and two Justices shall visit the same twice a Year, and report the State thereof to the Sessions. And if the Governors do not set to work or punish Persons committed, according to the Directions of the Warrant, or otherwise misbehave themselves, the Justices may fine or remove them; and upon Removal, if they do not quit Possession within ten Days after*
Notice

Notice from the Clerk of the Peace, two Justices may by Warrant direct the Sheriff to remove them, and clear the Possession. See also 14 G. 2. ch. 33. and 15 G. 2. ch. 24.

By 5 Ann. ch. 6. The Keeper of a House of Correction or Workhouse neglecting to give due Correction to any Person convict of Theft or Larceny, and committed thither, any Judge of Assize or Gaol Delivery, upon Proof, may remove the Keeper from his Office.

Tho' one have lawful Means to live by, yet if he is an *idle or disorderly* Person, (for those are the Words in the Disjunctive in one Part of the Statute of *Ja. 1*) the Justices of the Peace may safely commit him to the House of Correction, by Virtue of the Statute: *2y.* A general and large Power without Exception of any Person.

These Persons following may by Statutes be sent to the House of Correction, *viz.* An Alehouse-keeper selling Ale without Licence after a former Conviction, sturdy Beggars, Carters in London riding upon their Carts, Corn-spoilers, Destroyers of the Game for want of Distress, Hedge-breakers, idle or disorderly Persons, Labourers under thirty Years of Age refusing to work, Mother of a Bastard-Child, Imbezillers of Naval Stores under twenty Shillings, Robbers of Orchards, Parents of poor Children enticing them from their Masters, poor Children refusing to be Apprentices, poor Persons refusing to wear a Badge, Persons burnt in the Hand for Larceny, Persons running away, or threatening to run away and leave their Families upon the Parish, Players of Interludes [See 10 G. 2. ch. 28.] Seamen Quarreling and Fighting in his Majesty's Yards, upon Non-payment of their Fines, Servants running away, common Trespassers, Vagabonds and those whose Place of Birth or last Dwelling for a Year cannot be known, or who refuse to tell the Place of their Settlement, Spoilers of Trees and Wood-cutters, &c. But if the Way of Conviction is not appointed by the Statute in any of these Cases, then the Justices in Sessions only have Power to send such Offenders to the House of Correction. In the mean Time, one Justice may require Sureties for their Appearance at the Sessions.

CHAP. VIII.

Of Corporations or Bodies Politick.

IN Treating of Corporations or Bodies Politick, these Questions may arise, (*viz.*) What is a Corporation or Body Politick? How many Kinds of them? How are they made? What Things are essential to them? What is the Power of a Corporation? How are they dissolved?

1. What is a Corporation or Body Politick? A Corporation is a Person in a Political Capacity created by the Law, and is a Body Politick framed by Policy or Fiction of Law to endure in perpetual Succession with Capacity to take and grant, to sue and to be sued. He who gives the first Possessions is the Founder of it, tho' they

Of Corporations or Bodies Politick.

10 Rep. 33.
2 Inst. 68, 724.
1 R. Ab. 514.

they are but of small Value. So that a common Person may be Founder, tho' the King shall afterwards endow it with great Possessions. It differs from a Franchise or Liberty, because they are Estates of Inheritance, and may be granted over from one to another.

^a 10 Rep. 29.
¹ Inst. 250. a.

2. How many Kinds of them? Corporations are either ^a *Sole* or *Aggregate*. *Sole*, or in one single Person; as the King, a Bishop, a Dean of some Chapters, an Archdeacon, a Prebendary, Parson, Vicar, the Chamberlain of *London*, Heads of some Hospitals, *Aggregate* of many Persons together (in the *Civil Law* called *Universities* or *Colleges*); as Mayor and Commonalty, Dean and Chapter, Master and Fellows of a College, Master and Brethren of an Hospital, ^b and there, all Persons may be capable, or one Person only. The Bodies natural of such a Corporation may be seen; yet the Body Politick or Corporate it self cannot be seen, nor do any Act but by Attorney. A City or Borough may be incorporated, or Part of the City or Borough; as the Freemen of the City, or Burgeses of the Borough, or Men of such a Trade in the City, or Borough. ^c Hence there may be many Corporations in one City or Borough; and one Corporation may be made out of another Corporation. Lastly, There may be a Corporation without a ^d Head. ^e But where there is a Head, and he ^e dies, nothing can be done during the Vacancy.

^b 1 Inst. 2. a.
66. b.

^c 10 Rep. 31.

^d 10 Rep. 30.

^e 1 Inst. 263. b.
264. a.

Every Corporation also is either *Spiritual*, *Temporal*, or *Mix'd*. *Spiritual*; as Bishops, Deans of some Chapters, Dean and Chapter, Archdeacons, Prebendaries, Parsons, Vicars ^f; which in the Manner of their Constitution may be either Elective, Presentative, or Donative. *Temporal* or *Lay*; as Mayor and Commonalty, Bailiff and Burgeses. *Mix'd*, or consisting both of *Spiritual* and *Temporal* Persons; as many Colleges and Hospitals.

^f 3 Rep. 73.
1 Inst. 250. a.

3. How are they made? A Corporation or Body Politick may commence or ^g be made by *Common Law*, By the *King's Charter* or Letters Patent, By *Act of Parliament*, By *Prescription*.

^g 10 Rep. 29.
1 Inst. 250. a.

1. By *Common Law*; as the King, the Parliament, Bishops, some Deans, Archdeacons, Prebendaries, Parsons, Vicars, Church-wardens to some Purposes. 2. By the *King's Charter*, or Letters Patent, or by the King's Authority communicated to others. All such Charters must have a favourable Interpretation, and shall be taken strongly against the King to advance the Work intended. 3. By Authority of *Parliament*; so the College of Physicians ^h in *London* was made a Corporation.

^h Bonham's
Cases,
8 Rep.

By 39 El. ch. 5. Any Person seised of an Estate in Fee-simple may erect an Hospital or House of Correction, and the same shall be incorporated, and the Founder may appoint Visitors.

ⁱ 2 Inst. 720.

By 6 Geo. 1. ch. 23. All Security for Transportation of Offenders shall be by Bond in the Name of the Clerk of the Peace, who shall prosecute the same in his own Name; to which Purpose he shall be deemed a Body Corporate.

4. By *Prescription*; as that which hath been and continued a Corporation Time out of Mind. Tho' the Members cannot shew any Charter for it, it is supposed there was a Charter at first. ^j *London* is a Corporation by *Prescription*; and the Chamberlain of *London* to some Purposes. A Corporation by *Prescription* may be confirmed by

^j 2 Inst. 330.
1 Sid. 291.

1 R. Ab. 512.
1 Ld. Ray.

32.

by the King's Letters Patent, and yet be a Corporation by Prescription still.

4. What Things are *Essential* to them? Several Things are *Essential* to the making of a Corporation. I speak chiefly of Aggregate Corporations. There must be, 1. Lawful *Authority*. 2. Proper *Persons* to be incorporated, (*viz.*) Persons natural, or Bodies already incorporate. 3. A *Name* by which they are incorporated. A Misnomer in any Substantial Part is dangerous in Deeds or Pleading. 4. If the Name of a Corporation is changed, yet it shall have all the Privileges that it had before. 5. A *Place*, for without a Place no Incorporation can be made. 6. *Words* sufficient in Law to make a Corporation. But there is no Necessity of any certain Form of Words.

When a Corporation is duly created, all other *Incidents* are tacitly annexed to it; as to purchase and grant; to buy and to sell; to sue and to be sued; to have a Seal; that the Survivors shall be the Corporation; that if the Revenues increase, the same shall be employed to increase the Revenue or Number of the Poor; that if erected for private Charity, and not for publick Government, they shall be visited by the Founder and his Heirs, if no Visitor is appointed by the Founder; that they make Ordinances and By-Laws; that they shall be exempted from the Ordinary; (if it is a Lay Corporation he cannot visit it: But the Clause of Exemption is necessary if it is a spiritual Corporation;) to purchase in *Mortmain*; for without Revenues, the Members of it cannot live. A License to purchase is not of the Essence of a Corporation, for it is perfect without it.

If these Things are expressly granted in Charters, they are but Declaratory or Explanatory, and might have been left out; tho' it is the safest Way to grant them by express Words.

There are usually granted in Charters of Corporations divers Franchises; as Felons Goods, Waifs, Estrays, Treasure Trove, Deodands, Courts and Cognizance of Pleas, Return of Writs, Fairs, Markets, Exemptions from Serving in Offices, or on any Jury, Exemptions from Payment of Toll, the Assize of Bread and Beer, a Pillory and Tumbrel, the Office of a Justice of Peace, Coroner, Clerk of the Market; which are not incident to a Corporation; and therefore must be granted by special and express Words.

5. As to the *Power* of a Sole or Aggregate Corporation.

A *Sole* Corporation regularly cannot take in *Succession* Goods and Chattels, either in *Action*, as Bonds, or Recognizances; or in *Possession*, as Leases for Years; for the Executors or Administrators shall have them. A Lease for a hundred Years made to a Parson and his *Successors*, and a Release made to him and his *Successors*, was adjudged only an Estate for Life. And this is true, except in the Case of the ancient Jewels of the Crown, which go to the Successor; and of the Chamberlain of London, whose Successor by *Custom* may have Execution of a Bond or Recognizance, acknowledged to his Predecessor for Orphanage Money; and perhaps the Ornaments of a Chapel of the Predecessor belong to the succeeding Bishop.

A Sole Corporation may take a Fee-simple in Succession, but not without the Word *Successors*.

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¹ See B. 2.

ch. 1. post.

See of Frank-

almoign, B. 2.

An ch. 2. post.

¹⁰ Rep. 29.

⁵⁷, 122, &c.

¹¹ Rep. 18.

³ Rep. 73.

⁴ Rep. 88.

¹⁰ Rep. 124.

¹²⁵.

³ Lev. 238.

¹ R. Ab. 512.

¹⁰ Rep. 29.

³², 123.

¹⁰ Rep. 30.

¹ Roll. Abr.

⁵¹³.

¹⁰ Rep. 30.

³¹, &c.

⁸ Rep. 131.

¹ Ld. Ray. 7.

is &c.

An *Aggregate* Corporation may take Goods and Chattels in *Action* or *Possession*, and they shall go in *Succession*. They may also have a *Fee-simple* without the Word *Successors*; for the Body never dies.

They cannot sue or appear in Person, but by Attorney. They cannot sue without their Head, or in Time of Vacation of the Headship. They cannot commit ^a *Treason*; or be outlawed or excommunicated; or be Executors or Administrators, ^b *24.* for they cannot take an Oath. They cannot be Jointenants to take by Survivorship; but they may be Tenants in common. They cannot be seised to the Use of another. The Members cannot regularly be Witnesses ^c for the Corporation, especially if they testify for any considerable Advantage or Profit of the Body. ^d For every Member hath a Right and Freehold for his Life as to his Freedom, and all the Members together have an Inheritance in the Lands, and an Interest in the Goods.

^a 10 Rep. 32.
^b Rep. 127.
^c Inst. 134. a.
^d 1 Roll. Abr. 915; Contra.

^e See B. 4. ch. 4. post.
^f 11 Rep. 98.

See P. 30. ante; and of Leases post. B. 2. ch. 3.
^g Lit. 443.
^h Inst. 264. a.

Grants of a Corporation Sole and Aggregate, must be by Deed under their Seal; tho' they are good without Delivery. But a Grant made to or by a Body Politic during the Vacation of the Headship, is void; as they cannot sue till they have a Head. Yet if a Lease for Life is made with a Remainder to the Mayor and Commonalty of *B.* there being no Mayor at the Time, it will be Good, if a Mayor is chosen during the particular Estate.

ⁱ 2 Ld. Ray. 778.

A Corporation Aggregate cannot make a Grant to the Head of the Corporation; thus, a Dean and Chapter cannot make a Grant to the Dean, nor a Mayor and Commonalty to the Mayor; but they may make Grants to one of the Chapter, or of the Commonalty, respectively.

^j Ventr. 47.
^k 48.
^l Mod. 18.
^m 3 Lev. 107.

They may retain a necessary Servant without Seal. But generally all Contracts and Grants of Offices by them ought to be under Seal by Deed.

I said before that an Aggregate Corporation might make *By-Laws*; it being impossible for the general Law to provide fit Discipline for every particular Society. But some Powers concerning *By-Laws* are often inserted in Charters that are void. As to make *By-Laws* upon pain of ⁿ *Imprisonment* of the Offender. For such an Ordinance is against *Magna Charta*, ch. 29. A Reasonable Penalty might have been imposed and levied by Distress, or recovered by Action of Debt.

^o 5 Rep. 64.
^p 2 Inst. 54.

Thus a *By-Law* to *Forfeit* Goods upon Disobedience is not valid; for no Forfeiture can grow by Charter or Letters Patent, tho' ^q it may be good by *Custom*. A *By-Law* to restrain ^r *Trade* is void in a Charter, as to hinder Apprentices to set up their Trades; or to have the sole making of Cards, &c. for it is against the Liberty and Freedom of the Subject. But Prescription or *Custom* to restrain a Man to exercise his Trade in a particular Place is good, tho' void in a Charter. I say it is good by Custom, or it may be made good by Act of Parliament. For all *By-Laws* and Ordinances contrary or repugnant to the Laws and Statutes of the Kingdom are void and of no Effect; and the King's Charter alone cannot uphold them. Corporations may make *By-Laws* or Ordinances without Custom, or the King's Charter, where it is for the Good of the Commonwealth; as to repair the Church or Highway, &c. but not where it is for their own ^s private Profit. And if they make *By-Laws* only for the

^t 8 Rep. 125.
^u 127.
^v 2 Inst. 47.
^w Hob. 210.
^x 2 Ventr. 182.
^y 183.
^z 11 Rep. 55.
^{aa} 85.
^{ab} See P. 50. ante.

^{ac} 1 Ld. Ray. 496.

^{ad} 2 Inst. 47.
^{ae} 1 Roll. Abr. 364.

the good Government and Order of the Body incorporate, the King's Charter will support them in it; and those By-Laws shall oblige even Strangers, and subject them to Penalties, to be levied by Distress, or recovered by Action of Debt.

But those Laws must be subject to the general Law of the Kingdom, and subordinate to it, if they are not made good by Act of Parliament, as the Customs of London are.

By 19 H. 7. ch. 7. No Master, Wardens or Fellowship, shall make any By-Laws in Diminution of the Prerogative of the King or others, or against the common Profit of the People; but the same By-Laws shall be examined and approved by the Chancellor, Treasurer and Chief Justices of either Bench, or three of them, or by both the Justices of Assize, on Penalty of forty Pounds.

But the Approbation of the Chancellor, &c. doth not strengthen any By-Laws, but leaveth them to be affirmed as good, or disaffirmed as unlawful; and only saves the Makers of them from the Penalty of forty Pounds, if they are not good.

An Aggregate Corporation may have Power by Charter or Prescription to disfranchise or discharge a Member of his Freedom, if he doth any Act to the Prejudice of the Body, and against his Oath. But if they have no such Authority, he ought to be convicted by the Course of Law, before he can be disfranchised, or ousted of his Freedom. [This hath been held not to be Law; and it hath been determined that the Power of Amotion is necessarily incident to a Corporation; and that there are three Sorts of Offences for which a Member may be discharged: 1. Such as don't particularly relate to the Corporation, but make him unworthy of any Office of Trust; and of such an Offence he must be previously convicted at Law, whether the Corporation have an express Power or not, for this is the only Mode of Trial. 2. Such as are merely and solely against his Oath of Office, and relate immediately to the Corporation: And 3. Mixed Offences, consisting of an Injury to the Corporation, and a Crime against the Publick, such as Defacing the Records of the Corporation, and the like.] If one is wrongfully removed or unduly disfranchised, his Remedy is by Mandamus, in the King's Bench. [See 9 Ann. ch. 20. Concerning the Writ of Mandamus.]

6. How are they dissolved? An Aggregate Corporation may be dissolved, 1. By the Death of all the Members. 2. By Forfeiture of their Charter, as by Usurpation, Misuser, &c. upon the Writ Quo Warranto. [But see 7 Ri. 2. (not printed) 2 W. & M. Seff. 1. ch. 8. Concerning the Charter of the City of London, and 9 Ann. ch. 20.] 3. By Surrender. 4. By Act of Parliament. A Sole Corporation can be dissolved only by Surrender or Act of Parliament.

Upon Dissolution of a Corporate Body, their Lands shall not escheat, but revert to the Donor. For the Law annexes such Condition in every Grant to a Body Politick.

But their Grants stand good, which were made while they were a Corporation. If they bind themselves in a Bond, and are afterwards dissolved, they shall not be charged in their natural Capacities.

By 33 H. 8. ch. 27. Every Lease, Election or Grant of any Hospital, College or other Corporation, shall be good by the Grant of the Governor,

Governor, with the Assent of the greater Part; all private Statutes to the contrary notwithstanding.

By 31 El. ch. 6. If any Elector into any Church, College, School, Hospital, Hall, or other Society shall take any Reward directly or indirectly for his Vote, his Place shall be void. And if any Person in such Societies take any Reward directly or indirectly for resigning his Place, he shall forfeit the double Value of such Reward, and the Party giving it shall be incapable of such Place. [See 3 Ed. 1. ch. 5.]

a 2 Inst. 169.

2 Inst. 710.

By 43 El. ch. 4. The Misemployment of Lands and Goods given to Hospitals and certain publick and charitable Uses, are to be redressed by awarding Commissions to enquire of all Gifts and Misemployments thereof, with Power to make Orders and Decrees accordingly. This Act not to extend to Colleges and Halls, &c. or to any Cathedral or Collegiate Church, nor to any City or Town Corporate, or where there are special Visitors appointed.

[See 13 Car. 2. St. 2. ch. 1. An Act for the well Governing and regulating Corporations; and 5 Geo. 1. ch. 6. An Act for Quieting and Establishing Corporations; which hath altered 13 Car. 2. and see of Offices, B. 2. ch. 2.]

[See 6 Ann. ch. 21. For avoiding Doubts touching the Statutes of some Cathedral and Collegiate Churches. 10 Ann. ch. 11. Concerning the Rectors of the fifty new Churches in London, Westminster, and the Suburbs thereof. 1 Geo. 1. ch. 10. Concerning the Augmentation of the Maintenance of the poor Clergy, where the Ministers nominated shall be esteemed Bodies Politick.]

Thus far of Persons in their natural and civil Capacities, the first Object of the Laws of England.

The End of the First Book.

BOOK

BOOK II.

Of ESTATES.

CHAP. I.

Of *Estates in Lands, Tenements and Hereditaments.*

And therein of the *First Division of Estates in Lands, &c. (viz.) Into Fee-simple, Fee-Tail, In Tail after Possibility of Issue extinct, By Curtesy, In Dower, For Term of Life, For Term of Years, At Will, At Sufferance, By Copy of Court-Roll, In Ancient Demesne, Estates upon Condition, By Statute Merchant, By Statute-Staple, By Elegit, Estates in Lands devised to Executors, Estates in Coparcenary, Jointenancy, Tenancy in Common, In Remainder, In Reversion.*

ESTATES are the *second Object of our Laws*; and in common Signification are all Manner of Property in *Lands and Tenements, Goods and Chattels*. For all Estates may be reduced to *Inheritance, Freehold, or Chattels*. In treating therefore of Estates, I shall speak of Estates in *Lands, Tenements, or Hereditaments* in the first four Chapters of this Book; and then in the three last Chapters, of Estates in *Goods and Chattels* Personal.

While I speak of Estates in *Lands, Tenements, or Hereditaments*, I intend to shew, 1. What is an *Estate in Lands, Tenements, or Hereditaments*. 2. How Estates in *Lands, &c.* are divided. 3. How *Lands, Tenements, and Hereditaments*, may be *purchased or conveyed* from one to another. 4. How Estates in *Lands, &c.* may be *lost*.

I. The Words *Estate, Right, Title, and Interest*, are to be explained. Of an Estate
in Lands, &c.

* An *Estate in Lands, Tenements, or Hereditaments*, signifies such *Inheritance, Freehold, or Term for Years*, as any Man hath in the said *Lands, &c.* For by Grant of his *Estate*, all shall pass that he can grant. 1 Inst. 265. a.
345. a. & b.
347. b. 369. a.
8 Rep. 153.

A *Right* in Writs and Pleadings is properly in one, when he is ousted of Possession of his Estate by *Disseisin or Wrong*, and hath Remedy by *Entry or Action*. But *Right* doth also include an

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Estate in *Esse* in Conveyances. Therefore if Tenant in Fee-simple makes a Lease for Years, and releases all his Right in the Land to the Lessee and his Heirs, the whole Estate in Fee-simple passes.

See of Remitter, B. 4. ch. 3. post.

A Title is properly when a Man hath a lawful Cause of Entry into Lands whereof another is seised, for which he can have no Action; as a Title by Condition, Forfeiture, Act of Parliament. But this Word Title includeth a Right also. For every Right is a Title, though every Title is not such a Right for which an Action lieth. It signifies also the * Means whereby a Man cometh to Lands, as by Feoffment, Fine, last Will and Testament, &c.

Interest (*Interesse*) is vulgarly taken for a Chattel real, as a Lease for Years, and more particularly for a future Term; in which Case it is said in pleading that one is possessed *De Interesse Termini*. But in legal Understanding too, an *Interest* extendeth to *Estates*, *Rights* and *Titles* that a Man hath of, in, to, or out of Lands; so that by Grant of his whole *Interest* in such Lands, Reversions as well as Possessions in Fee-simple shall pass.

Let us see now what are *Lands*, *Tenements*, or *Hereditaments*.

* 1 Inst. 4. a. & b. 19. b. 11 Rep. 82.

* *Lands* signify not only Gardens, Arable Grounds, Meadows, Pastures, Moors, Waters, Rivers, Marshes, Furzes, Heath; but also Messuages, (*i. e.* Houses) Tosts (Places where Houses once stood,) Mills, Castles, &c. for in Conveying of the Land, the Buildings pass with it. Land built upon is more worthy than other Land. But as to Land only, the Common Law gives ^b arable Land the Pre-eminence before all other Ground whatsoever. * Land hath in Law an Extent upwards; but one may build over my Land by Agreement with me. A Grant only of the *Herbage* of Land, or of the *Vesture*, (*i. e.* of the Corn, &c.) is a Grant only of a particular Right, by which the Soil doth not pass. But by a Grant of the *Profits* of the Land, the whole Land itself doth pass; for what is the Land but the Profits thereof? So if one grants all his *Woods*, the Land shall pass. *Water* is not demandable by that Name; but so many Acres of Land covered with Water. * An *Hide* or Plough-Land, a Yard-Land, or an Oxcgang of Land do not contain any certain Number of Acres. But a Plough-land, in Respect of the Repairing of the Highways is settled at fifty Pounds a Year by 7 & 8 W. 3. ch. 29.

b 4 Rep. 39. 1 Inst. 85. b. c 1 Inst. 4. a. & b. 5 Rep. 11. 11 Rep. 46. &c. 2 Cro. 487. Contra, 1 Vent. 393.

* 1 Inst. 69. a. 2 Inst. 596. 9 Rep. 124.

See P. 105. ante.

* 1 Inst. 6. a. 19. b. 20. a. b. 154. a. Comyns, 265.

The Word * *Tenement* comprehends not only a House or Homestead, but all corporeal Inheritances which are *holden* of another; and all Inheritances issuing out of those Inheritances, or exercisable within the same, tho' they lie not in Tenure; as Rents or Commons, granted out of Land, or Uses, Offices, Dignities which concern Lands or certain Places.

* 1 Inst. 6. a. 16. a. & b. 3 Inst. 19, 126.

* *Hereditament*, is the largest Word of all, and signifies whatsoever may be inherited, or may come to an Heir, be it corporeal or incorporeal, real, personal or mixed; and tho' it is not holden, or lieth not in Tenure. The Word *Inheritance* is not only intended where one hath Lands or Tenements by *Descent*, but of every

* Titulus est justa causa possidendi quod nostrum est. 1 Inst. 345. b.

* Appellatione fundi omnis ædificium et omnis ager continetur. 4 Rep. 87. 10 Rep. 33.

* Cujus est solum, ejus est usq; ad cælum. 1 Inst. 4. a. 9 Rep. 54.

Fee-simple or Tail which one hath by *Purchase*; because his Heirs may inherit it. Also one may have an Inheritance by *Creation*; See P. 42. ante. as when the King creates one a Peer by Letters Patent, or by Writ.

If one holdeth in Fee-simple, Fee-tail, or for Term of his Life, he hath *Liberum Tenementum*, or a *Freehold*. It cannot commence *in futuro*, but must take Effect presently either in Possession, Reversion, or Remainder. Other Estates are not Freeholds. One is said to be *seised* of a Freehold, but to be *possessed* of other Estates; as of Leases for Years, Copyhold Lands, Goods and Chattels.

* A Freehold may be in *Deed* or in *Law*. A Freehold in *Deed* is actual Seisin of Lands or Tenements in Fee-simple, Fee-tail, or for Life. A Freehold in *Law* is a Right to such Lands or Tenements before Entry or Seisin. So there is a *Seisin* in Deed, and a *Seisin* in Law. ^a A Seisin in *Deed* is when a corporal Possession is taken. ^b A Seisin in *Law* is where Lands descend, and one hath not actually entered on them, or when something is done which amounteth in Law to an actual Seisin, as an Inrollment, Seisin of Rent for all other Services. ^c Lit. 448. ^d 1 Inst. 31. a. ^e 1 Inst. 266. b. ^f 4 Rep. 8, 9.

Of these Estates some may be *Appendant* or *Appurtenant*. ^a *Appendant* is an Inheritance belonging to another Inheritance, which is superior or more worthy. Appendants are ever by Prescription, and are as the Accessory to the principal Thing: In the Civil Law it is called *Adjunctum*. *Appurtenant* is almost of the same Nature, except that Appurtenants may be created in some Cases at this Day. They pass by Virtue of the Words, *Cum pertinentiis, with the Appurtenances thereto belonging*; as Advowsons, Commons with a Manor-House or Lands, and as Lands with an Office. ^b Ap- 4 1 Inst. 121, b. 122. a.

But by these Words *Cum Pertinentiis* neither Freehold nor Copyhold Lands shall pass with a House or Messuage; but only the Orchard, Garden and Yard. When one hath a House or Mill to which Things are Appendant or Appurtenant, and it is burnt down or blown down by the Act of God, or destroyed by the Default of the Owner; if the Owner builds it in the same Place and Manner as before, he shall have the ancient Appendants and Appurtenances. ^c 2 Cro. 526. ^d 4 Rep. 86, &c.

* Note, That Things incorporeal must be *appendant* to Things corporeal, and corporeal to incorporeal. And the principal Thing must be of perpetual Continuance to carry any Thing that is properly *appendant* or *appurtenant*. ^a 4 Rep. 37. ^b 1 Inst. 121. b. ^c 122. a.

* An *Incident* is a Thing dependent on another, either necessarily and inseparably, as a Court-Baron is so incident to a real Manor, that it cannot be severed by Grant; or separably, as Rents incident to Reversions. ^a 1 Inst. 93. a. ^b 151. b.

So that now we see what is an *Estate* in *Lands, Tenements, and Hereditaments*, and a *Freehold*; and what are Estates *Appendant, Appurtenant* and *Incident*.

II. Estates in Lands, &c. are divided, 1. Into *Fee-simple, Fee-tail, &c.* 2. Into Estates *corporeal* and *Incorporeal*. Of these two Divisions in this and the following Chapter.

The first Division of Estates in Lands, &c.

The first Division of Estates is into *Fee-simple*; *Fee-tail*; in *Tail after Possibility of Issue extinct*; Estates by *Curtesy*; in *Dower*; for *Term of Life*; for *Term of Years*; at *Will*; at *Sufferance*; by *Custom or Copy of Court-Roll*; in *Ancient Demesne*; Estates upon *Condition*; by *Statute-Merchant*; by *Statute-Staple*; by *Elegit*; Estates in Lands devised to *Executors*; Estates by *Coparcenary*, *Tenancy in Common*, in *Remainder*, in *Reversion*.

Of an Estate in Fee-simple. Lit. 11.

* 1 Inst. 1. b.

b Inst. 17. a. & b.

I. An Estate in *Fee-simple* (*Feodum simplex*) is where one hath Lands or Tenements to hold to him and his *Heirs*, and he cannot have a greater Estate. To have a *Fee* is to have an Inheritance; to have *Fee-simple* implies that it is without Limitation to what *Heirs*; but to *Heirs* generally. In this Sense the King may be said to be seised in *Fee*. *Fee* is taken also for the Inheritance that is *holden* of another by some Service; but that belongeth only to a Subject. If he is seised of Lands or Tenements which may be manually occupied or received, he is seised in his *Demefne*, (or *Domaine, de Domo*) as of *Fee* (*viz.*) For the Service of his *House*. But of Things which do not lie in such manual Occupation, (as an Advowson of a Church,) he is seised as of *Fee*, not in his *Demefne* as of *Fee*.

* Lit. 647, 648.

* Lit. 1. See P. 66. ante.

* 1 Inst. 9. b. 10. a. Show. 348.

* See P. 42. ante.

* 1 Inst. 8. b. 9. a.

Contra, 1 Roll. Abr. 832.

* 2 Str. 1172.

All other Estates and Interests are derived out of a *Fee-simple*; and therefore there must be a *Fee-simple* at last in some Body; otherwise the Lands are in *Abeyance*, (*i. e.*) In Consideration and Custody of the Law only.

These Words *his Heirs*, make the Estate of Inheritance. To hold to him for ever, or to him and his *Assigns* for ever, makes but an Estate for Life for Want of these Words *his Heirs*: But the Word *Heirs* is not necessary in some Cases; * as in *Wills*, an Estate of Inheritance may pass without these Words *his Heirs*; for it is good if it is given to one and his *Assigns* for ever, or by any other Words that express the Testator's Intent to pass a *Fee*. In a *Will*, to his *Blood* makes a *Fee-simple*; to his *Seed* an Estate in *Tail*. If in a *Will* one gives in these Words *All the rest of my Estate*, they carry a *Fee-simple*, if the Devisor had a *Fee-simple* therein: A Devise to one and his Successors is a *Fee-simple*. The Word *Heirs* also is not necessary in a *Fine Sur Conusans de droit Come ceo*, &c. in *Releases* that work by Extinguishment, in a *Recovery*, nor to a Creation of *Nobility* by *Writ*, nor if Lands are given to the King by Deed *inroll'd*, nor in Feoffments that take Effect by * *Reference*, (as if *A.* enfeoffs *B.* and his *Heirs*, and then *B.* enfeoffs *A.* as fully as *A.* enfeoffed him) nor in Gifts in *Frank-marriage*, nor in a Grant of a Rent to a Parcener to make *Partition Equal*, nor in a Grant of an Assart by the King at a Justice-Seat by the *Forest-Law*.

A Grant to one and his *Heir* in the singular Number [*2y.*] to one or his *Heirs*, to *two* and *Heirs* omitting *bis*, is but an Estate for Life. But to *one* and *Heirs*, (omitting *bis*) is good; for there is no Incertainty. A Gift to one and his *Children* and their *Heirs*: The Father and all his Children in Being at the Time of the Gift, do take a *Fee-simple* jointly; but if he had no Child at the Time

* Verba relata hoc maxime operantur per referentiam, ut inest videntur.
1 Inst. 9. b.

of the Feoffment, a Child born after shall not take. A Gift of Lands to one and his Heirs Male is a Fee-simple, for Want of the Word *Body*; but in a Will it gives an Estate-tail only.

The Definition of an Estate in Fee-simple is to be understood of Purchases by *Natural Persons*, or by *Bodies Politick* or Corporate. In a Feoffment to a *Sole Corporation* in *Frankalmoin* or Free Alms, See P. 113: a Fee-simple doth pass without the Word *Successors*, tho' it cannot ^{ante.} in other Cases. So that a Fee-simple is an Estate to *one and his Heirs*, or in Case of a *Sole Corporation* (as Bishop or Parson) to him and his *Successors*.

But *Note*, that in all Feoffments and Grants (generally speaking) Exchanges, Releases and Confirmations enlarging Estates, Warranties, Bargains and Sales by Deed indented and inrolled, the Word *Heirs* or *Successors* is necessary.

^a If the King purchaseth Lands to *him and his Heirs*, he is seised ^{a 1 Inst. 16. a.} thereof *Jure Coronæ*; and so when he purchases Lands to him, his Heirs and Successors. ^{See P. 21. ante.}

^b A Fee-simple, or rather a *Fee* or an Inheritance, is *divided* ^{b 1 Inst. 1. b.} into *simple* or *absolute*, *conditional*, and *qualified*. We have hitherto ^{18. a. 19. a.} been speaking of a *Fee-simple* or *Fee absolute*. *Conditional*, is that ^{10 Rep. 97.} which is defeated when the *Condition* is broke or not performed; but till then it is as it were absolute. *Qualified* or *Base* is that which may be defeated by a *Limitation*, as when a Grant is made to *A.* and his Heirs Tenants of the Manor of *Dale*; who have an absolute Estate only so long as they continue Tenants of that Manor. So a Parson has a Fee-simple qualified to many Purposes, as to ^{c 1 Inst. 67. a.} have an Action of Waste; tho' in other Cases he has in Effect but ^{300. b. 301. a.} an Estate for Life; because the entire Fee or Right is not in him. But a Fee conditional or qualified is not in Strictness Fee-simple.

^d Again a Fee-simple (or rather *Fee*) may be divided into *Real*, *Personal*, and *Mix'd*. *Real*, as the common Estates are. *Personal*, as ^{d 1 Inst. 1. b.} when an Annuity is granted to one and his Heirs. *Mix'd*, as when an Earl is created of such a County, which is a Dignity Personal relating to *Lands*. ^{2. a.}

Lastly, ^e A Fee-simple in Lands may be either Certain and *Im-* ^{e 1 Inst. 4. a.} *moveable*, or Incertain and *Moveable*, (*i. e.*) at several Times it may ^{343. b.} be moveable, sometimes in one *Person*, sometimes in another; or sometimes in one *Place*, and sometimes in another.

Note, ^f That in Pleading, Estates in Fee-simple may be gene- ^{f 1 Inst. 303. b.} rally alledged; but the Commencement of Estates-tail and other particular Estates regularly must be shew'd.

After this *Description* and *Division* of Fee-simple, it must be allowed, that tho' it is the most ample Estate of Inheritance, it is subject to many Incumbrances. Therefore Care must be taken in the Purchase of a Fee-simple, that it be not incumbered with Judgments, Statutes Merchant or of the Staple, Recognizances, Mortgages, Wills, Feoffments, Fines, Bargains and Sales, Amerciaments, Dowers, Jointures, &c.

II. Of *Fee-tail*, 1. How *defined*. 2. How *divided*. 3. What ^{Of an Estate} ^{in Fee tail.} Estates may be entailed.

1. An Estate in ^g *Fee-tail* (from *tailler* to cut or limit) is, That ^{g Lit. 18.} Inheritance whereof one is seised to him and the *Heirs* of his *Body*

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begotten or to be begotten. He that giveth Lands in Fee-tail is the *Donor*, and he to whom the Gift is made is the *Donee*.

^a 1 Inst. 20. a. In Gifts in Tail, these Words ^a *the Heirs*, or *his Heirs* are as necessary as in a Fee-simple: And this Word ^b *Body* (or his *Flesh* or ^c *Heirs begotten by him*, or other Words that amount to it) make the Tail; and may be restrained to Males or Females of the *Body*.
^d Lit. 31. But a Gift to one and his Heirs ^e Male or Heirs Female is a Fee-simple; the Law rejecting the Words *Males* or *Females*, because it is not limited to what *Body*. It is good without the Word *Body* in
^f 1 Inst. 13. a. a ^d Devise or last Will to make an Entail. But if the King grants to Heirs Male, his Grant is void; for the King is deceived. ^e *Begotten* shall be necessarily intended by the *Donee*. Hence a Corporation cannot be seised in Tail.

Lands given by one Man to another with a Wife (which is ^f Lit. 17. Daughter or Cousin to the Donor or Giver) in ^f *Frank Marriage*, (freely in Marriage) amounts by Implication to a Gift to the Husband and Wife, and to the Heirs of their two Bodies. So that in Frank Marriage, a Fee-tail may be created without the Words *Heirs* or *Body*. But these Gifts in Frank Marriage are out of Use.

^g 1 Inst. 20. b. If one gives Lands to one and his ^g *Seed*, or to his *Issue* or *Children* of his Body, he hath but an Estate for Life; for there wants the Words *his Heirs* to convey the Inheritance. And tho' the Intent of the Donor may be to convey the Inheritance by the Words, *Seed*, *Issue*, *Children*, yet this is not sufficient; because his Intent does not agree with the Rules of Law. But such Words are good enough to convey the Inheritance in a *Will*; because Men usually defer making their Wills to their last Hours, when they have not Time to consult with learned Counsel, and therefore the Law makes greater Allowances to last Wills.

^h 1 Inst. 224. a. By the Common Law it is ^h incident to an Estate in Tail to be punishable of *Waste*; that the Wife of the Donee shall be *endowed*; ⁱ 10 Rep. 38, that the Husband of a Feme Donee shall be *Tenant* by the *Curtesy* ^j 39, 41. after Issue; that the Tenant in Tail may suffer a common *Recovery*; ^k 1 Inst. 223. b. that *collateral Warranty* with Affets, [See 4 Ann. ch. 16.] or *Lineal* with Affets may bar it; and therefore Conditions to restrain either of these shall be void.

Ca. temp. And the Chancery cannot restrain Tenant in Tail from committing any Kind of Waste. But Tenant in Tail after Possibility, will be restrained from committing Waste in Houses, or defacing a Seat.
^l Talb. 12, 16.
^m 2 Vern. 733.

ⁿ 1 Inst. 223. b. By Statute it is incident to an Estate-tail to make Leases according to 32 H. 8. ch. 28. and to levy a Fine by 4 H. 7. ch. 24. and 32 H. 8. ch. 36. to bar Issues. And none of these Incidents by Act of Parliament may be restrained by Condition.

^o See B. ante. Lastly by *Custom* it is incident to an Estate-tail in a Manor to grant Lands by Copy, at the Will of the Lord, according to the Custom of the Manor; which likewise cannot be restrained by Condition.

This is the Definition and Description of an Estate in Tail.

^p Lit. 14. 2. As to its *Divison*, a Fee-tail is either *General* or *Special*. ^q *General*, is where Lands and Tenements are given to a Man and the Heirs of his Body begotten; or to a Woman and the Heirs of her Body begotten. In this Case it is called a *general* Tail, because what-

whatever Woman the Man taketh to Wife, the Issue may inherit the Lands; and whatsoever Man the Woman taketh to Husband, the Issue by any Husband may inherit; or if she has divers Husbands, and hath Issue by every one, they may inherit one after another as Heir of her Body. * *Special*, is where Lands and Tenements are given to a Man and his Wife, and to the Heirs of their two Bodies begotten. In this Case, none shall inherit but those that are begotten by him on that particular Wife. Lit. 16.

If Lands and Tenements are given to a Man and his Wife, and to the Heirs of the Body of the Man, ^a the Husband hath an Estate in general Tail, and the Wife an Estate for Life; because the Word *Heirs* relates generally to the Body of the Husband. And if the Estate is made to the ^c Husband and Wife, and to the Heirs of the Body of the Wife by the Husband begotten, there the Wife hath an Estate in special Tail, and the Husband for Term of Life, because the Word *Heirs* relates to the Body of the Wife, and is confined to Heirs begotten by that particular Husband. But if Lands are given to the Husband and Wife, and to the Heirs of their two Bodies, both of them have an Estate in special Tail, as hath been said; because the Word *Heirs*, or the Inheritance, is not limited to one more than to the other. Therefore by observing to whom the Word *Heirs* relates, whether to both or one of them, you may see where the Inheritance is lodged. Lit. 26. Lit. 28.

These Estates of *general* and *special* Tail are only mentioned in the Statute of *West. 2. ch. 1.* But there are ^d other Estates-tail within the Equity of the said Statute. As if Lands are given to a Man and his Heirs, Male or Female, of his Body begotten, the Issue Male or Female shall only inherit according to the Limitation and the Will of the Donor. By Virtue of the ^e Statute the Daughter may be Heir by *Descent*, tho' there is a Son, where the Limitation is to *A.* and the Heirs Female of his Body. But in Case of a *Purchase*, or Limitation by Way of Remainder to the Heirs Female of the Body of *A.* the Estate will go to the Son, who is the right Heir in Law. Here there cannot be an Heir Female, where there is a Son. And there are many other Estates in Tail, by the Equity of the said Statute. Lit. 21, 22. Inst. 24. b. 164. a.

If Tenant in Tail *general* or *special* dieth without any Issue, the Donor or his Heirs may enter as in their Reversion. For in every Gift in Tail, the ^f Reversion of the Fee-simple is in the Donor. Lit. 18, 19.

3. All Lands of ^g *Inheritance*, and all Inheritances favouring of the Realty, may be *entailed*, as all Advantages and Profits whatsoever granted out of Lands, or which concern Lands or certain Places. Therefore Rents, Estovers, Commons, Uses, Offices, Dignities, which concern certain Lands or Places, may be entailed. Lit. 19. b. 20. a. 7 Rep. 33. 34.

If the Thing granted be merely *Personal*, or to be exercised with *Chattels*, it cannot be entailed. So a Grant of an *Annuity* or of a ^h *Lease* for *Years* to a Man and the Heirs of his Body is void, as to the Limitation to the Heirs of his Body; for a Chattel cannot be turned into an Inheritance. ⁱ Yet it is commonly assigned in Trust, that the Trustees should permit the Issue in Tail to receive the Profits, which is an Entail in Effect. ^j 10 Rep. 87. 4 Inst. 87. Ca. temp. Talbot 250. See § 18. post.

* But

^a Duke of Norfolk's Case, Fol. 27. ^b 1 Inst. 60. a. & b. Coke's Compl. Cop. § 47, 48, 53. 3 Rep. 8. Contra, 3 Cro. 42. 2 Saund. 422. 3 Lev. 327. ^c But tho', if a Lease for Years is limited in Tail, the Law allows not a *present* Remainder to be limited thereon, it will allow a future Estate arising upon a Contingency, which must (if ever) happen in a short Time. ^d Copyholds cannot be entailed by the Statute. Yet Custom co-operating with the Statute, will make an Estate-tail, if not Custom only. For the Custom might have been before the Statute. It is not sufficient Proof of such Custom, that Lands have been granted to many and the Heirs of their Bodies; for that may be a Fee Conditional as it was at Common Law. But if a Remainder hath been limited and enjoyed, or if the Issues in Tail have avoided the Alienation of the Ancestor, such are good Proofs of an Estate-tail. As Copyholds by Custom may be intail'd, they may by

like Custom be cut off by Surrender.
^e See of a Recovery, ch. 3. post. ^f A Fee-simple may be limited by Act of Parliament.

^g 4 Inst. 206. ^h Lit. 13. ⁱ 1 Inst. 19. a. 327. a. & b. ^j 2 Inst. 333. 334. All Inheritances were ^k Fee-simple at Common Law, before the Statute of *West. 2. ch. 1*. For if Lands were given to a Man and the Heirs of his Body, it was interpreted to be a Fee-simple presently by the Gift, *upon Condition that he had Issue*. And so if he had Issue, the Condition was supposed to be perform'd for three Purposes, (*viz.*) To *Alien* and disinherit the Issue, and by the Alienation to bar the Donor or his Heirs of all Possibility of the Reversion; To *Forfeit* for Treason or Felony; To *Charge* with Rent, Common, &c. and thereby to have bound the Issue. But,

^l 2 Inst. 333. &c. *By that Statute, the Intention of the Donor is to be observed; as that the Tenant in Tail must not alien, forfeit, or charge it longer than for his own Life. Fines, hereafter to be levied, to be void.*

But daily Experience shewed, that much Contention and Mischief had crept into the Law by entail'd Inheritances; ^m as Frauds to Farmers, Creditors, &c. Sons became disobedient; when they found they could not be disinherited. [Therefore by 4 *H. 7. ch. 24.* and 32 *H. 8. ch. 36.* the Issue in Tail were made barrable by a Fineⁿ.] Subjects also that were Owners of entail'd Lands, were less fearful to commit Treason. [Therefore by 26 *H. 8. ch. 13.* such Lands are forfeitable^o for Treason.] Men that had entail'd Lands could not make Improvements; for when the Owner had only an Estate for Life, none would give a Fine of any Value for a Lease of it, nor lay any great Stock upon the Land, that it might yield an improv'd Rent. [Therefore by 32 *H. 8. ch. 28.* Tenants in Tail are enabled to grant Leases^p.]

^q See of Leases, ch. 5. post. [See 33 *H. 8. ch. 39.* 13 *El. ch. 4.* Concerning Lands of Tenants in Tail, as liable to the King's Debts; or saleable for the Arrears of the King's Officers.]

But notwithstanding the many Mischiefs and Inconveniences of entail'd Estates, and the Statutes before-mentioned, and *Fines* and *Recoveries* to Dock Entails; there are Methods found out in Settlements to limit Estates, that no Law or Statute can reach or alter them, except a particular Act of Parliament is made for that Purpose.

Hitherto I have said somewhat of Estates of *Inheritance*; next are Estates of *Freehold* only, or for Term of *Life*.

III. * An Estate in Tail, after Possibility of Issue extinct, is where ^{Of an Estate in Tail after Possibility, &c.} Lands and Tenements are given to a Man and his Wife in special Tail, and the Survivor hath an Estate in Tail when there is no Possibility of Issue. If they have Issue, and the Issue dies without Issue, ^{* Lit. 32. 1 Inst. 27. b.} so that there is not any Issue alive which may inherit by Force of the Entail, the Survivor of the Donees hath an Estate in Tail after Possibility, &c. ^b None can have this Estate but one of the Donees, ^{* Lit. 34. 1 Inst. 28. a. 11 Rep. 80.} or the Donee in special Tail; for a Donee in general Tail may by Possibility have Issue. And the Estate of this Tenant must be created by the Act of God, (viz.) by Death of either Party without Issue, and not by Limitation of the Party, or by his own Act.

IV. * An Estate by Curtesy of England is where a Man taketh a ^{Of an Estate by Curtesy, &c.} Wife seised in Fee-simple, or in Fee-tail General, or seised as Heiress in special Tail, and hath Issue by her, Male or Female born alive, ^{* Lit. 35. 52. 1 Inst. 29. b. 30. b. 8 Rep. 34.} (not rip'd out of the Mother's Womb after her Death) evidenced by Motion, Crying, &c. which by any Possibility may inherit, and the Wife dies, and the Husband holdeth the Land during his Life. This is by the Law and Curtesy of England. One may be Tenant by the Curtesy of a Castle for the Defence of the Realm, a common Sans Number, &c.

* A Man shall not be Tenant by the Curtesy of a bare Right or Title, or of a Reversion or Remainder expectant upon an Estate of Freehold, unless the particular Estate is determin'd during the Coverture; nor of a Seisin in Law; but of an equitable Trust he shall, ^{* F.N.B. 149. 1 Inst. 29. a. 30. b. 40. a. 1 Wms. 108. 2 Vern. 324. 536. 3 Wms. 234.} and Equity will relieve him against a Term attendant on the Inheritance. But if a Wife dies before a Rent in Fee becomes due; or, in the Case of an Advowson, before the Church becomes void, the Man shall be Tenant by the Curtesy, though the Wife had only a Seisin in Law; because he could by no Industry attain unto any other Seisin. A Seisin in Deed is required in other Cases.

* Four Things must concur to give an Estate by Curtesy, (viz.) ^{1 Inst. 30. a.} Marriage, Seisin of the Wife, Issue, and Death of the Wife.

V. Of an Estate in Dower. 1. Its Definition and Division. ^{Of an Estate in Dower.} 2. Who may be endowed? 3. Of what and how? 4. Of Jointures, which supply the Place of Dower.

1. An Estate in * Dower is where a Man is seised of Lands or Tenements in Fee-simple, Fee-tail general, or as Heir in special Tail, and marries a Wife and dies, and the Wife, by the Common Law, after the Death of her Husband, hath, during her Life, the third Part of such Lands and Tenements as were her Husband's at any Time during the Coverture, whether she hath Issue by her Husband or no; so that she be above nine Years of Age at the Time of the Death of her Husband. ^{* Lit. 36. 1 Inst. 30. b. 4 Rep. 22.} ^b Dos, or Dower, signifying in a vulgar Sense, the Estate which the Woman brings in Marriage, or her Marriage Portion, is of another Nature ^{* 1 Inst. 31. a.}

Three Things do entitle to Dower, as appears by this Definition, (viz.) ¹ Marriage, Seisin, and the Death of the Husband. The Bond of Marriage must continue, and there must be no Divorce ^{1 Inst. 32. a. & b. 33. a. & b. Vid. Pr. Ch. 111. See P. 62. ante.} *Vinculo Matrimonii*. A Separation *à Mensa & Thoro* only, doth not destroy the Bond of Marriage. A Wife *de Facto* may be endowed, if the Husband dies before the Divorce. Concerning the

^a 1 Inst. 31. *Seisin*; the Wife shall be endowed of a *Seisin* in ^a *Law*, or where the Husband had only a Right, as well as where he had a *Seisin* in *Deed*. For it lieth not in the Power of the Wife to bring it to an actual *Seisin*, as a Husband, when he is to be Tenant by the Curtesy, may in most Cases. It is not necessary that the *Seisin* should ^b continue during the *Coverture*; for if the Husband aliens the Lands, yet the Woman shall be endowed. But the Husband, must be ^c *Sole* seised, and not as Jointenant at the Time of his *Death*; for then Survivorship will take Place. If there are two Jointenants in Fee, and one maketh a Feoffment in Fee, his Wife shall not be endowed: Of a *Seisin* for an *Instant* a Wife shall not be endowed; as of a *Seisin* of a Conusee of a Fine that grants and renders to the Conusor, the Wife of the Conusee shall not be en-

dowed: Neither shall she be endowed of an Estate which is in Trustees, and in which the Husband hath only an equitable Interest: But she shall be endowed of an Equity of Redemption, whether of a Mortgage for Years or in Fee; and she may redeem the Mortgage, and hold over till satisfied ^d. Or keeping down a Third of the Interest, intitles her to Dower of the Equity of Redemption ^e. And it seems that Equity will set aside a Term for Years attendant on the Inheritance in Favour of a Widow as against an Heir at Law ^f, or Devisee; but not against a Purchaser ^g.

^h Littleton reckons up ^h five Kinds of Dower, (*viz.*) Dower by *Common Law*; by *Custom*; Dower *ad Offitium Ecclesie*; Dower *ex Assensu Patris*; and Dower *de la plus Beale*, (*i. e.*) Of the most fair of the Tenements. But the two first are only in Use.

2. ⁱ The Wife of an Idiot, *Non Compos Mentis*, of one outlaw'd or attainted of Felony, Trespass, Heresy, *Præmunire*, may be endowed. But a Wife of one attainted of High Treason, or Petit Treason, cannot be endowed; [See 5 & 6 Ed. 6. *ch.* 11.] nor the Wife of an Alien ^k, nor an Alien Wife, except in Case of the King.

By West, 2. *ch.* 34. *If the Wife Elopeth from her Husband* (*i. e.*) *If the Wife willingly leaveth the Husband, and carrieth with the Adulterer, she shall lose her Dower, unless the Husband willingly without Ecclesiastical Coercion be reconciled to her, and permit her to cohabit with him.*

3. Now I come to shew of *what*, and *how* a Wife may be endowed.

^l 1 Inst. 31. b. A ^l Wife may be endowed of the principal Messuage, (not of a Castle for Defence of the Realm) Lands and Tenements, and of a Reversion upon a Lease for Years made before Marriage, and of the Rent, where the Estate is divisible by Metes and Bounds: but not of a Reversion on a Lease for Life, made before Marriage; for of that the Husband has neither *Seisin* in *Deed* or *Law*. Where no Division can be made, a Woman must be endowed of the Thing in a special Manner, as of the third Presentation to an Advowson, the third Toll-Dish of a Mill, or of the Mill for every third Month; of the third Part of the Profit for Stallage, and of the third Part of a Fair; of the third Part of the Profits of an Office, of the third Part of a Gaol, a Park, a Dove-house, a Piscary; of the third Part of the Profits of Courts; the third Part of Fines, Heriots, Rents, Tithes, (as of the third Sheaf) of the third Part of Common certain; but not of Common without Number in Gross; for then the Land

would

would be doubly charged; not of an Annuity that doth not issue out of Lands or Tenements.

Dowers of *Copyholds* are warranted by special Custom only.

By Custom the Wife may have half; or the whole of the Estate.

There must be an Assignment of Dower at the Common Law, either by the Sheriff, by Virtue of the King's Writ, or else by the Heir or other Tenant of the Freehold, by Consent or Agreement amongst themselves. The Wife cannot enter into her Dower, but must recover the same by Writ of Dower.

This Claim by Dower at Common Law seldom happens, especially upon great Estates, by reason of Jointures. [See *Mag. Char. ch. 7. 20 H. 3. ch. 1. 3 Ed. 1. ch. 49. 13 Ed. 1. ch. 4. 27 H. 8. ch. 10. 1 Ed. 6. ch. 12. 5 & 6 Ed. 6. ch. 12.*]

These two last Estates (*viz.* by *Curtesy* and *Dower*) are special Estates for Life, and do arise after the Death of one that hath an Inheritance joined with a Freehold.

4. A *Jointure* is a competent Livelihood of Freehold Lands or Tenements for the Wife, to take Effect presently in Possession or Profit after the natural Death of the Husband, for the Life of that Wife at least, if she herself is not the Cause of the Determination or Forfeiture of it; as where the Estate is settled *Durante Viduitate*, and she marries. This Definition of a Jointure is made with Respect to the Statute of 27 H. 8. ch. 10.

Which enacts, that where an Estate is made in Possession or Use to Husband and Wife, and his Heirs, or to the Heirs of their two Bodies, or of one of their Bodies, or to them for their Lives, or for the Wife's Life, for her Jointure; she shall not have Dower. Howbeit, upon a lawful Exemption of that Jointure, she shall be endowed of as much of the Residue of her Husband's Lands, whereof she was dowable at the Common Law, as the Lands from which she is so exempted shall amount unto. But such Jointure being made after Marriage, the Wife (after the Husband's Death) may refuse it, and betake herself to her Dower; unless such Jointure be made by Act of Parliament.

Now to the making of a perfect Jointure within this Statute, and to bar a Claim of Dower, Six Things are to be observed.

1. Her Jointure by the first Limitation is to take Effect for her Life in Possession or Profit, presently after the Decese of her Husband.
2. It must be for the Term of her own Life, or a greater Estate. But it may be limited to continue no longer than she remains a Widow; or while she forbears to do any Act in her own Power.
3. It must be made to herself, and to no other in Trust for her.
4. It must be made in Satisfaction of her whole Dower, and not a Part of it.
5. It must be expressed to be in Satisfaction of her Dower in the Deed or Devise.
6. It may be made either before or after Marriage. If made before, the Wife cannot waive it, and claim her Dower at the Common Law; otherwise, if it is made after Marriage.

This Statute does not extend to *Copyholds*, because Dowers of *Copyholds* are warranted by special Custom only, as hath been said. But in Equity, if the Wife hath a Compensation for Dower, it is also deemed a Satisfaction for her Free Bench in *Copyhold* Land, which is in the Nature of Customary Dower.

* 4 Rep. 22,

30.

Lit. 37.

1 Inst. 33. b.

114. a.

* 1 Inst. 34. b.

35. a.

1 Rol. Abr.

682, &c.

* 1 Inst. 36. b.

* 4 Rep. 2.

* 4 Rep. 3.

* 1 Inst. 36. b.

* 4 Rep. 1, &c.

* Coke's

Compl. Co-

pyh. f. 54.

* Walker and

Walker in

Chan. 17

Nov. 1747.

Ward and

Ward, in

Chan. 26

Feb. 1756.

All

All other Settlements in Lieu of Jointure, are Jointures at the Common Law, and are no Bars to a Claim of Dower. A Jointure was no Bar of Dower before this Statute. ^a For a Right or Title to a Freehold cannot be barred by Acceptance of a collateral Satisfaction. But Dower may be released.

¹ Inst. 36. b. If a Jointure is made of Lands, according to the Statute, before the Coverture, and after the Husband and Wife alien them by Fine, she shall not be endowed of any other Lands of her Husband; otherwise, if the Jointure was made after Marriage.

^b 1 Inst. 36. b. & 37. a. The Wife may ^b enter into her Jointure after the Death of her Husband, and is not driven to a real Action, as she is to recover Dower at the Common Law. Neither shall her Jointure be forfeited by the Treason of her Husband, as in the Case of Dower.

Notwithstanding her Dower or Jointure, the Wife shall have all ^c her Chattels real and Bonds again, unless her Husband altered the Property in his Life-time. Also her Proportion of his Chattels real and personal, upon an Administration and Distribution, if the Husband dies Intestate; and likewise all convenient Apparel suitable to her Character.

Of an Estate for Life.

^d Lit. 56.
¹ Inst. 41. b.
¹ Rep. 140.
³ Wms. 368.

VI. An Estate for ^d Life is when one hath Lands and Tenements for Term of his own Life, or the Life of another, or for the Term both of his own and another Man's Life. But an Estate for a Man's own Life is higher than for another's Life. An Estate made to One and his Heirs, during the Life of Another, is but an Estate for Life: Tho' the Heir of the Grantee shall take as special Occupant.

^e Lit. 57.

He that hath an ^e Estate for Term of his own Life, or the Life of another, hath a Freehold, and no other of a lesser Estate hath a Freehold; but they of a greater Estate have a Freehold, as Tenant in Fee-simple, or Fee-tail. Estates by Statute-Merchant, Staple or *Elegit*, are but Chattels.

¹ Inst. 43. b.
² Wms. 381.
³ Wms. 102, 264.
See ch. 3. f. 1.
& ch. 6. f. 5. post.

But now by Force of the Statute of Frauds and Perjuries, 29 Ch. 2. ch. 3. and 14 Geo. 2. ch. 20. f. 9. An Estate *pur autre Vie* is devisable by Will attested by three Witnesses; and if granted to A. B. or to A. B. and his Executors and Administrators, is personal Assets, and subject to simple Contract Debts, and if not disposed of by Will, is distributable among the next of Kin; but if granted to one and his Heirs, it is a Freehold, and is real Assets, and liable only to such Debts as bind the Heir^s.

³ Wms. 166.

^h 1 Inst. 41. b.
See of Estovers, ch. 2. and of Waste, ch. 4. post.

Every Lessee for Life may take upon the Land demised reasonable ^h Estovers; unless he is restrained by special Covenant or Agreement.

¹ 1 Inst. 42. a.
² Inst. 301.

If a Man grants an Estate to another, *Quam diu se bene gesserit*, or so long as he shall dwell in such a House, or to a Woman *Dum sola fuerit*, or *Durante Viduitate*, or for any like ⁱ uncertain Time; in all these Cases the Lessee hath an Estate for Life determinable.

^k 1 Inst. 42. a.
¹ 83. a. & b.

A Grant of Lands, &c. without expressing any Estate, is a Grant for the Life of the ^k Lessee. So a Grant from Tenant in Fee-simple for Term of Life generally, without mentioning for whose Life, shall be construed to be for the Life of the Lessee; for the Grant shall be taken most strongly against the Lessor. Otherwise if such

a Grant

a Grant is made by Tenant in Tail, or for Life, for then it shall be taken for the Life of the Lessor, to prevent Injury and Wrong.

A Lease for any Number of Years, determinable upon a Life or Lives, is not a Lease for Life or Lives, or a Freehold; but a Lease for Years, or a Chattel determinable upon Life or Lives.

If Tenant for his own Life, or the Life of another, sows the Land, and he dies, or *Cessuy que vie*, (he for whose Life he holdeth) dieth before the Grain is reaped, his Executor shall have the Emblements, (i.e.) the Profits of the Land; for his Estate was Uncertain and determined by the Act of God. But he shall not have the Grass, or other Fruits, which are the natural Profits of the Earth, if they are not severed, because they are Parcel of the Inheritance. And so it is where any one hath an Uncertain Estate; as Tenant in Tail after Possibility of Issue extinct, Tenant by Curtesy, or in Dower; for these are uncertain Estates for Term of Life. Here the Law gives to the Party, whose Right it is, free Ingress, Egress and Regress to enter, cut down and carry away the Corn. But if a Woman that holdeth Lands during her Widowhood, soweth the Ground, and taketh Husband, the Lessor shall have the Profits; because the Estate was determined by her own Act; and so it is if she had granted a Lease thereof for Years, and her Under-tenant had sown the Land, for he shall not be, as against the original Lessor, in a better Case, than her under whom he immediately holdeth. And so if any other Tenant determines his Estate by his own Act, (as by Forfeiture) he that entereth for the Forfeiture shall have the Corn. But if a Lease be made to Baron and Feme, (Husband and Wife) during the Coverture, and the Baron sows the Land, and after they are divorced à Vinculo Matrimonii, the Baron shall have the Corn, because the Judgment is the Act of the Law. Or if the Lessor of Tenant at Will be outlawed, whereby the Will is determined, yet the Tenant at Will shall have the Emblements. So note the Diversity where the Estate is determined by one's own Act, the Act of the Law, and the Act of a Stranger.

A Lease for Life is not saleable by the Sheriff upon Execution for Debt, but he may extend the yearly Profits to pay the Debt. And if Tenant for Life forfeits Issues, and dies, they shall be levied upon the Reversioner; Because serving upon Juries being a Charge upon landed Men for the Service of the Publick, the whole Fee is charged with it. [How an Estate for Life may be forfeited, see Forfeiture by Waste, ch. 4. post, how surrendered, see Surrender, ch. 3. post.]

By 28 H. 8. ch. 11. s. 6. If an Archdeacon, Dean, Prebendary, Parson, Vicar, Master of an Hospital, or other Person admitted to any Benefice, Dignity, &c. (Chauntries only excepted) hath caused any of his Glebe Lands to be manured and sown at his proper Costs and Charges with any Corn or Grain, the said Incumbents may make and declare their Testament of all the Profits of the Corn growing upon the said Glebe Lands so manured and sown.

This Act does not extend to Glebe Lands in the Possession of a Tenant, manured and sown by him.

[See 14 El. ch. 8. An Act for avoiding Recoveries suffered by Collusion of Tenant for Life.]

By 19 Car. 2. ch. 6. If a Person for whose Life an Estate hath been or shall be granted shall remain beyond Sea, or absent himself in

this Realm for seven Years together, and no sufficient Proof is made of the Life of such Person, in any Action commenced for the Recovery of the Lands held for the Life of such Person, then such Person, for whose Life the Lands were bolden, shall be accounted as naturally dead.

And by 6 Ann. ch. 18. Any Person claiming in Remainder after the Death of any Tenant for Life, may yearly, upon Affidavit that he hath Cause to believe such Tenant for Life to be dead, and that his Death is concealed, apply to the Lord Chancellor, who shall order the Person suspected to conceal such Tenant for Life to produce him, and if not produced he shall be taken to be dead, and the Remainder-Man may enter upon the Land.

By 8 Ann. ch. 14. An Action of Debt may be brought for Rent upon a Lease for Life, as well as upon a Lease for Years.

Now follow Estates less than a Freehold.

Of an Estate
for Years.
a Lit. 58.
b Lit. 67.
c Inst. 54. b.
d Lit. 66.
e Inst. 46. b.
See of Leases
and Surrenders
ch. 3. post.

VII. An Estate for Years, or (Tenancy for Years) is where a Man letteth Lands or Tenements to another for a certain Term of Years. A Tenant for Half a Year, or a Quarter of a Year is said to be a Tenant for Years. The Tenant (or his Executors or Administrators, if he dies) may presently enter by Force of the Lease, tho' the Lessor dies; and then he is possessed (not seised) of a Term for Years. Till Entry, he cannot take a Release to increase his Estate, except upon the Statute of Uses, 27 H. 8. ch. 10. But before Entry, he may grant his Interest to another; but not surrender it, or have an Action of Trespafs.

f 1 Rep. 154.
g Inst. 45. b.

A Term (Terminus) doth not only signify the Limitation of Time, but also the Estate that passeth for that Time. Thus if a Man makes a Lease for Twenty-one Years, and afterwards maketh a Lease to begin after the Expiration of the said Term of Twenty-one Years; if the first Lease is surrendered, the second shall begin presently; not if the Words had been *After the Expiration of the said Twenty-one Years*, without mentioning the Term, which signifieth the Estate or Interest. So that there is a Difference betwixt *Terminus Annorum* and *Tempus Annorum*. But a Disposition of Part of the Term is not the Disposition of the whole.

h 1 Inst. 46. b.

Tenant for Years hath but a Chattel real. Therefore it is not inheritable, but goes to the Executors or Administrators. Neither can it go in Succession, in case of a sole Corporation, as to a Bishop and his Successors.

See p. 113.
ante.

An Estate for ten Thousand Years is not a Freehold, or of so high a Nature as an Estate for Life. It is but a Chattel, and cannot be entailed.

i See of Fee-
tail ante.
k Lit. 68.

If a Tenant for Term of Years sows the Land, and his Term ends before the Corn is ripe, the Landlord shall have it; unless it is covenanted betwixt them, that the Tenant shall have his Way-going Crop. It was his Folly to sow the Ground with Corn, when he knew that his Term would expire before the Corn was ripe. But where the Lease for Years depends upon an Uncertainty, as upon the Death of Tenant for Life who made it, or of a Husband seised in Right of his Wife, there the Tenant for Years shall have the Crop. Yet if there is Lessee for Years upon Condition, that if he doth Waste, his Estate shall cease; if he

l 1 Inst. 56. a.

m 5 Rep. 116.
n Inst. 55. b.

sows

sows the Land, and after does Waste, the Lessor shall have the Corn.

Every Tenant for Years, as well as Tenant for Life, hath Incident to his Estate three Kinds of *Eftovers*.

The Sheriff may sell a Term for Years for Debt, by Writ of Execution * upon a Judgment in the Life-time of the Owner, or when it is in the Hands of Executors or Administrators.

^a 1 Inst. 41. b.
See of Eftovers
ch. 2. and of
Waste, ch. 4.
post.
^b See B 4 ch. 4.
f. 10. post.

VIII. An Estate *at Will*, (or a Tenancy at Will) is where Lands or Tenements are let by one Man to another, to have and to hold to him at the Will of the Lessor. By Force of this Lease the Tenant is in Possession, but he hath no certain or sure Estate, tho' a Chattel real; so that the Lessor, or Landlord may put him out at what Time he pleaseth, except that by the Custom of

Of an Estate
at Will.
^b 1 Lit. 68.

London, a Tenant at Will under the yearly Rent of forty Shillings, shall have a Quarter's Warning; and paying above forty Shillings, shall have Half a Year's Warning. But it is regularly true, that every Estate at Will must be at the Will of both Parties, (Landlord and Tenant) tho' one Party is only named. Yet if the Tenant at Will sows the Land, and the Landlord before

^a 2 Sid. 20.

the Corn is ripe, or when it is ripe, putteth him out, the Tenant notwithstanding shall have the Corn, and shall have free Entry, Egress and Regress, to cut and carry it away; and shall not be forced to bring his Action for this, because he knew not at what Time the Landlord would enter upon him. So it is if the Tenant at Will sets or sows any other Annual Profit. But if the Tenant plants Trees, or sows the Ground with Acorns,

^a 1 Inst. 55. a.

there the Landlord may put him out, because they will yield no present annual Profit. And so it is, tho' he improves the Grass by Composting, or sowing Hay-seed, because Grass is the natural Profit of the Earth. And all this is proper to every particular Tenant that hath an incertain Estate. But if the Tenant at Will sows the Ground with Corn, and after he himself determines his Will, and refuseth to occupy the Ground, the Landlord shall have the Corn.

^b 1 Lit. 68.

Also if Tenant at Will of a House is put out, he shall have free Entry, Egress and Regress, and reasonable Time to remove his Goods. And when a Tenant at Will leaves a House, he is not bound to leave it in Repair, as Tenant for Years is.

^a 1 Inst. 56. a.

The Landlord may reserve a yearly Rent upon a Lease at Will, and distrain for the Rent behind of Common Right; or he may have an Action of Debt, at his own Election.

^a 5 Rep. 116.

If Tenant at Will commits voluntary Waste, it amounteth to a Determination of his Will, or that he will hold the Estate no longer. For when Tenant at Will taketh upon himself to do such Things, which none can do but the Owner of the Land, This amounts to a Determination of the Will and Possession. But if an Estate is let at Will upon Rent payable at a certain Day, the Lessee at Will cannot determine the Lease before the Day of Payment to the Prejudice of the Lessor, and on the other Hand, if the Lessor determines it before the Day of Payment, he loses his Rent. [See 29 Car. 2. ch. 3. What Estates in Lands, &c. not put in Writing shall be accounted only Estates at Will.]

^a 1 Inst. 55. b.

^a 1 Inst. 81.

^a 1 Inst. 81.

^a 1 Inst. 81.

^a 1 Inst. 81.

^a 1 Inst. 81.

^a 1 Inst. 81.

^a 1 Inst. 81.

^a 1 Inst. 81.

^a 1 Inst. 81.

^a 1 Inst. 81.

^a 1 Inst. 81.

^a 1 Inst. 81.

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^a 1 Inst. 81.

^a 1 Inst. 81.

^a 1 Inst. 81.

^a 1 Inst. 81.

^a 1 Inst. 81.

^a 1 Inst. 81.

^a 1 Inst. 81.

Of an Estate
at Sufferance.

a 1 Inst. 57. b.

IX. An *Estate at Sufferance* is when one comes on an Estate, or enters by a lawful Lease, and keepeth his Possession after his Lease is expired, and so holdeth over by Wrong; as a Tenant for Term of Years holding over his Term; Tenant at Will is always by Right; Tenant at Sufferance always by Wrong.

By 6 Ann. ch. 18. Persons, who as Guardians or Trustees for Infants, or seised in the Right of their Wives only, and every other Person having any Estate determinable upon Life or Lives, who after the Determination of such particular Estate, without the expresse Consent of the Person next intitled, shall hold over and continue in Possession, shall be adjudged Trespassers; and the Person next entitled, his Executors and Administrators, may recover against such Person holding over, his Executors or Administrators, the Value of the Profits received.

[By 4 Geo. 2. ch. 28. All Persons holding over after the Expiration of any Term for Life, Lives or Years, and after Demand and Notice in Writing to quit Possession, shall pay double the yearly Value, for so long as they shall so hold over.]

See 8 Ann. ch. 14. Concerning Distresses for Rent.

Of an Estate
by Copy of
Court-Roll.

X. Of an Estate by Copy of Court-Roll.

For the right Understanding of an Estate by Copy of Court-Roll, it will be necessary to shew, 1. The Nature of a Manor. 2. The Nature of the Estate held by Copy of Court-Roll, which doth depend upon the Manor. 3. The Method of granting Copyhold Estates, 4. Of Fines upon Copyholds. 5. Of Copyhold Customs. 6. How Copyhold Estates may be extinguished.

1. Of the Nature of a Manor.

b Coke's
Compl. Co.
pyh. f. 31.
4 Rep. 26.
1 Cro. 19, 38,
39.

A Manor (*à Manendo*, because the Lord did usually dwell in the Manor-House; or, *à Manurio*, from manuring the Land; or *à Mesner*, from Guiding and Governing) is an ancient Royalty or Lordship, (of old called a Barony) consisting of *Demesnes* and *Services*; and of a Court Baron as incident to it. It cannot be a Real Manor, or Manor in Law, if it wanteth Freeholders; nor can it be a Customary Manor without Copyholders. It must be Time out of Mind; for a Manor cannot be made at this Day. A

c 1 Inst. 58. a.

Manor may consist of one or more Villages and Hamlets adjacent, or only of several Houses in a Village. If it is a Capital Manor, it may contain other Manors under it, and then it is called an *Honor*; on which other inferior Manors do depend by Per-

d 1 Inst. 188. a.

2 Inst. 67.

2 Roll. Abr.

72.

e 4 Rep. 26,

27.

11 Rep. 17.

18.

1 Inst. 58. b.

2 Cro. 317.

260.

f 4 Rep. 26.

6 Rep. 64, 65.

Coke's

Compl. Cop.

f. 31.

formance of Customs and Services to him that is Lord over them. This originally belonged to the King, tho' afterwards it was given in Fee to a Subject. There may be a Customary Manor granted by Copy of Court-Roll, and held of another Manor. And such customary Lords may keep Courts, and grant Copies; and the Customary Manor itself may pass by Surrender and Admittance.

A Manor then is either *Real* or *Nominal*. A *Real* and perfect Manor is such as is before described. A *Nominal* Manor is a Manor by Reputation only; as when a Lord of a Manor transfers over to a Stranger the Services of all his Tenants, and reserves unto himself the Demesnes only; or when he passes away the Demesnes, and reserves the Services. In both these Cases the Lord

hath

hath not a Manor really, but nominally, and in Reputation only. Some call this a Manor in *Gross*; as a Man may have a Court-Baron with the Perquisites thereunto belonging, and another may have the Scite and every Foot of Land in such a Manor.

The Parts of a *Real* Manor are the *Demefnes* and Services with a *Court Baron* incident to it. A Court-Baron^a is the chief Supporter of a real Manor, and one cannot be without the other.

1. The *Demefnes* are the Lands that are manually occupied and possessed by the Lord for the Maintenance of himself and Family. These in the Possession of a Subject are called *Demefnes* in a different Sense from the *Demefne* Lands of the *Crown*.

The Waste is Part of these *Demefne* Lands. The Lord reserves to himself one Part of these *Demefnes*; Part is distributed amongst the Tenants; and what is left is the Lord's Waste, which was neglected by the Lord upon Creation of the Manor; because he had before taken as much of the *Demefnes* as he had need of, and distributed as much as was convenient amongst his Tenants.

2. The *Services* are those Duties which the Tenants are bound to perform to the Lord, by Reason of their Estates which they hold of him; as *Fealty*, *Wardship*, *Heriot*, *Relief*, *Amerciament*, *Forfeiture*, *Escheat*. 1. *Fealty* (*Feaulte*, *Fides*) is an Oath taken at the Admittance of every Tenant to be true to the Lord. 2. *Wardship* was the Custody or Guardianship of the Heir of the Tenant within Age. [But this is abolished by 12 Car. 2. *ch.* 24.] 3. *Heriot*, (*Herigate* from *Herus* Lord, and *Gate* best) is a Render made at the Death of the Tenant to the Lord of the best Beast or other Thing. This Service is most esteemed. It is either a *Heriot Service*, or *Heriot Custom*. *Heriot Service* is never due without special Reservation in the Grant; and is seldom reserved upon a less Estate than an Inheritance. For *Heriot Service*, the Lord may *distrain* or *seize*. Distress may be of any Beast on the Land. But Seizure may be of any Beast belonging to the Tenant. *Heriot Custom* is what is challenged by some particular Custom; and is usually paid upon an Estate for Life or Years, as well as upon an Estate of Inheritance. For *Heriot Custom*, the Lord must *seize*, not *distrain*. Here the Lord may *seize* for *Heriot* the best Beast, tho' it is out of the Manor, or in the Highway, that being no Distress; for it is his own proper Goods by the Death of the Tenant; and therefore he may *seize* it where he finds it. Where many purchase Lands jointly, an *Heriot* shall not be paid till after the Death of the Survivor. If a Tenant *devise* away all his Goods, and dieth, yet the Lord shall have his *Heriot*, for the Law preferreth the Custom before the Gift by Testament. It hath been anciently said, That a *Heriot* shall be paid before a Mortuary. It is payable by Copyholders as well as Freeholders. 4. *Relief* (*quia Hereditas jacens Relevatur in Manus Haereditis*) is a certain Sum of Money which every Freeholder, being at full Age, payeth unto his Lord at the Death of his Ancestor, when he taketh Possession of the Inheritance. It is either *Relief Service*, or *Relief Custom*. *Relief Service* is that which is paid upon the Death of any Freeholder. *Relief Custom* is that which is paid upon the *Death* or *Alienation* of any Freeholder according to the Custom of the Place. In many Places, it is Half a Year's Profit; in some, double the Rent of that Year. It is paid by Freeholders only. For this

the Lord may distrain, but cannot have an Action of Debt. His Executors or Administrators may have an Action of Debt, and cannot distrain. 5. *Amerciament* (in *Mercy* of the Lord) is a pecuniary Punishment for any Offence committed against the Lord; or a certain Sum of Money imposed upon the Tenant by the Steward, upon Presentment of the Homage or Jury for the Breach of any By-Law, for not doing Suit or Service, or for other Misdemeanors punishable in a Court-Baron. It differeth from a Fine imposed for an Offence in divers Respects. 6. *Forfeiture* (*Forefait*) is a Penalty for an Offence committed against a penal Law or Custom, by Loss of *Freehold* or *Copyhold* Lands, or of *Goods*. If a *Freeholder* alieneth his Lands in *Mortmain*, or ceases for two whole Years to perform his Services, or pay his Rents, and hath not upon his Lands sufficient Goods or Chattels to be distrain'd, he forfeiteth his Freehold, and the Lord may make a Grant of it. A *Copyholder* may forfeit his Lands by *special Custom*, when upon the Descent of any Copyhold of Inheritance, the Heir of full Age, not being beyond Sea, faileth to come in to be admitted to his Copyhold, after three Proclamations made at three several Courts for him; when a Copyholder refuseth to appear upon Warning, and perform Suit and Service; or refuseth to be sworn on the Homage or Jury; or being sworn, refuses to present according to his Oath; If upon Admittance he does not pay his Fine, if certain; or denieth to pay his Rent upon Demand; or commiteth Waste voluntary or permissive, when there is no Custom for his so doing; (for the Custom of the Manor must direct what is Waste in Houses, Trees, &c.) If he leaseth his Copyhold above the accustomed Term without License by Deed; if he leaseth his Copyhold for one Year, and so from Year to Year during the Life of the Lessor, reserving one Day; for this is a Lease for two Years at least, and the Reserving a Day in every Year is Fraud. All these are Forfeitures *ipso facto*. By the general Custom of *England*, a Copyholder may make a Lease for one Year without License of the Lord. If a Copyholder commits Treason or Felony, or is a Popish Recusant, or does alien by Deed; these are no Forfeitures till Presentment by the Homage. An Idiot, Lunatick, an Infant under the Age of fourteen Years, or a Feme Covert, cannot forfeit. But if a Feme Covert does any Act by the Consent of her Husband, which amounteth to a Forfeiture, this is a Forfeiture of her Estate. If the Husband commits Waste, this is a Forfeiture of the Wife's Copyhold. Where the Lord enters for a Forfeiture, he shall have the Corn then growing. However, in all these Cases, if the Lord doth any Thing whereby he doth acknowledge him his Tenant after Forfeiture, and after the Lord hath Notice thereof, this Acknowledgment amounteth to a Confirmation. If there be Tenant for Life of a Copyhold, the Remainder for Life, and Tenant for Life commits a Forfeiture, the Lord shall enter, and not he in the Remainder. *Goods* are forfeited to the Lord by Waifs, Strays, Wrecks, Deodands^b, which accrue to the Lord not merely from the Tenants, but most commonly from Strangers. They are not incident to every Manor, nor do they add any Perfection to it. They are gain'd by Seizure only. 7. *Escheats* are when Lands fall to the Lord for want of Heir general or special to inherit them. But before the Lord enters, there ought to be a Presentment

^a Inst. 127. a.
Coke's
Compl. Cop.
§. 26.

^b See B. 4. ch. 1.
§. 16, 17.
post.

^c Coke's
Compl. Cop.
§. 27, 57, 58.
59.

^d Inst. 59. a.
3 Inst. 227.
1 Roll. Abr.
506, 507, 508.

^e 4 Rep. 27, 28.
2 Mod. 229.
3 Lev. 308.
1 Cro. 779.
Hob. 135.

^f 4 Rep. 26.
9 Rep. 75.
Coke's
Compl. Cop.
§. 33.
Contra,
2 Cro. 301.
3 Cro. 233.
234.
Coke's
Cop. §. 59.

^g 4 Rep. 21.

^h Coke's
Compl. Cop.
§. 61.
ⁱ 2 Ld. Ray.
1000.

^j See ch. 2.
post.

^k Coke's
Compl. Cop.
§. 28.

ment of the Homage, and Proclamations to come in and claim. Besides this ordinary Sort of Escheats, there is another; as where any Freeholder committeth Felony, and is attainted. For then after the King hath had his Year, Day and Waste, the Land shall come to the Lord as an *Escheat* *.

Sometimes where Services are *Entire*, and cannot be divided, as Fealty, Heriot, Payment of a Horse or Hawk yearly, upon *Alienation* of Parcel of the Lands by the Tenant, the Services shall be multiplied; and every Alienee shall render the entire Service; and yet by *Purchase* of Parcel by the Lord, the whole is extinct, except in Case of Fealty and Heriot-Custom. Such Personal Services as are to be done to the Person of the Lord, as Fealty, shall multiply: And here if the Lord purchases Part, they shall remain for the Residue. If entire Services are for the Advancement of Religion, Charity, Justice, or for the Benefit of the Commonwealth, they shall remain, tho' the Lord purchases Part. But Personal Services that are for the private Benefit of the Lord, as to feast the Lord and his Family once in the Year, or to exercise a Personal Office under him, tho' they shall not be multiplied by *Alienation* of Part; yet a *Purchase* of Parcel of the Tenancy by the Lord extinguishes all such Personal Services. If Parcel of the Land holden by entire Service comes to the Lord by *Descent*, in some Cases it shall be extinct for the whole, as Suit-Service. But if the Service is to render yearly a Horse, and Part of the Land is aliened by the Tenant, and afterwards descends to the Lord; the Tenant is still liable to the Service, for it was multiplied before the Lord took his Part. [See 52 H. 3. ch. 9. 18 Ed. 1. ch. 2.]

There are many other Services besides those above-mention'd; but then those are due upon special Reservation and Agreement to do or pay something for the Lord's Profit or Advantage. And there are many collateral Powers appropriated to Lords of Manors; as to erect Dove-houses; to prove the Wills of their Tenants deceased, in many Places; to inclose Common, leaving sufficient for other Commoners; but it is enough to hint at them.

In every Manor there is the *Lord*, the *Steward*, the *Lord's Tenants*, and the *Bailiff*.

A Manor is *lost*, if all the Freeholds but one escheat; or if the Lord purchase all the Freeholds; or if there is but one or no Suitors in a Court-Baron. So a customary Manor is *lost* when there are no customary Tenants or Copyholders, or but one Copyholder.

2. An *Estate* held by *Copy of Court-Roll* (which depends upon a Manor) is an Estate in Lands and Tenements, which by Custom of the said Manor the Tenants within the said Manor have, Time out of Mind, held to them and their Heirs in Fee-simple, Fee-tail, or for Term of Life or Years, at the Will of the Lord, according to the Custom of the Manor. Copies of Court-Rolls for Lives are most in Use at this Day.

Quia in partes dividi nequeunt, solida a singulis prestantur. 6 Rep. 1. 1 Inst. 149. b.

^a Lit. 75.
9 Rep. 76.

Tenant by ^a Copy of Court-Roll, (not Tenant by Court-Roll) or a Copyholder, is the only Tenant in Law, who holdeth by Copy of any Record, Deed, &c. his Estate is entered in the Roll, and the Steward delivers him a Copy of it. Copyholders, tho' in the Eye of the Law they are but Tenants at the Will of the Lord, their Lands being Parcel of the Lord's Demesnes, ^b yet stand upon a sure Foundation, if they perform those Duties and Services which their Tenure doth require. For if the Lord pretends to expel them, they may either sue a *Subpœna* out of Chancery to be relieved, or have an Action of Trespass against the Lord. For altho' they are Tenants at Will of the Lord, yet they are Tenants at Will according to the Custom of the Manor, which the Lord cannot break.

^b Lit. 77.
¹ Inst. 60. b.
61. a.

^c 4 Rep. 21,
22.
9 Rep. 76.

By particular Custom, the Wife may be Tenant in Dower, the Husband Tenant by Curtesy.

^d Lit. 81.
^e 4 Rep. 22,
Coke's
Compl. Cop.
§. 49, 50.
¹ Wms. 16,
75.
² Ld. Ray.
1145.
Vid. Occu-
pancy, lib. 2.
c. 3 §. 1.
^f 4 Rep. 24,
31.
¹ Inst. 58. b.

Copyholds of Inheritance are not ^d Freeholds, yet are created by the same Words as an Inheritance at Common Law; and ^e Descents and Surrenders of Copyholds of Inheritance must be governed by the same Rules as Descents and Conveyances at the Common Law. But they have not other collateral Qualities which other Inheritances have; for Copyhold Inheritances shall not be *Assets* to bind the Heir.

The ^f Pillars of a Copyhold Estate are, that it hath been *demised* or *demiseable* Time out of Mind by Copy of Court-Roll; That the Tenements be *Parcel* of the Manor, or within the Manor. So that Parcel of the Manor and Prescription are two Incidents to every Copyhold.

3. As to the Method of Granting Copyhold Estates.

^g 4 Rep. 30,
31.
¹ Inst. 58. b.
Coke's
Compl. Cop.
§. 42.
¹ Cro. 413.

^g A customary Manor, Lands and Tenements may be granted by Copy, and whatever concerneth Lands or Tenements, as Underwoods, Tithes, &c. But Things that lie not in Tenure are not grantable by Copy; as Rents, Common in Gross, an Advowson in Gross, Stewardships; for these cannot be held by any Manner of Service. A Common or Advowson appendent may pass by Copy, and so a Fair appendent to a Manor, by Reason of the principal Thing to which they are appendent.

Now in passing a Copyhold, there is the *Grantor*, the *Grantee*, and the *Grant* itself to be considered.

The *Grantor* is sometimes the Lord himself, sometimes a *Copyholder*. The Lord when he is absolute Owner, as when the Lands come to him by Purchase, Forfeiture, Escheat. His Grant is called a *voluntary* Grant; and the Grant by the Lord himself may be at any Place ^h out of the Manor. The *Copyholder* grants by *Surrender*, as shall be shewed by and by. So that the Lord is only an Instrument of the Conveyance upon a Surrender, not a Conveyer, as in a voluntary Grant.

^h 4 Rep. 26.

ⁱ Coke's
Compl. Cop.
§. 35.

The *Grantees* are those that are capable of a Grant by Copy, and to whom the Grant is made. ⁱ All such may be Grantees of a Copyhold Estate, as are capable of a Grant by Common Law. The Lord himself may take a Copyhold to his own Use by a Surrender generally into the Hands of the Lord, or to the Use of the Lord. A Feme Covert may receive a Copyhold Estate from her Husband, because she cometh in by the Admittance of the Lord ^k. And all these Grantees

^k 4 Rep. 29.

Grantees may be admitted by Attorney, if the Lord consents^a. If the^a 9 Rep. 76.
Grantee is not born, or not capable of taking, at the Time of the
Surrender, yet if born and capable at the Time of Admittance,
that is sufficient^b. But such a Grant by the Common Law is void.^b 1 Lev. 135.

The Grant of Copyhold Estates regularly passeth by Surrender^c 2 Roll. Abr.
and Admittance. And if the Surrender is out of Court, there must^d 415. 416.
be a Presentment. Therefore three Things are to be considered, See p. 11.
the Surrender, the Presentment, and the Admittance. ante.

1. A Surrender (*Sursum-Redditio*) is the Yielding up of the Land Lit. §. 74:
by the Tenant to the Lord according to the Custom of the Manor,
to the Use of him that is to have the Estate. It is different from a
Surrender^e at Common Law. Surrender is a Word so necessary,^e See ch. 3.
that no Words can supply its Place. Neither can a Copyholder post.
transfer his Interest to a Stranger, otherwise than by Surrender.
So that if one would^f exchange a Copyhold, with another, both^f Coke's
must surrender to each other's Use, and the Lord admit accordingly. Compl. Cop.
If one would devise a Copyhold he cannot do it by his last Will; §. 36, 39.
but he must surrender to the Use of his last Will and Testament; 4 Rep. 25.
and in his Will declare his Intent; and such Will need not be 1 Inst. 58. b.
attested according to the^g Statute. * But the Chancery will supply the 59. a. 60. a.
Defect or Want of such a Surrender in the Behalf of a Wife or 2 Wms. 258,
younger Child unprovided for, (not of a Bastard, nor of a Bro- 261.
ther,) against an Heir at Law; and also in favour of Grandchildren; Pr. Ch. 475.
and for the Relief of Creditors, where a Copyhold Estate is charged Ca. Temp.
with the Payment of Debts. If I am ousted of my Copyhold by Talb. 35. 78.
another, a Release to him is void, if he is not admitted; otherwise 1 Eq. Ab. Tit.
it is good, if admitted. A Copyholder may surrender to the Use Copyhold.
of another, reserving Rent, with a Condition of Re-entry for Non- 1 Wms. 61.
payment, and upon Non-payment enter. 2 Wms. 490.
3 Wms. 283.
4 Rep. 21.

It is the general Custom of the Kingdom, that every Copyholder
may surrender^h in Court; and he need not alledge any particular^h 1 Inst. 59. a.
Custom for it. And so without Custom he may surrender out of & b.
Court to the Lord himself. But if he surrender out of Court into 9 Rep. 75.
the Hands of the Lord by the Hands of Customary Tenants, or 1 Roll. Abr.
any other, this must be by Custom, and must be particularly pleaded, 500.
He may surrender also to the Steward of theⁱ Manor in any Place Contra,
without Custom, not to the Steward of the Court without Custom; 1 Cro. 443.
his Business being only to keep the Court: But this Distinction seems 4 Rep. 30.
to be laid aside. A Tenant out of Court cannot take a Surrender of 1 Leon. 227.
a Feme-Covert, unless by special Custom; because she is to be se- 2 Cro. 526,
cretly examined by the Steward, whether she doth it willingly, or 527.
without Force of her Husband? A Copyholder being a Jointenant Kitch. 165.
may surrender out of Court his Part, according to the Custom, to the 1 Ld. Ray. 76.
Use of his Will; and if he dies, and this is presented at the next
Court, his Devisee shall be admitted; for by the Surrender the Join-
tenancy was severed.

All Surrenders may be made by^k Attorney; yet the Lord may^k 9 Rep. 76.
refuse to admit by Attorney him to whose Use a Surrender is made; 77.
because he ought to do Fealty. The Lord or the Steward of the 1 Roll. Abr.
Manor^l may appoint a special Steward or Deputy to go to a Prison, 500, 501.
or to a sick Person, and take a Surrender. Mitchel v.
Neal in Chan.

In some Manors, a Copyholder surrenders his Copyhold by hold- 8 Nov. 1755.
ing a little^m Rod in his Hand; which he delivereth to the Steward 1 Ld. Ray.
to deliver it to the Party to whose Use the Surrender is made in the 658.
the Party to whose Use the Surrender is made in theⁿ Lit. 78.

N n

Name
Compl. Cop.
§. 39.

Name of Seisin; and these are call'd Tenants by the *Verge* (*à Virga*) taking their Name from that Ceremony of the *Rod*. And in some Manors a *Straw* is used, in some a *Glove*.

^a Coke's
Compl. Cop.
§. 39.

Tho' there is a Surrender, yet the Grantor * continues Tenant till the *Admittance* of another. But he that has surrender'd cannot pass away the Land to any other, or make it subject to any other Incumbrance than it was subject to at the Time of the Surrender. And if he surrenders afterwards to the Use of another, the Surrender is void; * and a subsequent Admittance cannot make that good which was void from the Beginning. And tho' the Surrender is made out of Court, the Grantor cannot dispose of the Lands otherwise, or countermand his Surrender made upon valuable Consideration. Perhaps a Copyholder may revoke a Surrender made out of Court before Presentment, if the Consideration is only natural Love and Affection.

A Surrender to be in Force at a Day to come is void, as well as Livery and Seisin to take Effect *in futuro*.

If a Copyholder will surrender to the Use of the Lord, no Admittance is necessary; and if the Lord makes a voluntary Grant of a Copyhold, no Surrender is requisite. A Surrender of Copyhold Lands, and a Conveyance of Freehold Lands ought to have the same Construction ^b.

^b 2 Id. Ray.
1145.

^c Coke's
Compl. Cop.
§. 40, 41.

2. The *Presentment* is an Information in Court to acquaint the Lord, or his Steward, with the Surrender out of Court: And this Surrender is not effectual till presented in Court. * By the general Custom of Manors, the Presentment is to be made at the next Court immediately after the Surrender, or else the Surrender is void. But by special Custom, it may be at the second or third Court. And this Surrender is to be made in Court by the same Persons that took the Surrender out of Court, in all Points material, according to the Tenor of the Surrender. And therefore if the Surrender is ^d conditional, and the Presentment absolute, all is void. If the * Steward omitteth the Condition in his Entry on the Roll, upon Proof in Court, the Roll may be amended. ^e If one surrenders out of Court, and dies before Presentment, if Presentment is made after his Death, it is good. So if he to whose Use the Surrender is made, dieth before Presentment, yet upon Presentment made after his Death, his Heirs shall be admitted. The same Law is, if those into whose Hands the Surrender was made, die before Presentment, upon Proof in Court, that such a Surrender was made, the Lord shall be compelled to admit accordingly. And if they into whose Hands the Surrender was made refuse to present, upon a Petition exhibited in the Lord's Court, the Party grieved shall have Remedy. And if the Lord will not do him Right, he may sue the Lord and them that took the Surrender in *Chancery* for Relief.

^d Idem §. 40,
41.
^e 4 Rep. 28,
29.
^f Inst. 59. b.
^g Coke's
Compl. Cop.
§. 40.
^h 4 Rep. 25.
ⁱ 4 Rep. 29.
^j Inst. 52. b.
^k 62. a.
^l Coke's
Compl. Cop.
§. 40.

3. An *Admittance* is the giving of Possession to a Copyhold Estate, and is like Induction to a Benefice. A Court of Equity will force a Lord to admit a Copyholder, or if the Lord or Steward refuse to admit a Surrendree, he may enter ^m. Admittances are Three-fold. Upon *voluntary Grants*; upon *Surrenders*; upon *Descents*. 1. An

^m Yelv. 16.
Hob. 181.

* *Quod ab initio non valuit, tractu temporis non potest convalescere.* 2 Rep. 55.
8 Rep. 135. 10 Rep. 62.

Admittance upon a *voluntary* Grant is made by the Lord, where the Lord is Proprietor and Owner, and yet an Instrument; for here tho' it is in his Power to keep the Land in his own Hands, yet if he does dispose of it, he is bound to grant the usual Estate, and reserve the usual Rent, and payable as before; the Copyholder that comes in by the voluntary Grant not being subject to the Incumbrances of the Lord before the Grant. 2. An *Admittance* upon *Surrender* is where the Lord is not Proprietor; but only a necessary Instrument of Conveyance; the Party claiming his Estate under him that made the Surrender. But till the Admission, the Tenant hath no Estate; and therefore cannot surrender it again to any Stranger before Admittance. Yet any Act implying the Consent of the Lord to the Surrender after Notice of it, as accepting the Rent out of Court, is an Admittance in Law before any Presentment; for the Lord is now satisfied his Duties. The Admission of Tenant for Life or Years is an Admission of him who has the Remainder, but not so as to prejudice the Lord of his Fine where due by special Custom. A Copyhold Estate cannot be surrendered by Attorney without Deed; but one may be admitted to it by Attorney without Deed. For there is a Difference betwixt passing an Estate by an Attorney, and the Receiving of an Estate by him. 3. An *Admittance* upon *descent* is where an Heir is Tenant by Copy immediately upon the Death of his Ancestor, especially as to Strangers. The Lord is here a mere Instrument; for the Heir may enter upon the Land, take the Profits, bring Actions of Trespass, and surrender to whose Use he pleaseth before Admittance; tho' he cannot be sworn of the Homage or Jury before Admittance, or maintain a Plaint in the Nature of an Assise in the Lord's Court, before he is complete Tenant. If the Heir dies, his Heir may enter, take the Profits, &c. An Admittance is not necessary to strengthen the Heir's Title, but to give the Lord his Fine. But yet if the Heir is of full Age, and will not come in to be admitted, and take up his Copyhold in Court, if the Death of the Ancestor is presented, and Proclamations made for him to that Purpose, he may forfeit his Estate as before-mentioned, or incur a Penalty, as the Custom of the Court directs.

She who hath a Widow's Estate, by the Custom of the Manor, upon the Death of her Husband Copyholder for Life, hath the Estate immediately vested in her; for by the Death of her Husband, the Law casts the Estate upon the Wife before *Admittance*. Her Estate is only a Branch of the Estate of her Husband, and no Fine is due from her to the Lord. But her Husband must *die seised*; not if in his Life-time after Marriage he surrenders, or for for valuable Consideration agrees to surrender, his Estate into the Hands of the Lord to the Use of another, and then dies.

The Lord himself may admit out of Court and out of the Manor; but so cannot the Steward, unless at a Court holden out of the Manor by special Custom.

A Copyholder cannot be admitted by Attorney without Leave of the Lord, because he must do Fealty in Person, as aforesaid.

4. Of *Fines* upon Copyholds.

A *Fine* is a Sum of Money paid to the Lord of the Manor for an Admittance into any Lands or Tenements holden of him. By the general Custom of Manors, Copyholders are to pay Fines after Admittance; for Admittance is the Cause of the Fine; tho' by special Custom, they are to pay Fines upon *Licences* granted to them to demise by Indenture. Fines may be due by Change of the Lord, or by

Coke's
Compl. Cop.
§. 41.

8 Rep. 63.

4 Rep. 22,
23.

1 Inst. 59. b.
Coke's
Compl. Cop.

§. 41.
1 Roll. Abr.
502, 505.

1 Mod. 102,

120.

3 Lev. 308.

1 Cro. 504.

4 Rep. 22,

23, 27.

Coke's
Compl. Cop.

§. 41.

2 Cro. 36.

1 Hob. 181.

1 Roll. Abr.

502.

1 Salk. 185.

Hinton v.

Hinton, in

Chan. 14 July

1755.

1 Inst. 61. b.

4 Rep. 26, 27.

1 Roll. Abr.

505, 527.

1 Ld. Ray. 76.

Kitch. 165,

166 a.

See B. 4. ch. 1.

§. 17. post.

See B. 4. ch. 1.

§. 16, 17. post.

4 Rep. 27,

28.

Coke's
Compl. Cop.

§. 46.

1 Inst. 59. b.

60. a.

Change 1 Str. 654.

Change of the *Tenant*. Of the *Lord* by *Death* only, and according to Custom. If it were by Change of the *Lord* upon *Alienation*, the Copyholder might be oppressed by a Multitude of Fines by the *Lord's* own Act. Of the *Tenant*, either by the Act of *God*, as *Death*, or the Act of the *Party*. These Fines are due upon voluntary Grants, Surrenders, and Descents. [See 9 Geo. 1. ch. 29. for enabling Lords to recover their Fines, when Copyholds descend to Infants or *Femes Covert*.]

Fines taken of Copyholders are either *certain* by Custom, or *uncertain*. But tho' the Fine is *uncertain*, yet it must be *reasonable*, perhaps a Year's Value, or a Year and an Half^a, and that Reasonableness shall be determined by the Judges. And tho' it is adjudged afterwards to be a reasonable Fine, Contesting it is no Forfeiture; because it was Matter of Controversy, whether it was reasonable or not? If the Fine is unreasonable, the Copyholder is not bound to pay it.

If a Copyholder in Fee surrenders to the Use of one for Life, the Remainder to another for Life, the Remainder to another in Fee, there is but ^b one Fine due; for the particular Estate and the Remainders are but one Estate: Yet there may be a Custom to the contrary.

The Lord may have an Action of Debt for his Fine. But if the Fine was *uncertain*, the Copyholder must have Notice, and a reasonable Time to pay it, if the Lord limits no Time. But a Fine certain ought to be paid presently.

5. Of Copyhold Customs.

A Copyhold ^a Custom is a Law not written, established by Use, and practised Time out of Mind within a Manor. ^a Custom is the Life and Soul of Copyhold Estates; for if Copyholders break their Custom, they are subject to the Lord's Will. This Custom must be Time out of Mind; for a Copyhold cannot begin at this Day. Where there is no Custom to guide Copyhold Estates, they shall be directed by the Rules of the Common Law.

^a It is impossible to set down all the Customs of Manors. But they must be, 1. *Reasonable*; and therefore a Custom that no Tenant of the Manor shall put in his Cattle into his Common after the Corn severed, till the Lord hath put in his Cattle, is a void Custom. For perhaps the Lord may never put in his Cattle; and then the Tenants shall lose their Profits of it. 2. According to *Common Right*; And therefore if the Lord will prescribe to have of every Copyholder a Sum of Money for keeping Courts, this is void; for he ought to do it *gratis* for the Sake of Justice. But to have a Fee for an extraordinary Court for the Benefit of some particular Tenant (called a *Purchase Court*) is according to Justice and common Right. 3. Upon *good Consideration*; and therefore if the Lord prescribes to have a Penny of every one who passeth over a Bridge within his Manor, which is repaired by him, this is a Prescription upon good Consideration. But a Prescription to have a Penny for passing thro' the King's Highway in that Manor is void. 4. They ought to be *compulsory*, not left to the Liberty of the Tenant to observe or not observe them. 5. Customs ought to be *certain*; for an uncertain Thing cannot be continued Time out of Mind. 6. They ought to be *beneficial* to the Lord or Tenant.

6. A Copyhold Estate is *extinguished*, whenever it becomes not^a demisable by Copy. 1. By *Act* of the Lord; as if a Copyhold escheateth, and the Lord granteth away any Estate therein by Deed. This is an Extinguishment, because once not demisable. But if he keepeth the Copyhold in his own Hands, this does not destroy the Copyhold. 2. By *Act* of Law; as if a Copyhold escheated be extended upon a Statute of Recognizance acknowledged by the Lord; or if the Wife of the Lord hath this Land assigned to her for her Dower. 3. By the *Act* of the Copyholder; as if he accepteth a Lease for Years at the Common Law from the Lord of the Copyhold. Thus a Copyhold Estate may be *extinguished*.

The Statutes which do relate, or do not relate, to Copyhold Estates, are taken Notice of under proper Heads; as under Title *Health, Estates-Tail, Jointures, Jointenancy, Fines, Covenants to stand seised to Uses, Leases, Recognizances, Bankrupts, Forgery, Cottages, Limitation of Actions, Jury, Execution, &c.* But in general, it is to be observed, ^b That when a Statute or *Act* of Parliament altereth the Service, Tenure, or Interest of the Land, or other Thing in Prejudice of the Lord, or of the Custom of the Manor, or in Prejudice of the Tenant, the general Words of the Statute extend not to a Copyhold Estate: But when generally made for the Good of the Commonwealth, and no Prejudice may accrue by Reason of the Alteration of any Interest, Service, Tenure or Custom of the Manor, there usually Copyhold Estates are within the general Purview of such Statute.

XI. ^a Estates in *Antient Demesne* are certain Manors which were Antient Demesnes of the Crown, and in Possession of Edward the Confessor, or William the Conqueror, and so appear in the *Doomsday Book* in the *Exchequer*. Lands in Possession of a Subject are called *Demesnes*, in a different Sense from the Demesne Lands of the Crown. *Demesnes* or *Domains* in the Hands of a Subject are derived *à Domo*, because they are Lands in his Possession for Maintenance of his Household. But the *Demesnes* or *Domains* of the Crown signify Lands held originally of the King, who is absolute Lord, having proper *Dominion*; and not by any feudal Tenure of a superior Lord, as of Fee. Estates or Lands held in *Socage* of these Manors by such Service as is required, according to the Custom of the Manor, are also called *Antient Demesne*.

During the Time that Lands in Antient Demesne are in the Hands of the King, they are *Frank-fee*, or free from Service. But if the King grants them over to hold of the Manor again, it is *Tenure* in Antient Demesne.

The Tenants hold by the *Verge*, and have no other Evidences of their Estates but Copy of Court-Roll; yet they are said to have Freehold.

Regularly all general Statutes extend to Antient Demesne. But the Lord in Antient Demesne and his Tenants are *exempted* and discharged from Taxes by Parliament, unless specially named; from Toll in Fairs and Markets, for all Things concerning Husbandry and Sustenance; from Expences to Knights of the Shire; the Tenants are not to be sued for their Lands, out of the Court of that Manor;

^a See B. 4.
ch. 1. f. 18.
post.

Manor^a, and shall not be put upon Juries out of Antient Demesne, nor appear at any other Court; because by their Tenure they are intended to apply themselves to the Manurance and Husbandry of the King's Demesnes; and to reap the Corn, &c. for furnishing his Household with necessary Provisions. And therefore for those Lands so holden, they have this Privilege at this Day; tho' the original Cause thereof is ceased, and their Services changed into Money.

^b 2 Inst. 221.
F. N. B. 228.
¹ Cro. 227.
¹ Roll. Abr.

But for buying and selling of Wares, that rise 'not upon the Manurance and Husbandry of those Lands, or for other Lands, held by the Common Law, they shall not have this Privilege.

³²¹.
See of Fairs
and Markets,
ch. 2. post.
^c 2 Inst. 397.
⁴ Inst. 270.

Lands in Antient Demesne are extendible upon a Statute-Merchant, Staple or *Elegit*^c.

Now follow Estates which may be either *Inheritances*, *Freeholds*, or *less* than Freeholds.

Of Estates
upon Condi-
tion.
^d 1 Inst. 201. a.
Lit. 325, 326.

XII. An *Estate upon Condition* is an Estate granted in Fee-simple, Fee-tail, for Life or Years, with a Quality annexed by him that hath Estate, Interest, or Right to the same, whereby the Estate granted may be either defeated, enlarged, or created, upon an uncertain Event.

There are Estates upon Condition in *Deed*, and upon Condition in *Law*.

^e Lit. 330.
³³¹.
¹ Inst. 205. a.

1. A Condition in *Deed* is expressed by the Party in legal Terms. And here if a Feoffment is upon Condition, That one pay so much Rent, or *provided* or *so that* he pays so much Rent, it is not necessary to add a Clause, *That upon Nonpayment of the Rent, it shall be lawful for the Feoffor and his Heirs to enter*, (tho' it is commonly done) because the Feoffment is upon that Condition. But these Words in a Deed, (*viz.*) *If it happen that the Rent be behind*, &c. give no Re-entry, if a Clause of Re-entry is not added. A

^f Lit. 360.
¹ Inst. 222. b.
223. a.

Conveyance in Fee upon Condition not to *Alien*, is void: For it is absurd, that he that hath no Possibility to have the Land again, should restrain one that hath the Fee-simple, of Power to dispose of it. So it is if a Man is possessed of a Lease for Years, a Horse, or any other Chattel real or personal, and gives or sells his whole Property therein upon such Condition; because it is against Trade and Traffick. But one may give an Estate in Fee, upon Condition that he shall not alien another Estate, or that he shall not alien the Estate to a particular Person, for he is not thereby restrained of *all* his Power to alien. And in this Case, if the Feoffee enfeoffs another, to the Intent that he should enfeoff or alien to that particular Person, he hath broken the Condition. And observe, that whatever is prohibited by Act of Parliament, may be prohibited by Condition; ^h and yet a general Power given by Act of Parliament may be restrained by Condition.

^g Lit. 361.
¹ Inst. 223.
a. & b.

^a 1 Inst. 223.
a. 224. a.
⁶ Rep. 41,
42, 43.
See of Condi-
tions, ch. 3.
post.

^{*} *Expressio eorum quæ tacite insunt, nihil operatur.* 1 Inst. 191. a. 205. a. 4 Rep. 73. 8 Rep. 56, 145.

^{Quæ} *dubitationis causâ tollendæ inferuntur, communem legem non lædunt.* 1 Inst. 205. a.

ⁱ *Regulariter non valet pactum de re mea non alienanda.* 1 Inst. 233. a.

Rerum suarum quilibet est moderator et arbiter. Ibid.

^j *Quando aliquid prohibetur fieri ex directo, prohibetur et per obliquum.* 1 Inst. 223. b. 3 Inst. 158.

A *Mortgage* (from *Mort*, dead, and *Gage* a Pledge) is a Pawn^a of Land, &c. for Money borrowed, upon Condition to be the Creditor's, if the Money is not repaid on the Day agreed. He that mortgages or pawns, is called the *Mortgagor*; and he to whom the Mortgage or Pawn is made, is called the *Mortgagee*. It is usually made by a Lease for a long Term of Years, or by Assignment of a subsisting Lease, or in Fee, by Lease and Release, and the Creditor holding the Land upon this Agreement, is in the mean Time called *Tenant in Mortgage*; and holdeth the Estate upon that Condition in Deed. But 'till Failure is made of Payment, the Mortgagor holds the Lands; and tho' Failure is made, and the Mortgagee doth enter into the Lands, yet the Mortgagor hath an *Equity of Redemption* in the Court of *Chancery*; and he may call the Mortgagee to an Account for the Profits. And a Mortgagee tho' in Possession, shall not present to a Living which becomes void, unless by express Agreement in the Mortgage Deed, or that the Advowson is the only Thing in Mortgage^b.

And a Feoffment in Fee, or a Gift in Tail, or a Lease for Life or Years, may be made upon Condition in Deed, That if the Feoffor, or the Grantor, or Lessor, or his Heirs or Executors, pay to the Feoffee, Grantee or Lessee, such Sum of Money at a certain Day, then the Feoffor, Grantor, or Lessor, his Heirs, or Executors, may re-enter.

In the former Case, the Mortgagor keeps the Possession till Failure; but here the Mortgagee or Grantee has the Possession presently, and till Payment.

It is allowed in Courts of *Equity*, that where Lands are mortgaged thrice, the 'third Mortgagee may buy in the first Incumbrance, to protect his own Mortgage: And he shall hold the Land against the second Mortgagee, unless he is satisfied the Money he paid the first Mortgagee, and also his own which he lent upon the last Mortgage. But when 'Part only of the Lands are mortgaged to the first, and the whole to the second, and after to the third, if the third Mortgagee buyeth in the first Title, it shall Protect only that Part which is first in Mortgage: So a Purchaser or Mortgagee coming in upon a valuable Consideration without Notice, and then purchasing in a precedent Incumbrance, shall protect his Estate against any Person that hath a Mortgage subsequent to the first, tho' before the last Mortgage; and tho' he purchased in the Incumbrance after Notice of a second Mortgage.

Mortgages are not redeemable in *Chancery* after 'twenty Years, no Demand being made, or Interest paid, unless there be an Excuse by Reason of Imprisonment, Infancy, Coverture, or being beyond Sea. [See 21 *Ja. 1. cb. 16.*]

If a Feoffment on Condition is made, that if the Feoffor pays such a Sum at a certain Day, he shall re-enter; yet if the Heir pays or tenders the Sum at the Day, he may enter, tho' the Words are, if the Feoffor pays, not mentioning Heirs; because the Heir has an Interest in Right of the Condition. So likewise the Executors or Administrators of the Mortgagor; or a Guardian in Socage may Tender the Money. And if the Heir is an Idiot, any one may do it out of Charity. But, in other Cases, the Feoffee is not bound to accept a Tender by a Stranger.

^a Lit. 339.
⁵ Rep. 96, 97.
¹ Inst. 209. b.
 210. a.

^b 2 Inst. 209. b.
 210. a.

^c 2 Ventr.
 348, 351.

^d 2 Ventr.
 365.

Upon a Mortgage in Fee, if the Feoffee maketh his Executors, and dieth before the Money is paid, the Redemption Money shall be paid to the Executor, tho' he is not named, and not to the Heir. But the Words of the Condition may be such as the Payment shall be made to the Heir, as when particularly named, and then the Money cannot be paid to the Executors. And if the Words of the Condition be to pay the Money to the Feoffee, his Heirs ^b or Executors, then the Feoffor hath Election to pay it to either of them. If the Feoffee is to pay to the Feoffor, his Heirs and Assigns, and before Payment, the Feoffor makes his Executors, and dieth, the Feoffee may pay the same either to the Heir or to the Executors; for the Executors are his Assigns in Law to this Intent, where the Feoffor has but a bare Condition, of which he cannot make any Assigns; and therefore the Law will find out Assigns for him. But if the Feoffor is to pay to the Feoffee, his Heirs or Assigns, and the Feoffee dieth before Payment, he must pay it to the Heir, for the Executors in this Case are no Assignees in Law. Here Assigns were only intended by the Condition to be Assignees of the Estate. But in Chancery it is a constant Rule, that Money to be paid on Mortgages, upon the Death of the Mortgagee in Fee, shall go to the Executors.

The Court of Chancery cannot shorten the Time of Payment of the Money, that is given by express Covenant and Agreement of the Parties, but may ^d lengthen it; and then upon Non-payment, the Practice is to foreclose the Equity of Redemption of the Mortgagor, and to make the Estate absolute in the Mortgagee.

[See 27 El. ch. 4. Against fraudulent Conveyances.]

By the 4 & 5 W. & M. ch. 16. If any Person, for Money borrowed or other valuable Consideration, shall suffer a Judgment, Statute, or Recognizance, and shall afterwards, for other Money borrowed, or other valuable Consideration, become indebted to a second Creditor, and for the Security of such second Debt, shall mortgage Lands to the second Creditor, or to any other Person in Trust for him, and shall not give Notice in Writing of such Judgment, &c. to the Mortgagee, before the Execution of the said Mortgage; such Mortgagor shall have no Benefit in Equity of Redemption of the Lands mortgaged; unless such Mortgagor (upon Notice given by the Mortgagee in Writing under Hand and Seal, attested by two Witnesses, of such former Judgment, &c.) shall within six Months pay off and discharge the same, and cause the same to be vacated or discharged by Record.

And if any Person, who shall once mortgage Lands for valuable Consideration, shall again mortgage the same Lands, or any Part thereof, to any other Person, for valuable Consideration, (the former Mortgage being in Force) and shall not discover in Writing to the second or after Mortgagee the first Mortgage, such Mortgagor shall have no Relief or Equity of Redemption against the second or after Mortgagee. But such second or after Mortgagees may redeem any former Mortgage.

^a Expressum facit cessare tacitum. 1 Inst. 210. a. 5 Rep. 97. 7 Rep. 40.
 11 Rep. 24.

^b Designatio unius personae est exclusio alterius. 1 Inst. 210. a.

^c Vendens eandem rem duobus, falsarius est. 1 Rep. 45.

This

This Act shall not extend to bar any Widow of any Mortgagor of her Dower, who did not legally join with her Husband in such Mortgage, or otherwise lawfully exclude herself.

And by 4 & 5 W. & M. ch. 20. No Judgment not docketed and duly entered, shall affect any Lands or Tenements as to Purchasers or Mortgagees.

[See 2 & 3 An. ch. 4. 5 An. ch. 18. 6 An. ch. 35. and 8 Geo. 2. ch. 6. For registering Deeds, &c. within the County of York; and 7 An. ch. 20. For Middlesex.]

By 7 Geo. 2. ch. 20. Where an Action on any Bond for Payment of Money secured by Mortgage, or for Performance of the Covenants therein, or any Ejectment to recover Possession of the mortgaged Premises, is brought by a Mortgagee, and no Suit is then depending in Equity to foreclose or redeem, the Person intitled to the Redemption may pay to the Mortgagee, or if he refuse to accept, may bring into Court Principal, Interest, and Costs, to be computed by the proper Officer of the Court, and the Monies so paid or brought in shall be deemed a full Satisfaction of such Mortgage, and the Court may by Rule compel the Mortgagee to re-convey the mortgaged Premises, and deliver up the Title Deeds to such Mortgagor, or as he shall appoint.

And on Bills of Foreclosure the Court may before the Hearing, on the Defendants Application, and Admission of the Plaintiffs Title, make such Order as if the Cause had been regularly at Hearing.

But this not to extend to Cases where the Right to redeem is controverted, or the Money due not adjusted, nor to prejudice subsequent Mortgagees.

2. A Condition in ^a Law is that which the Law intendeth or implieth without express Words in the Deed: As in a Grant of an Office for Life, the Estate is upon Condition implied in Law, that the Grantee shall do his Duty, or otherwise that the Grantor or his Heirs may oust him, and grant the Office to another. So in a ^b Lease for Life, it is implied, that if the Lessee make a greater Estate, the Lessor may enter.

XIII. A Statute-Merchant is a Bond, or Obligation of Record, acknowledged before a Clerk of the Statutes-Merchant and Lord Mayor of the City of London; or two Merchants of the said City assigned for that Purpose; or before the Mayors of other Cities, ^{Of an Estate by Statute-Merchant, Staple and Elegit.} York, Bristol, &c. or the Bailiff of any Borough or Town; or other sufficient Men, for that Purpose appointed, that have Power to make Execution of the said Bond, sealed with the Seal of the Debtor and the King; upon Condition, that, if the Obligor pays not the Debt at the Day, Execution may be awarded upon Body, Lands, and Goods, and that the Obligee may hold the Lands to him, his Heirs and Assigns, till the Debt is levied and paid. Now during this Time of being in Possession of the Lands, the Obligee hath an Estate by Statute-Merchant, or is Tenant by Statute-Merchant; the Bond or Recognizance being called a Statute, because it is made according

^a Quod necessario intelligitur, non desit. 4 Rep. 22.

Quod tacite intelligitur, non desit. Ibid.

Quædam tacita habentur pro expressis. 7 Rep. 40.

Expressio eorum quæ tacite insunt, nihil operatur. 5 Rep. 11. 8 Rep. 56.

to Form by Statute. [See the 11 Ed. 1. and the 13 Ed. 1. *ff.* 3. *ch.* 1.] In which last Statute the whole Proceedings are directed, and the Force of the Obligation or Recognizance is set forth, and the Nature of its Execution upon Body, Lands, and Goods.

See *ch.* 3.
f. 15. *post.*

A Statute-*Staple* is a Bond of Record acknowledged before the Mayor of the Staple, in the Presence or one or more Constables of the same Staple; by Virtue of which Statute-*Staple* the Creditor may forthwith have Execution of the Body, Lands, and Goods of the Debtor upon Non-payment. And then he hath an Estate in the Lands by Statute-*Staple*, or is Tenant by Statute-*Staple* till his Debt is paid. *Eshape* is a French Word (antiently written *Eshape*) and signifies a Mart or Market. So that the *Staple* signifies amongst us this or that City or Town where the Merchants are commanded to bring their Wool, Leather, Woolfells, Lead and Tin. And the Bond is called a *Statute*, because it is founded on the Statute of the 27 Ed. 3. *ff.* 2. which sets forth the Manner of entering into it, and of its Execution. This Statute also specifies the Places which are to be Staples (or Marts) for the Commodities aforesaid, their Duties upon Exportation, and the Jurisdiction of the Staples according to *Law-Merchant*. [See 23 H. 8. *ch.* 6. and 8 Geo. 1. *ch.* 25.]

See *ch.* 3.
f. 15. & B. 4.
ch. 2. *f.* 9.
post.

An Estate by *Elegit* (so called from the Words in the Writ, (*viz.* *Elegit sibi Liberari, &c.*) is where a Man hath recovered Debt or Damages by Judgment against another, and within the Year hath had a judicial Writ, called an *Elegit*, to have Execution on all the Party's Goods (Oxen and Beasts of the Plough excepted) and Half of the Party's Lands or Tenements, to be delivered by the Sheriff to him till his Debt and Damages are fully levied. During this Time he hath Estate by *Elegit*, or is Tenant by *Elegit*.

See B. 4. *ch.* 4.
f. 10. *post.*

These three Estates, (*viz.*) By Statute-*Merchant*, Statute-*Staple*, and by *Elegit*, are uncertain Interests in Lands and Tenements, and yet they are but Chattels, not Freeholds, tho' the Tenants are said to hold the Lands *Ut Liberum Tenementum*, until the Debts are paid. As a Chattel, the Estate shall go to the Executors. For *Ut* is similitudinary only, because by the Statute these Tenants may have an Assize, as a Tenant of a Freehold may have; and in that Respect their Estates are like a Freehold. [See 13 Ed. 1. *ch.* 18. 32 H. 8. *ch.* 5.]

^b 1 Inf. 42. a.
^c 1 Inf. 43. b.
290. a.
2 Inf. 396.

No Execution on any of these Statutes shall go against the Heir of the Defendant within Age, or if two Daughters are Heirs, and one of them is within Age.

Of an Estate
in Lands de-
vised to Exe-
cutors.

^d 1 Inf. 236. a.

XIV. An Estate in Lands devised to Executors for Payment of Debts, or Legacies, is different from a Power to sell them. When the Land is devised to Executors to be sold, there the Devise taketh away the Descent to the Heir, and vesteth the Estate in the Executors; and they may enter and take the Profits, and make Sale according to the Devise. So when a Man deviseth his Tenements to be sold by his Executors, it is all one as if he had devised his Tenements to his Executors to be sold; because he deviseth the Estate in the Tenements, whereby he breaks the Descent to the Heir. But where a Man deviseth that his Executors shall sell the Land, there the Lands in the mean Time descend to the Heir; and until the Sale is made, the Heir may enter and take the Profits; because here the

the Executors have only a *Power*. And when the Executor has the *Estate* vested in him, and the mean Profits, he is bound to make ^{a Lit. 383.} Sale as soon as possible after the Death of the Testator; because the ^{1 Inst. 236. a.} mean Profits taken before the Sale, shall not be *Assets* ^b to pay ^{c See of Assets,} Debts; and therefore the Executor must not be suffered to make ^{ch. 6. post.} Advantage of his own Negligence and Delay. But if one deviseth that his Executor shall sell his Land; there he may sell it at any Time, because he hath but a bare *Power*, and no *Profit*. [But this Distinction does not seem to be now of any Force, for the Estate itself is now held to be *Assets*; but supposing the Rents and Profits are not properly legal *Assets* in the Hands of the Executors, yet they are but Trustees in Equity, and therefore are accountable to the Creditors for those Rents and Profits, as well as ^{Office of Executor, ch. 6. P. 105. 1 Wms. 390. 2 Wms. 416, 550.} for the Money arising from the Sale; and after Payment of the Testator's Debts, the Surplus as well of the Rents accrued after the Testator's Death, as of the Purchase Money, is considered as real Estate, and the Executors are but Trustees as to that, and accountable for it either to the residuary Devisee, if there is one, or else to the Testator's Heir at Law.]

If one deviseth *Lands* to his Executors to be sold, and maketh ^{a 1 Inst. 112. b. 113. a. 181. b.} two Executors, and the one dieth; yet the Survivor may sell the Land, because as the *Estate*, so the *Trust* shall survive. But where the Executors have but a *Power* to sell, they must all join in the Sale, and if one dies, the Survivors cannot sell. ^d Where a Man does such an Act as cannot be good by any other Means but by ^{1 Ld. Ray. 660.} Virtue of his Authority, it shall be intended to be an Execution of his Authority; but where a Man has both an Interest and an Authority, and does an Act without reciting his Authority, it shall be intended to be done by Virtue of his Interest. So Note The Difference betwixt a Trust coupled with an Interest and a bare Power. ^{2 Wms. 103, (628)} But if the Sale is to be made by the Executors or the Survivors or Survivor of them, or by such as take upon them the Probate of the Will, those Words will prevent such Disputes.

If Executors have a bare Authority accompanied with a Trust, they cannot sell by *Attorney*; but if they are Owners of the Land, ^{e 9 Rep. 75.} they may sell by *Attorney*.

By 21 H. 8. ch. 4. *Where Lands, Tenements, or other Hereditaments, are devised to be sold by Executors, and one or more refuses to prove the Will, yet the Residue that take upon them the Charge of the Will may sell.*

This is construed to ^{f 1 Inst. 113. a.} extend to Executors that have the *Estate*, as well as to Executors that have *Power* only. But in neither Case may the Sale be made to him that refused; because he remains Executor notwithstanding his Refusal.

We have hitherto spoken of *Sole Tenants* to an Estate; now follow Estates in *Coparcenary*, *Jointenancy*, and *Tenancy in Common*.

XV. An Estate in *Coparcenary* is where two or more have equal Portion in the Inheritance of their Ancestors.

Coparceners are of two Sorts, (*viz.*) Parceners according to the Course of the *Common Law*, and Parceners according to *Custom*. ^{Of Estates in Coparcenary. a Lit. 241, 242. 1 Inst. 163. b. 164, &c.}

1. Parceners

If others or others who are put in Trust by devise to sell, or the like, will not perform a Trust: the Heir may sue. 4 Co. Inst. 2. 161. One: decr. 46

1. *Parceners by Common Law* are, where a Man or Woman seised of Lands or Tenements in Fee-simple, or in Fee-tail, hath no Issue but Daughters; or dies without Issue, and leaves only Sisters, or Aunts, or other Females of Kin in equal Degree; and the Tenements descend to such Daughters, Sisters, Aunts, &c. and the Daughters, Sisters, Aunts, or other Females of Kin in equal Degree enter into the Lands; then these Women are called *Parceners*, or *Coparceners*, and are but one Heir to their Ancestor, and have but one Freehold. But tho' they have but one Freehold, yet between themselves they have in Judgment of Law ^a several Freeholds to many Purposes. For one of them may enfeof the other of her Part; and the Coparcenary is not severed or divided in Law by the Death of any of them; for if one dies, her Part shall descend to her Issue, be it Son or Daughter. Men descending of Daughters may be Coparceners, as well as Women, and shall jointly plead, or be impleaded.

^a 1 Inst. 164. b.
165. a.

^b Lit. 265.

2. *Parceners by Custom* are where Lands in Fee-simple, or Fee-tail, of the Tenure of *Gavelkind*, descend to all the Sons by *Custom*. Here the Descent is to Men, as it was to Women by the Common Law.

You see this Estate of Coparceners is applicable only to Inheritances.

^c Lit. 243.

¹ 1 Inst. 164. b.
167. b. 175. a.

They are called *Parceners* ^c because they are compellable by Writ *de Partitioe Facienda*, to make Partition, tho' they may make Partition by Consent. This was by the Common Law: And by 8 & 9 W. 3. ch. 31. an easier Method of proceeding upon this Writ is provided. But some Inheritances ^d cannot be divided amongst Coparceners, as reasonable Estovers ^e of *Houfe-bote*, *Hay-bote*, &c. appendent to the Freehold, a Piscary uncertain, a Common ^f *sans Nombre*, a Mill, &c. for that would be a Prejudice to the Tenant of the Soil. But the eldest Coparcener in these Cases shall have reasonable Estovers, Piscary, Common, &c. and the rest shall have an Allowance in some other Part of the Inheritance; or in some Cases one shall have it for one Year, the other for another; or in the Case of a Piscary, one may have the first Draught of Fish, the second the second Draught, &c. if the common Ancestor left no other Inheritance to give any Thing in Allowance, or to make up the Owelty or Equality. An Advowson is an entire Thing, and yet in Effect the same may be divided betwixt Coparceners; for they may present by Turns. [See of the *Nobility B. 1. ch. 4. ante*, where an Earldom descends to Coparceners.]

^d 1 Inst. 164. b.
165. a.

^e See ch. 2.
post.

^f See ch. 2.
post.

¹ Ld. Ray.
136.

And by 7 A. ch. 18. *After Partition to present by Turns, each shall be deemed seised separately of his or her Part of the Advowson, to present in Turn.*

² 2 Roll. Abr.
31.

One Coparcener may justify the ² Detaining of the Deeds concerning the Land in Coparcenary against the other, for they belong to one as well as the other.

Show. Rep.
13, 30, 105.
3 Lev. 259.
1 Vern. 465.

Partners in Trade are those (two or more) who agree to come in Share and Share alike to any Trade or Bargain. *Part-Owners* are those who are concerned together in Ships. But Coparcenary in Estates of Inheritance belongs only to this Place.

Of Estates in
Jointenancy.
^a Lit. 277,
281, 282.

XVI. An Estate in ^b *Jointenancy* is where a Man is seised of Lands or Tenements, and makes a Feoffment to two or more, and

and their Heirs; or makes a Lease to them for Life; or where two or more have a joint Estate or Possession of a Chattel, Real or Personal, or a joint Interest in a Debt, Duty, Covenant, or Contract, and the Part of him that dieth goes not to the Executor, but the Whole to the Survivors, or Survivor. An Exception is to be made of two ^a Joint Merchants; for the Benefit of the Stock and Debts, ¹ Inst. 181. a. which they have as Partners, goes to the Executor of him that dies, ^{182. a.} and to the Survivor, according to their Shares, by the *Law Merchant* for Incouragement of Trade; tho' the Debts and Credits as against third Persons survive. ^b Every Jointenant is seised *per my & per tout*, ¹ Lit. 288. i. e. seised by every Parcel, in every Parcel, and in the whole jointly ¹ Inst. 186. a. with his Companion; but each of them hath a Right to his Share to several Purposes, ^c as to give, lease out, forfeit. One also may let a ¹ Lit. 289. Lease to his Companion, or make him his Bailiff. ¹ Inst. 186. a. & b. 188. b. 189. a.

They are called *Jointenants*, because Lands or Tenements are conveyed to them *jointly* by one and the same Title; and because they take by Purchase only; whereas an Estate in *Coparcenary* is always by *descent*; and an Estate in *Common* is always by several Titles, or by *one* Title and several Rights.

Jointenants must jointly implead, and be jointly impleaded by others; which Property is common to them and Coparceners. But Jointenants have a sole and peculiar Quality to take by ^a Survivorship, which Coparceners have not, and this Survivorship is called *Jus Accrescendi*. Two or more may have a naked Trust, an ^a Authority or Power committed to them jointly, and yet it shall not survive. But a Trust, an Authority or Power coupled with an Estate or Interest may survive, as hath been said concerning an Estate in Lands devised to Executors. ^a Authorities created by the Party for *private* Causes do not survive, if there are no particular Words to empower the Survivor. As if a Man makes a Letter of Attorney to two to do any Act, and one of them dies, the Survivor shall not do it. But Authorities created by *Law* for Execution of Justice may survive, because it is for the Good of the Commonwealth. As if a Sheriff upon a *Capias* directed to him makes a Warrant to four or three jointly or severally to arrest a Defendant, two of them may arrest him. [And so it should seem to be in a private Case where the Authority is joint and several.] There may be Jointenants tho' there is not ^c equal Benefit of Survivorship ¹ Inst. 181. on both Sides. And if one Jointenant grants ^a a Rent, Common ^{a. & b.} or Way, out of his Part, and dies, the Survivor shall have the ¹ Lit. 286. whole Land discharged. ¹ Inst. 185. a. But if one Jointenant makes a ^b Lease for ¹ Lit. 289. Years, to begin presently, or *in futuro* of the Land, or of the ¹ Inst. 186. Herbage, and dies during the Term, or before it begins, it cannot ^{a. & b.} be avoided by the Survivor; because the Lessee has an Interest in the Land by Force of the Lease. And if one Jointenant makes a Lease for Years, ¹ reserving a Rent and dieth, the Survivor shall have ¹ Inst. 185. a. the Reversion; but he shall not have the Rent, because he claimeth by the first Feoffor, which is Paramount the Rent. A ^b Devise of ¹ Lit. 287. Land, whereof the Devisor is jointly seised or possessed, is void; ¹ Inst. 185. a. & b.

^a *Qui eandem rem in solido possidere non possunt.* ¹ Inst. 368. a.

^b *Jura publica ex privato decidi non debent.* ¹ Inst. 181. b.

^c *Jus accrescendi praeferitur oneribus.* ¹ Inst. 185. a.

^d *Alienatio rei praeferitur juri accrescendi.* Ibid.

^e *Jus accrescendi praeferitur ultimae voluntati.* ¹ Inst. 185. b.

for the Title of the Survivor cometh, as from the first Feoffor, presently upon the Death, and the Will takes Effect after Death. If
¹Inst. 185. a. a Jointenant in Fee-simple is indebted to the King, and dieth, the Lands cannot be extended in the Hands of the Survivor, because the Survivor claims not from his Companion, but from the Feoffor. Two Women Jointenants of a Lease for Years,
¹Inst. 185. b. and one taketh Husband, and dieth ^b before the Husband hath altered the Property, or alienated her Part, the Term shall survive. But otherwise it is of personal Goods, because these are presently vested in the Husband by the Marriage. If a Jointenant doth not alienate his Part to bar the Survivorship, the Jointenants usually enter into Covenant, not to take Advantage of each other by Survivorship.

By 31 H. 8. ch. 1. *Jointenants and Tenants in Common of any Inheritance, [or of Estates for Life, Lives or Years, by 32 H. 8. ch. 32.] are compellable to make Partition by Writ of Partition, as Coparceners are compellable to do at Common Law.*

And by 8 & 9 W. 3. ch. 31. *An easier Method of proceeding on that Writ and of obtaining Partition of Lands in Coparcenary, Jointenancy and Tenancy in Common is provided. But these Statutes do not concern Copyhold Lands.*

By 4 Ann. ch. 16. *Actions of Account may be brought by one Jointenant or Tenant in Common, his Executors and Administrators against the other, as Bailiff, for receiving more than his just Share, and against his Executors and Administrators. And the Auditors shall examine the Parties about the Matters in Question upon Oath, and for their Trouble in auditing shall be allowed what the Court shall judge reasonable, to be paid by the Party on whose Side the Balance shall be.*

By 7 Ann. ch. 18. *Coparceners, Jointenants and Tenants in Common, having made Partition to present by Turns, each shall be deemed seised in Law of his or her separate Part of the Advowson, to present accordingly, if it be an Estate of Inheritance.*

Of Estates in Common.

^c Lit. 292.

¹ Inst. 188. b. 189. a.

^d Lit. 298.

¹ Inst. 190. b.

^e 1 Inst. 190. b.

^f Lit. 301.

¹ Inst. 191. a.

XVII. An Estate ^c in Common may be by Purchase, Descent, or Prescription, and is where two or more have Lands and Tenements in Fee-simple, Fee-tail, for Life or Years by several Titles, (or by one Title and several Rights) and none of them knoweth his own Part, but takes the Profits in Common. As if there be two Jointenants, which claim by one and the same Title, and one Aliens his Part, now the Aliance and the other Jointenant are Tenants in Common, because they claim by several Titles. So if Lands are given to two to have and to hold, the one ^a Moiety to the one and his Heirs, and the other Moiety to the other and his Heirs; they have an Estate in Common; ^e because they have several Freeholds, and their Occupation is undivided. ^f So if a Man lets Lands to two Men for Term of their Lives, and to the longest Liver of them; and the one grants all his Estate to another, then the other Tenant for Term of Life, and he to whom the Grant is made are Tenants in Common, during the Time that both Lessees are alive; for here the Jointure is severed, and there can be no Survivorship; but the Lessor shall enter into the Moiety, [24.] and the Survivor shall have no Advantage of these Words, (viz.) *to the longest Liver of them*; because, I say, the Jointure is severed, and these Words are no more than the Law would have implied without them. As there may be Estates in Common of Lands or Tenements, so there may

may be of *Chattels real*, as Leases for Years. For if two Jointenants^a Lit. 319. are of a Lease for twenty-one Years, and the one of them letteth^b Inst. 192. a. his Part for three Years, &c. the Jointure is severed; and they become Tenants in Common, and Survivorship does not take Place, as in Jointenancy. [24.] For a Term for a small Number of Years is as high an Interest as for many more Years. In the same Manner it is of *Chattels personal*. As if two have jointly an Horse, and one^c Lit. 321. grants his Part to another; the Grantee, and he that did not grant, possess such Chattel personal in Common; and if one dies, the other shall not have the Whole by Survivorship; but the Executor shall be Tenant in Common with the Survivor. Thus it is where there are *several Titles*.

As those are Estates in Common where the Claim is by several *Titles*; so those also are Estates in Common, that are claimed by one Title and several *Rights*, as you may observe by the Defini-^c Inst. 189. a. tion of an Estate in Common. As where *Lands* in Fee vest in two & b. 190. a. Bishops or Parsons, and their Successors, in Right of their Churches, and in their politick Capacities; these have an Estate in Common, and not in Jointenancy; because Jointenants ought to have the Estate in one and the same Right and Capacity; whereas two Bishops, or two Parsons, are seised of their Moieties by several Rights, (*viz.*) in the Right of their two Bishopricks, or two Parsonages; and so in several Capacities. Thus it is if Lands are given to the King and a Subject, and their Heirs; or to a Layman and his Heirs, and a Parson and his Successors: But this does not hold in *Chattels real* or *personal*; for if a Lease for Years, or Goods, be granted to a Bishop, and secular Man, they are Jointenants; because Goods and Chattels cannot go in Succession, and therefore the Bishop cannot take them in his political Right or Capacity.

The essential Difference then betwixt Jointenants and Tenants in Common is, that Jointenants have the Lands by one joint Title and in one Right, and Tenants in Common by several Titles, or by one Title and several Rights. And this is the Reason that Jointenants have one joint Freehold, and Tenants in Common several Freeholds.

See the *Statutes* concerning an Estate in Common, under the Title of an *Estate in Jointenancy*, *ante*.

Hitherto we have spoken of Estates that are supposed to be in *Being*; now follow, in the last Place, Estates in *Expectancy*, as a *Remainder* and *Reversion*.

XVIII. An Estate in *Remainder* is the Residue of an Estate in Of an Estate in Remainder. Land depending upon a particular Estate, and created together with^d Inst. 49. a. the same. A *particular* Estate is that which is derived from a & b. 143. a. general and greater Estate. As if a Man seised in Fee letteth Lands or Tenements for Term of Years, the Remainder over to another for Life, in Tail or in Fee. Here is first a particular Estate for Years, created out of a Fee, and afterwards the Residue disposed of, which we call the Remainder; tho' the particular Estate, and all the Remainders, make but one Estate in Law.

The following *Rules* are to be observed in the Creation of Re-^e Plowd. 25. mainders, &c. 35. Noy's Max.

31, 123, 124, 125, 126, 127. Hern, &c. 2, 3, 4, 5.

1. There

1. There must be a *particular* Estate precedent made at the same Time, that the Remainder may depend on it. 2. ^a The particular Estate must *continue* 'till the Remainder vests, and the Remainder must commence in Possession, at the very Time the particular Estate endeth; for there must not be a Mean between them. 3. The Remainder must pass out of the Lessor or Grantor, executed or executory, at the Time of the Possession taken by the particular Tenant; ^b but it cannot depend upon a Matter *ex post facto*; as where there is an Estate-tail, with Condition, that if the Tenant in Tail aliens in Fee, or Fee-tail, then the Estate to cease, and the Land to remain to another. This is a void Remainder; because the Alienation vests the Estate in the Alienee, or else in the Donor. A Remainder may depend upon a Condition that is not repugnant or against Law, and then it will pass either executed or executory. 4. The Person to whom the Remainder is limited must be capable at the Time it was created, or else ^c by common Possibility, or *in Potentiâ propinquâ* to be thereof capable during the particular Estate. Therefore Lessee for Life, Remainder to the right Heirs of J. S. is good; for by common Possibility J. S. may die during the Life of the particular Tenant; but if the Tenant or Lessee for Life dieth, living J. S. The Remainder is become void, because there is no Person capable to take at that Time. But a Remainder to the first begotten Son of J. S. (in general Terms) born during the particular Estate, is good. If the Remainder had been limited in particular by Name of Baptism and Surname, it had not been good, if he was not *in Esse*; for it was *Potentia remota*, and not probable that J. S. should have a Son of that Name. But by 10 & 11 W. 3. ch. 16. *A posthumous Child may take under a Remainder limited to the Issue of any Person, as if born in his Father's Life-time, tho' there are no Trustees to preserve contingent Remainders.* 5. The Thing whereof a Remainder shall be created must be *in Esse*, before and at the Time of the Appointment and Creation thereof, else the Remainder is void. As if I grant a Rent out of my Land, the Remainder in Fee; this Remainder is void, because the Rent was not *in Esse* before. [^d But by later Cases it hath been held, that a Rent *de novo* may be limited to one for Life, with Remainder over in Fee, for that the Law considers the whole Interest or Fee in the Rent to be first granted, and the immediate or particular Estate therein to be carved out of it, and that it may be granted to commence *in futuro*, so that this 5th Rule seems not to be Law.]
- An Estate at Will is not such a particular Estate whereon a Remainder may depend. One may grant a Lease for Years to one, for so long as he shall live of those Years, ^e Remainder to another for the Rest of the Years.
- In a *Devise*, or last Will and Testament, a Lease for Years may be given to one for Life, or so long as he shall live, and after to another for the Residue of the said Term; for in this Case the Intent of the Testator (which is to be followed in *Devises*) may take Effect by Way of executory *Devise*, tho' not by Way of Remainder. Yet one must take Care not to *devise* a Term for Years expressly in *Tail*, with Remainder over to raise a Perpetuity. For the Law abhors Perpetuities. [But a Devise over of a Term for Years upon the Contingency of the first Taker's dying without Issue, (that

is, without leaving Issue at the Time of his Death) hath been held to be a good Devise, and not too remote.]

No Remainder can be of a *Chattel personal*; as to give my Study ^a Noy's Max. of Books to one for Life or Years, Remainder to another. But if ³¹, 99, 100. I had given the *Use* of my Books to one for Life, and then those Books to another, it would have been good. [A Devise of a *Chat- 2 Vern. 246,* tel *personal* for Life is now taken to mean the same Thing with a ^{331.} Devise of the *Use* of it for Life.] ^{1 Wms. 502, 652.}

Remainders are either *absolute* or *contingent*. *Absolute*, as a Lease for Years, with a Remainder to another in Fee-simple, Fee-tail, &c. ^b *Contingent*, where the Estate is limited to take Place *in futuro*, ^b 3 Rep. 20. upon a dubious and uncertain Event; or where the particular Estate, ^{10 Rep. 85.} which doth support the Remainder, may, or may not, determine ^{1 Inst. 378. a.} before the Remainder commences. There the Remainder doth not vest forthwith, but dependeth on Contingency. As in the Case above-mentioned, where a Lease is made to one for Life, the Remainder to the right Heirs of *J. S.* This Remainder is good upon Contingency, that is, if Lessee for Life survives *J. S.* or else not. For *J. S.* hath no Heir whilst he is alive.

To prevent the Disappointing contingent Estates, the ^a common ^{1 Ventr. 189.} Way of Conveyancing was to make a Feoffment, &c. to the Use of *J. S.* for Life, Remainder to the Use of the Feoffees for the Life of *J. S.* for preserving contingent Remainders, yet the more modern Way is to make the first Estate only for Years. In both Cases, he that hath the first Estate cannot destroy the Remainder. [See 19 *Car. 2. ch. 6. 6 An. ch. 18. In Page 129 and 130. ante.*]

Note, That there is a Difference betwixt a *Contingent* Remainder and an *executory Devise*. For in all Cases of *executory Devises* the Estate descends until the Contingency happens, and nothing is vested till then in the *executory Devisee*; whereas a Remainder is an Estate vested.

XIX. An Estate in *Reversion*, (from *Reverto* to Return) is the ^d Of an Estate Residue of the Estate left in the Grantor after some particular ^{in Reversion.} Estate granted away, always continuing in him that granted the ^{4 1 Inst. 22. b.} particular Estate; or where the particular Estate is derived out of ^{142. b.} his Estate. As in a Gift in Tail, the Reversion of the Fee-simple is in the Donor; in a Lease for Life, or for Years, the Reversion is in the Lessor. If one has a Lease for twenty Years, and leaseth out ten of those Years, a Reversion is in the second Lessor, as well as in the first that granted the twenty Years. A Reversion also may commence after a Remainder, where one disposeth of a less Estate than that whereof he was seised at the Time of such Disposition.

The Reversion expectant upon an Estate-tail is of ^a no Account in ^{1 Inst. 273. a.} Law, because it may be cut off by Fine and Recovery; and therefore a Reversion upon an Estate-tail is no ^a Assets. Otherwise it is ^{6 Rep. 58.} of a Reversion on an Estate for Life or Years. ^{1 Ld. Raym.}

The Possession of the ^a Tenant does preserve the Reversion in the ^{53.} Donor or Lessor; and consequently the Rents and Services due to ^{1 Inst. 324. b.} him.

There was no Reversion or Remainder upon Estates in ^b Tail at ^{1 Inst. 327. a.} Common Law. ^{See p. 122. ante.}

By the Common Law no Grantee or Assignee of a Reversion, could take Advantage of any Condition or Covenant broken by the Lessees of the same Lands. But now,

¹ Inst. 215.

By 32 H. 8. ch. 34. Grantees of Reversions may take Advantage of Conditions and Covenants against Lessees of the same Lands, as fully as the Lessors themselves, their Heirs or Successors might have done. Lessees also may have the like Remedies against the Grantees of Reversions, as they might have had against the Lessors themselves, their Heirs or Successors.

[See 19 Car. 2. ch. 6. 6 An. ch. 18. p. 129 and 130. ante.]

CHAP. II.

The second Division of Estates in Lands, Tenements, or Hereditaments, (*viz.*) Into Estates Corporeal and Incorporeal. And therein of Dignities, Advowsons, Tithes, Tenures and Services, Annuities, Commons, Ways, Multure of a Mill, Corrodies and Pensions, Offices, Franchises, Privileges.

^a 1 Inst. 9. a.
49. a.

ESTATES are either ^a Corporeal or Incorporeal; Corporeal, as Houses and Lands, which may be touched or handled. These are properly called Lands and Tenements, because they are held of some Lord by some Service or other. Incorporeal, which cannot be touched or handled; but are only ^b Rights issuing out of corporeal Inheritances, or concerning them, or annexed to, or exercisable within the same. As Dignities, Advowsons, Tithes, Tenures, and Services, Annuities, Commons, Ways, Multure of a Mill, Corrodies or Pensions, Offices, Franchises, Privileges. These may be comprehended under the Word Hereditaments, and are conveyed by ^c Deed only, and without any Livery and Seisin, or other Ceremony.

^b 1 Inst. 20. a.

^c 1 Inst. 9.
See of Grants,
ch. 3 post.

Reversions and Remainders are not Things incorporeal in their own Nature; but are so called, because they are Estates in Expectancy only. They are a present Interest, yet stand in a Degree removed from the Possession, till the particular Estate is determined. However, of these I have already spoken in the last Chapter.

Of a Dignity.
^d See p. 41.
ante.
Of Advow-
sons.

I. A Dignity is a Title of Nobility ^d.

II. Concerning Advowsons it will be necessary to know, 1. What is a Benefice; and then, 2. What is an Advowson, and how divided. 3. How an Advowson may lapse. 4. How it may be gained by Usurpation.

^e 2 Inst. 29.
³ Inst. 155.

1. A ^e Benefice is any Ecclesiastical Dignity, Promotion, or spiritual Living whatsoever. All Church Preferments are Benefices. [See 13 R. 2. st. 2. ch. 2. concerning Bishopricks.] They must be given for Life, not for Years, or at Will.

Deaneries,

Deaneries, Archdeaconries, Prebends, &c. are Benefices with Cure of Souls, tho' not comprehended, as Benefices with Cure of Souls, within the Statute of Residency, (*viz.*) 21 H. 8. *ch.* 13. But according to a more strict and proper Acceptation, Benefices are *Rectories* and *Vicarages*. A *Rectory* or *Parsonage* is a Church endowed with a House, Glebe and Tithes. Some Rectories have a Cure of Souls annexed to them, and some have no Cure of Souls. These are called *Sine-Cures*, as when the Church is fallen down, and the Parish becomes destitute of Parishioners, or where the Rectors have Vicars under them. A *Vicarage* is a Benefice where some or all of the Tithes are Improprite. See B. 1. *ch.* 3. ante.

1. An *Advowson*, (*Advocatio*, *Jus Patronatus*) is a Right of Presentation or Collation to a Church. The Nomination was originally in the Bishop of the Diocese, but granted afterwards by him to the Patrons (either as Founders or Benefactors to the Church) reserving a Right to himself of Approving the Person presented to him. So that now Patrons have as absolute Ownership and Propriety in the Advowson or Right of Presentation, as they have in their Lands; it being of a temporal Nature, and a Lay Fee. It may be granted by Deed or Testament, and it is *Assets* by Descent. And it may lie in *Tenure*; for a common Person may give it to hold of him. Finch 133. Inst. 17. b. 119. b. Dr. & Stud. Dial. 2. *ch.* 26, & 36. 2 Inst. 273, 646. 1 Inst. 374. b. 2 Str. 879. 3 Wms. 398. Finch. 133. 1 Inst. 17. b. 118. a.

There may be *Advocatio Medietatis Ecclesie*, and *Medietas Advocationis*, *i. e.* an Advowson of the *Moiety* of the Church, and a *Moiety* of the Advowson. An Advowson of the *Moiety*, is where there are several Patrons and two several Incumbents in one Church; the one of the one *Moiety*, the other of the other *Moiety*, and one Part, as well of the Church as of the Town, allotted to the one, and the other Part thereof to the other. The *Moiety* of the Advowson is, where two must join in the Presentation, and where there is but one Incumbent; as where there are two Coparceners. And tho' they agree to present by Turns, yet each of them hath but the *Moiety* of the Church. See P. 148. ante.

This is the Description of an Advowson.

Advowsons are divided thus. Advowsons are of two Kinds. 1. *Appendant* and in *Gross*. 1. *Appendant* is a Right of Presentation dependent upon a Manor, Lands or Tenements; and does pass in a Grant of the Manor as an Incident, without saying, *With the Appendants, or Appurtenances thereunto belonging*. But in Case of the King, tho' *with the Appurtenances* is added, an Advowson will not pass without express Mention of it. [See 17 Ed. 2. *ch.* 15.] 2. In *Gross*, is a Right subsisting by itself, belonging to a Person, and not to a Manor, Lands, &c. So that when an Advowson Appendant is severed by Deed or Will from the corporeal Inheritance, to which it was Appendant, then it becomes an Advowson in *Gross*. Lit. 184. 1 Inst. 121. b. 122. a. 1 Inst. 77. a. 307. a. 10 Rep. 63. Hob. 323. 11 Inst. 120. b. 121. b. 122. a.

Again, Advowsons are either *Presentative*, *Collative*, or *Donative*.

1. An Advowson *Presentative* is, where the Patron does present or offer his Clerk to the Bishop of the Diocese, to be instituted in his Church, as hath been observed. [See 1 Geo. 1. *ch.* 10. Concerning the Patronage of some augmented Cures.] 1 Inst. 120. a. See P. 33. ante.

This may be done either by Word or Writing. The King may present by Word, or in Writing under any Seal; who otherwise cannot

not do any legal Act but by Matter of Record. But where an aggregate Corporation doth present, it must be under Seal. The
 * F. N. B. 53. Presentation to a Vicarage doth of Common Right belong to the
 b. 34 b. Parson. If a *Feme Covert* hath Title to present, the Presentation must be by Husband and Wife, and in both their Names, except in Case of the *Queen Consort*.

And if a *Feme Covert* is seised of an Advowson, and the Church
 b. 1 Inst. 120. a. becometh void, and the Wife^b dieth, the Husband shall present to
 * F. N. B. 33. the Advowson. A *Guardian* in Socage or by Nurture, cannot
 1 Inst. 17. b. present to a vacant Living in Right of the Heir, or in his Name, be-
 89 a. 246. a. cause he can make no Benefit of it, or Account for it, though it is
 3 Inst. 156. sometimes practised, and made good by Time. Therefore the In-
 2 Cro. 99. fant shall present of whatsoever Age. If a common Patron presents
 first one Clerk, and then another, the Bishop may Inſtitute which
 he pleases; unless he Revokes the Presentation of one of them be-
 fore he is admitted by the Bishop. [2y.] If there is a Right of No-
 mination in one, and a Right of Presentation in another, to the same
 Benefice; he that has the Right of *Nomination* is the true Patron,
 and the other is obliged to present the Clerk which is nominated.
 If one that hath a Turn presents his Clerk, and he is admitted, In-
 stituted, and inducted, but he doth not read the thirty-nine Arti-
 cles, &c. This shall not be accounted his Turn, because the Ad-
 mission, Institution, and Induction are void. Otherwise if he was
 deprived for a Crime. If the Presentation bears Date whilst the
 Church is full of another Clerk, it is void.

A *Deacon* may be presented; but he must be made a Priest, be-
 fore he can be instituted. A *Patron* cannot present himself; but
 he may pray to be admitted by the Ordinary; and if admitted, it
 is valid. A *Dean and Chapter* cannot present the *Dean*, nor *Ma-
 ſter and Fellows the Maſter*.

The *Patron* must regularly and generally present within *ſix* Ca-
 lendar Months after the Avoidance of the Church. It is not suf-
 ficient, that the Presentation bears date within the six Months.
 And if the Bishop *refuſes* to admit the Clerk presented, he must
 give Notice of his Refusal, with the Cause of it forthwith. And
 on such Notice, the Patron must present another Clerk within the
 six Months from the Avoidance, if he thinks the Exceptions against
 his first Clerk are sufficient Causes of Refusal. Otherwise he may
 bring his *Quare Impedit* against the Bishop. But it is said, that
 a spiritual Person is not intitled to have any Notice upon Refusal of
 his Clerk, especially for want of Learning. If the Church be-
 comes void by the *Act of God*, as *Death*; or by *Creation*, or *Ceſſion*
 of the last Incumbent, or otherwise by the *Act of the Incumbent*;
 the *Patron*, at his Peril, is bound to take Notice of the Avoidance,
 and to present within six Months after. But if it becomes void
 by Deprivation by the *Canon Law*, or Resignation, the Patron must
 have Notice from the Ordinary, and then he must present within
 six Months after that Notice. For the Church was void by the *Act*

of the *Ordinary*. If a Church becomes *Litigious* by the Pre-
 sentation of two several Patrons of their Clerks to a void Church,
 within the six Months, the Bishop may suspend the Admitting the
 one Clerk or the other; and suffer Lapse to incur, without Award-
 ing a *Jus Patronatus*. But upon Request of either Party, Patron,
 or Clerk, he must award it; and then if he admits the Clerk ac-
 cording

according to the Verdict found, and Certificate of the Commissioners, he secures himself from being a Disturber; tho' the Right in a *Quare Impedit* is found for the other. The Bishop may award it, if one Patron only presents, and assign Commissioners to inquire into his Title. By which you may apprehend, that a *Jus Patronatus* is a Commission, granted by the Bishop to some Persons, to inquire who is the rightful Patron. But if the Bishop delays the Patron upon his Presentation, by Deferring to examine his Clerk, &c. he may sue his *Quare Impedit*, and thereupon a Writ of *Ne Admittas* to the Bishop, within the fix Months. And then if the Bishop, after the Receipt of such Writ, admits the Clerk of any other, the true Patron may have a *Quare Incumbavit* against the Bishop, and recover the Presentation with Damages.

But it is to be observed that as to Advowsons, or Right of Presentation, the King has his *Prerogative*. He hath the ^a supreme Right of Patronage of all the Benefices in *England*. So that he may present by *Lapse*, or upon *Forfeitures* by Attainder, Simony, Outlawry. He hath Right to present to all the Dignities and Benefices of the Advowson of Archbishops and Bishops during the Vacancy of the Sees, not only after the Seizure of the Temporalities, but after the Death of the Archbishop or Bishop; and altho' the Temporalities are restored to the succeeding Bishop. [See 14 *Ed. 3.* ^{See p. 19. ch. 5.}] And if a Church belonging to the Patronage of a Bishop becomes void, and the Bishop collates, and dies before Installation or Induction, the ^b King shall present. Upon the Promotion of a Clerk to a ^c Bishoprick in *England* or *Ireland*, (tho' the Dignities or Benefices lay in *England* or *Ireland*;) the King hath Right to present to such Dignities or Benefices (except Donatives,) as the Person was possessed of before such Promotion; and altho' he grants him a Dispensation to hold that Church in *Commendam* for Years; ^d unless the Commendatory dies, or resigns, during that Term.

In his Right also the Lord Chancellor, or Keeper of the Great Seal, may present to the Benefices, belonging to the King in Right of his Crown, under the Value of ^e twenty Marks in the King's Book of First-Fruits and Tenths. But the Use is, that the Lord Chancellor or Keeper ^f presents to Livings of and under ^g twenty Pounds; though the King may present to them if he pleases. And when the King does present at any Time to a Church, and his Clerk is instituted, yet before ^h Induction the King may revoke his Presentation; or if he presents another, it is a Revocation in Law, if the second Presentation was not obtained by Fraud.

Therefore, if the King's Clerk is instituted, and dies before Induction, the King's Turn is not served. By Institution Church Presentative is full against a common Person, but not against the King till ⁱ Induction, if the King hath a Right to present.

2. An Advowson *Collative*, is that Advowson which is lodged in the Bishop; for *Collation* is the giving of a Benefice by a Bishop, when he is the original Patron thereof, or he gains a Right by *Lapse*. Institution is given by the Bishop upon a Presentation of a Patron; but Collation here is an immediate Institution, because the Bishop is both *Patron* and *Ordinary*. *Institution* and *Collation*

S f

are

² Cro. 93.
See B. 4. ch. 1.
of Writs, post.

^a Dr. & Stud.
Dial. 2. ch.
36.
^b F. N. B. 33. b.
See p. 19.
ante.

^c See p. 19.
ante.

^d F. N. B. 34.
36.

^e Inst. 90. a.
^f 4 Inst. 356,
357.

^g Lev. 377,
382.
^h Show. Cases
Parl. 164.
ⁱ Dyer 228.

^j Mod. 200.
See p. 36. ante.

^k F. N. B. 35.

^l See B. 4. ch. 1.
^m 4. post.
ⁿ Hob. 214.

^o 6 Rep. 29.
^p 1 Inst. 344. b.
^q 2 Roll. Abr.
353.

^r See p. 34.
ante.

^s 6 Rep. 49.
^t 7 Rep. 26.
^u 1 Inst. 119. b.
^v 2 Roll. Ab.
349.

are in Effect (for the most part) the same; and are Terms made Use of to distinguish the Persons, who have the Power to bestow the Benefice.

3. An Advowson *Donative* is, when the King, or other Patron (in whom the Advowson of the Church is lodged) does by a single Donation in Writing put the Clerk into Possession without Presentation, Institution or Induction. If the Clerk is disturbed, the Patron may have a *Quare Impedit*; but if the Patron of a Donative will not nominate a Clerk, there can be no *Lapse*,^a except it be specially provided for in the Foundation. Yet the Bishop may compel him to nominate a Clerk by Ecclesiastical Censures. For tho' the Church is exempted from the Power of the Ordinary, the Patron is not exempted. Donatives are of Churches Parochial, Chapels, Prebends, &c. and may be exempt from all ordinary Jurisdiction; so that the Ordinary cannot visit them, and consequently cannot demand Procurations. [But see 1 Geo. 1. St. 2. ch. 10. For Augmenting the Maintenance of the Poor Clergy.] The Patron may appoint Commissioners to visit for him. The Patron and Incumbent may Charge the Glebe, to bind the Successors. The Incumbent may resign to the Patron. But if the true Patron of a Church or Chapel Donative doth once present to the Ordinary, and his Clerk is admitted and instituted; it becomes a Church Presentative, and shall never have the Privilege of a Donative afterwards. Yet if a Stranger presents to such a Donative, and Institution is given, all is void.

^a 1 Inst. 344. a.
Yelv. 61.
² Cro. 63.
S. C.

Statutes concerning Advowsons Presentative, Collative or Donative.

By the Common Law no one could recover Damages for the Loss of the Presentation. But now,

² Inst. 362.
&c.

By West. 2. ch. 5. *When six Months pass hanging a Quare Impedit, or Assize of Darrein Presentment, by the Disturbance of any one, so that the Bishop hath a Right to present by Lapse, the Person shall recover Damages by two Years full Value of the Church, if he lose his Presentation. Otherwise, if he recovers his Presentation within the six Months, Damages shall be given to Half a Year's Value only.*

So that the Patron may either lose his Presentation, and have double Damages, or have his Presentation with single Damages. It is said, that the Value of the Church shall be reckon'd only according to the King's Books, and not according to the real Value.

^b 2 Inst. 362.
6 Rep. 48.
49. 51.
Hob. 137.

By this Statute Damages are not given to the King, because he cannot lose his Presentation. But in all Cases the three ordinary Points inquirable on this Statute are, 1. If the Church be full, and if so, by whose Presentation. 2. The yearly value of the Church. 3. If six Months pass'd after the Avoidance.

1 Inst. 120. a.
3 Inst. 153.
&c.
1 Ld. Ray.
449.

[By 31 El. ch. 6. *If any shall present or collate any Person to any Benefice with Cure, Dignity, Prebend, or Living Ecclesiastical, or give or bestow the same for any Money or Reward, or Promise or Assurance thereof, directly or indirectly, such Presentment, Collation or Gift, and the Admission, Institution and Induction thereon, shall be utterly void, and*

and the Crown shall present for that Turn, and the Person presenting shall forfeit double the Value of one Year's Profit of the Living, and the Presentee shall be disabled ever after to enjoy that Living.

And if any Incumbent of a Benefice with Cure, shall corruptly resign or exchange the same, or corruptly take for the Resigning or Exchanging the same, any Pension, Sum of Money or Benefit whatsoever, directly or indirectly, as well the Giver as the Taker shall forfeit double the Value of the Sum so given or taken, one half to the King, and the other to the Informer.]

The King himself cannot present the disabled Person to that Church; neither can the Patron of a Donative grant it to the same Clerk.

But it is to be observed, that ^a general Bonds of Resignation upon Notice or Request are allowed, notwithstanding this Statute; because there doth not appear a corrupt or simoniacal Contract in the Condition; and because a Man may bind himself to resign upon good and valuable Reasons; as in Case of Plurality or Non-Residence, or when the Patron's Son is at Age, and qualified to take the Benefice. But if it had been for a Lease of the Glebe or Tithes, or Sum of Money, that had been within the Statute. And Courts of Equity will not admit the Bond, tho' the Condition is general, to be made an ill Use of; but will in such Case restrain the Obligee from proceeding thereon at Law.

By 1 W. & M. ch. 16. After the Death of a Person simoniacally promoted to any Benefice, the Offence or Contract of Simony shall not be alledged to the Prejudice of any other Patron innocent of Simony, or of his Clerk; unless the Person simoniacally promoted, or his Patron was convicted of such Offence in the Life-time of the Simoniac Person.

If the guilty Patron doth present another Clerk upon the Decease of the former, the Simony upon the first Presentation, may be alledged both against the guilty Patron, and his second Clerk, though innocent.

By 12 Ann. sess. 2. ch. 12. If any Person shall, for any Sum of Money, Reward, or other Advantage, or Promise, or Assurance thereof, directly or indirectly, in his own Name, or the Name of any other Person, take or accept the next Avoidance of, or Presentation to a Benefice with Cure, Dignity, or Living Ecclesiastical, and shall be presented thereto; every such Presentation shall be void, and such Agreement deemed a simoniacal Contract; and the Crown may present for that Turn, and the Presentee shall be disabled to have that Living, and be subject to the same Ecclesiastical Penalties, as if the corrupt Agreement had been made after the Vacancy of the Benefice.

This Act restrains only those that are to be presented to the next Avoidance of the Living, and that upon Purchase only, not Laymen, or those of the Clergy that are not to be presented to the Benefice.

By 3 Ja. 1. ch. 5. 1 W. & M. ch. 26. and 12 An. St. 2. ch. 14. All Presentations or Grants of Avoidances by Persons professing the Popish Religion, or their Children being under twenty-one, and not being Protestants, or by their Trustees, are null and void; and one of the Universities shall present; and the Ordinary may tender the Declaration against Transubstantiation, mentioned in 25 Car. 2. ch. 2. to the Patron, which if he refuses to make and subscribe, his Presentation shall be void as aforesaid.

[See

[See 10 *Ann. ch. 11*. As to the fifty new Churches. 1 *Geo. 1. St. 2. ch. 10*. For Augmenting the Maintenance of the poor Clergy.]

3. A *Lapse* is a Title given to the Ordinary to collate to a Church, by the Neglect of the Patron to present to it within six Months after Avoidance. Or a *Lapse* is a Devolution of a Right of Presenting from the Patron to the Bishop; from the Bishop to the Archbishop; from the Archbishop to the King. The Term in which the Title by *Lapse* Commences from one to the other successively is six Months, or half a Year according to the ^a Calendar, not accounting twenty-eight Days to the Month, as in other Cases; because this Computation is by the Ecclesiastical Law, and because *Tempus Semestre* in the Statute of *West. 2. ch. 5*. is intended of half a Year; the whole Year containing three hundred and sixty-five Days, which, being divided, the half Year for the Patron to present is one hundred and eighty-two Days. The Day in which the Church becomes void, is not to be reckoned as Part of the six Months.

^a Dr. & Stud.
Dial. 2. ch. 36
6 Rep. 61, 62.
1 Inst. 135. b.
Hob. 154.
2 Roll. Abr.
521.

^b Dr. & Stud.
Dial. 2. ch. 31.
4 Rep. 75, 76.

^c 5 Rep. 57.
2 Inst. 632.
See p. 39.
ante.

^d 2 Roll. Abr.
369.
^e Dr. & Stud.
Dial. 2. ch. 36.
2 Inst. 273.
2 Roll. Abr.
350, 367.

^f 2 Roll. Abr.
357, 367.

I said ^b before, that where the Benefice is void by *Death, Creation*, or *Cession*, the Patron must take Notice at his Peril; but in Case of *Resignation* or *Deprivation* by Canon Law, (not for any temporal Crime, as Felony, &c. or by Act of Parliament, except the Act requires it, as 13 *El. ch. 12*. 31 *El. ch. 6*. 13 & 14 *Car. 2. ch. 4*.) Notice ought to be given to the Patron directly by the Ordinary; and from such Notice only do the six Months begin to give a Title by *Lapse*. When a Clerk is ^c *refused* for Illiterature or ill Life, the Patron ought to have Notice, that he may present another in due Time; but the *Lapse* shall still incur from *Death, Cession* or *Creation*. Notice is requisite, to give the Ordinary a Title by *Lapse*. But as to others, the true Patron may lose his Presentation without Notice. For the true Patron is bound to take Notice of the Avoidance against ^d Strangers at his Peril. But if a Patron presents his Clerk, before the Bishop hath ^e collated; tho' the six Months are expired, yet the Presentation is good, and the Bishop cannot take Advantage of the *Lapse*. So if the Patron makes his Presentation to the Bishop, before the Archbishop hath collated; tho' twelve Months are passed since the Vacancy. But if the Bishop after twelve Months are expired does collate, this bars the Patron, but not the Archbishop; for he may have a *Quare Impedit*. If the Bishop does not collate to Benefices of his own Gift, they *Lapse* at the End of six Months to the Archbishop: And if the Archbishop does not collate within six Months to a Benefice of his own Gift, it lapses to the King. If Title by *Lapse* accrues to the Bishop, and he dies, or is translated, before he takes Benefit of it, the Devolution is to the Archbishop, as he is Guardian of the Spiritualities. But if a *Lapse* happens while the King hath the Temporalties of the Bishop, the King shall have the Benefit of it. If *Lapse* accrues to the Bishop in a ^f metropolitanical Visitation, the Bishop shall have the Benefit of the *Lapse*, and not the Archbishop; tho' the Bishop must present his Clerk to the Archbishop for Institution, instead of Collating him.

If a *Quare Impedit* is brought, when the Patronage of the Church is litigious, and one Party doth recover against the other; if the Bishop was not ^g named in the Writ, and six Months pass while the Suit is depending, *Lapse* shall incur to the Bishop for there was no

Fault

Fault in him. * Therefore bring a *Quare Impedit* as soon as may * 6 Rep. 52.
be against the Bishop, and name him in the Writ, and then neither * 1 Inst. 344. b.
the Bishop, Archbishop, or King, can take Benefit by *Lapse*. But if * 345. a.
the Patron within the six Months brings a *Quare Impedit*, the Church * Hob. 201.
not being litigious, against the Bishop, and then the six Months
Lapse without any * Presentation by the Patron, *Lapse* shall incur * Hob. 201.
to the Bishop.

By Presentation and Institution *Lapse* is prevented, to the inferior
Ordinary, tho' the Clerk is never inducted.

A *Lapse* may incur against an * Infant or Feme Covert, if they * 1 Inst. 246. a.
do not present within six Calendar Months. * 2 Roll. Abr. 367.

If the Bishop is a * Disturber, or the Church remains void above * 1 Inst. 344. b.
six Months by his Fault, there can be no *Lapse*. * 2 Roll. Abr. 369.

A Donative cannot *Lapse* to the Ordinary, or to the King; as
hath been said. [See 1 Geo. 1. ch. 10.]

The King hath a *Prerogative* as to *Lapse*.

There is no *Lapse* from the King. * He may take his own Time, * Dr. & Stud.
so that the Patron cannot present before the King takes Advantage * Dial. 2. ch. 36.
of the *Lapse*. The King by *Quare Impedit* may recover his Presenta- * 1 Inst. 273.
tion, and remove any Clerk inducted into the Living without his
Presentation, tho' eighteen Months are past. [See 17 Ed. 2. ch. 8.
1 Geo. 1. ch. 10. Concerning augmented Cures.] But if the Patron
presents, and the Clerk is instituted and inducted, and then * dies * 7 Rep. 28.
Incumbent, or is deprived, the King has lost his Title to present * 2 Cro. 216.
by *Lapse*: For the King was to have the next Presentation only,
which cannot now be restored to him. But many will not allow
the same Reason if the Incumbent *resigns*; because it may be by
Contrivance to cheat the King of his Right.

If the King presents by *Lapse*, when he had an * original Title, * 6 Rep. 29.
tho' the Clerk is instituted and inducted, yet the King may present * 2 Roll. Abr. 351.
another; because the first Presentation was void.

The King hath not only a Right of Presenting to Churches which
Lapse to him during his own *Reign*, but also to such as *lapsed* in
a * former *Reign*, by the express Saving in 25 Ed. 3. St. 3. ch. 1. * 3 Cro. 355.

4. *Usurpation* is * when one, that hath no Right, presenteth to * 1 Inst. 277. b.
a Church, and his Clerk is admitted and instituted into it, and hath
peaceable Possession six Months after Institution, before a *Quare Im-*
pedit is brought. An *Usurpation* must Commence upon a * Presen- * 6 Rep. 29.
tation, not a Collation; and is settled by Institution six Months be- * 50.
fore a *Quare Impedit* brought. * 1 Inst. 344. b.

By Collation the Church is not full, nor is Plenarty by six Months
upon Collation pleadable; but the right Patron may bring his Writ
at any Time, to remove the Person collated; unless he is such a
Patron, that hath also a Right to collate; for then against another
collating Patron, Plenarty by Collation is pleadable. A Presenta-
tion which is * void in Law (as in the Case of Simony, or to a * 1 Inst. 120. a.
Church that is full, &c.) makes no *Usurpation* against the rightful
Patron.

The * Fee of an Advowson may be gained by *Usurpation*, and * 6 Rep. 49.
not only the Avoidance upon which the *Usurpation* is made. As if * 1 Inst. 344. a.
a Purchaser of an Advowson in Fee-simple, before any Presentation, * & b.
suffers an *Usurpation*, and six Months to pass without bringing his * 2 Ld. Ray.
Quare Impedit, he has lost his Right to the Advowson; because he * 954.
has lost his *Quare Impedit*, which was his only Remedy: For, he
T t could

could not maintain a Writ of Right of Advowson; and tho' he afterwards usurps, and dies, and the Advowson descends to his Heir, yet the Heir cannot be remitted, but the Advowson is lost for ever. [But see 7 *Ann. ch. 18. post.*]

^a 2 Rep. 93.

* If one presents to a Church in Time of War, and upon it the Presentee is admitted and instituted in Time of Peace, the Law regards the original Act; and the Presentment and all that follows after is void, and shall not put the Rightful Patron out of Possession.

^b 1 Inst. 344. a.

There can be no Usurpation by presenting to a ^b *Donative*.

^c 6 Rep. 30.

^{49.}

^{Contra,}

^{2 Cro. 54.}

The *Prerogative* of the King is, that tho' he may usurp upon others, and gain the Inheritance of the Advowson thereby; yet no one can usurp upon the King, so as to gain the Inheritance of his Advowson; for that is Permanent, and in this Sense *Nullum Tempus occurrit Regi*.

^d 1 Inst. 119. b.

^{344. a.}

^{2 Inst. 358.}

^e 6 Rep. 30.

^{49. 50.}

^{1 Inst. 344. b.}

^{2 Inst. 358.}

^{361, 362.}

^{2 Cro. 385.}

* Institution by six Months before a *Quare Impedit* brought, is a good Plenarty against a common Person or Subject; but Plenarty is not a Plea against the King, till six Months after Induction. But if there is an Usurpation upon the King by a ^e complete Plenarty by six Months after Induction, the Plenarty can only be pleaded against the King's *Presentation*, for the Quiet of the Church. For he may remove the Incumbent by due Course of Law and Judgment by *Quare Impedit*, (whether he claimeth in Right of the Crown, or in Right of a Subject) and then he may present. [See 13 *Ri. 2. St. 1. ch. 1.*] For as to the King's Right no Time shall Prejudice him. Plenarty by six Months after Institution is a good Plea against the Queen Consort, tho' she claims the Advowson of the King's Endowment. But in this Case of Plenarty, if the Incumbent pleads the Presentment of a Stranger, *Quare* if he ought not to shew, that the Stranger had ^f Title: If the Incumbent was in six Months after Institution, by Presentment of the *Plaintiff*, or by *Lapse*; there he need not shew Title.

¹ Noy 30.

^{Lit. 495.}

^{Crameel.}

By West. 2. *cha. 5.* If a Defendant alledgeth Plenarty of the Church of his own *Presentation*, the Plea shall not fail by reason of the Plenarty, if the Writ be purchased within six Calendar Months, though he does not recover his *Presentation* within the six Months.

² 6 Rep. 49.

^{51.}

So that if the rightful Patron brings his Writ within six Months, it is maintainable by this Statute; and if the Incumbent is ^g named in the Writ, he may be removed; whereas Plenarty at any Time before the Writ brought was good at Common Law.

^h 6 Rep. 51.

The ^h King is not within this Clause of the Statute, where Plenarty by the Space of six Months is made a Bar to a *Quare Impedit*; for the King shall not be concluded by such general Words.

ⁱ 6 Rep. 50.

^{1 Inst. 344. b.}

^{1 Cro. 207,}

^{208.}

Plenarty upon a Collation is not pleadable, as was intimated before. And the Reason why Collation does not make a Plenarty, is, ⁱ because then the Bishop would be Judge in his own Cause. For the Bishop must certify whether the Church is full or not; and therefore the Bishop's Collation on this Account is interpreted to be

* *Nullum tempus occurrit Regi.* Lit. 178. 6 Rep. 49. 1 Inst. 90. b. 118. a. 294. b. 2 Inst. 495, 496.

^g *Res inter alios acta, alteri nocere non debet.* 6 Rep. 1, 51. 2 Inst. 513.

no more than a temporary Provision for Celebration of divine Service, until the Patron does present. [See more in the aforesaid Statute concerning *Heirs and Infants, Heirs of full Age, Feme Coverts, Ecclesiastical Persons.*]

By 7 Ann. ch. 18. *No Usurpation upon any Avoidance shall displace the Estate or Interest of any Person entitled to the Advowson, or binder him to present upon the next Avoidance, or to maintain a Quare Impedit to gain the Possession.*

III. Of Tithes; 1. How defined and divided. 2. To whom due. 3. Of what Things due and payable, or not; and the Manner of paying what is due. 4. How they may be recovered; as also how Mortuaries and Pensions may be recovered. 5. To what publick Payments subject. 6. Who may be discharged from Payment of Tithes.

1. *Tithes (Dismes, Decimæ)* are the tenth Part of the Increase, yearly arising from the Profits of Lands, Stocks upon Lands, and the Industry of the Parishioners, payable for the Maintenance of a Parish Priest, by every one that hath Things titheable, if he cannot shew a special Exemption. They are an Ecclesiastical Inheritance, collateral to the State of the Land, not issuing out of it, but distinct from it, and therefore not extinct by Unity of Possession only. 2 Rep. 40.
11 Rep. 13.

They are of three Kinds, *predial, personal, and mix'd.* *Predial*, (*à Prædio*). Those that immediately arise from the Land, either by Manurance, or of its own Nature; as Grain of all Sorts, Hay, Wood, Fruits, Herbs, &c. These are due without Deducting the Costs, and are payable where they arise. *Personal*, such as arise only from the Labour and Industry of Man (other than Common Day-Labourers) being the Tenth of his clear Gains in his Trade or Possession, after Charges deducted. [See 2 & 3 Ed. 6. ch. 13. §. 7 & 8.] These are paid where they are due by Custom only, but scarce paid any where in England, unless for Mills, or Fish caught at Sea; and then payable where the Party hears Divine Service, and receives the Sacraments. *Mix'd*, those that arise not from the Ground, but from Cattle and other Things, that receive their Nourishment immediately from the Ground, as Colts, Calves, Pigs, Wool, Lambs, Milk and Cheese from Cows, Chickens or Eggs, &c. and are payable where they arise. 2 Inst. 490.
649, 656.
657, 621.
1 Roll. Abr. 656.

Tithes, with Regard to their Value, are also divided into *great and small.* *Great Tithes* are Corn, Hay, and Wood. *Small Tithes* are all other predial Tithes besides Corn, Hay and Wood; as also those Tithes which are personal and mix'd. These small Tithes sometimes in the Endowments of Vicars are comprehended under the Word *Altaragium*, as well as the Profits that arise from the *Altar.* Custom will make Wood and Hay a small Tithe in the Endowment of a Vicarage, or to pass by the Word *Altaragium.* And the Quantity will turn a small Tithe into a great one, if the Parish is generally sown with it. And some Things may be great or small Tithes in regard of the Place, as Hops in Gardens are small Tithes, and in Fields may be great Tithes. [The Notion that the Quantity or the Place where sown alters the Nature of the Tithe, or makes it become great or small, is now exploded.] 1 Roll. Abr. 643.
1 Cro. 467.
578.
3 Lev. 365.
Bund. 19, 169.
Simms and Bennet in Chanc. 10
Nov. 1760.

2. *To whom due.* The Maintenance of the parochial Clergy is by the *Glebe*, which takes in the House, by *Offerings*, by *Tithes*. All *Tithes* are *due* of Common Right to the Parson or Rector of the Parish where they arise; but by *Endowment* or *Prescription* they may become due to the Vicar; and the Parson of one Parish may prescribe to have a *Portion* of *Tithes* separately and divided in the Parish of another; probably because the Lord of the Manor had Part of his Estate lying in another Parish, and obliged his Tenants to pay *Tithes*, &c. to the Church which he built within his Manor; or because of some Grant by Parson, Patron and Ordinary.

a 2 Inst. 641,
642, 646, 653.
Hob. 296.

If there was any Land within such Manor or Parish, which did not hold of the Lord who built the Church, or was Parcel of the Manor which had no Church built in it, one might pay his *Tithes* to any Church heretofore, especially if it was so near that he could go thither to hear Divine Service. But this was altered about the Year 1200 by the Council of *Lateran*.

b 2 Rep. 43,
44.
11 Rep. 13,
14.

No *Layman* at this Day is capable of *Tithes*, or a *Portion* of *Tithes*, but under the Statutes of Dissolution of religious Houses, or by a Grant made by the Parson, Patron and Ordinary before the disabling Statutes; by Virtue whereof they may become temporal Inheritances in the Hands of Laymen.

c 11 Rep. 13,
14.
1 Roll. Abr.
655.
1 Cro. 161.

If an *Impropriator*, Parson or Vicar leaseth his *Glebe Lands*, and does not Grant the *Tithes* thereof, the Farmer or Tenant, or Under-Tenant, shall pay *Tithes* to the *Impropriator*, Parson or Vicar. And if a Parson sows his Land, and sells the Corn growing, the Buyer shall pay the *Tithes* of it to the Parson. But if a Parson purchaseth Lands in the same Parish whereof he is Parson, and leaseth out his *Tithes*, he shall pay *Tithes* to the Farmer of them.

d 11 Rep. 14.
1 Cro. 479,
578, 579.

A Vicar upon a general Endowment shall * not pay *Tithes* of His *Glebe* to the Parson, if he keeps it in his own Hands. So if a Vicar is endowed of all the small *Tithes* arising within the Parish, he shall not have the small *Tithes* arising upon the *Glebe Lands* of the Parson, while they are in his own Hands; otherwise if the *Glebe* was in the Hands of a Tenant. But if the Endowment had been by express Words of the small *Tithes* of the *Glebe Land* of the Parsonage, the Parson should pay *Tithes* to the Vicar, tho' the *Glebe* was in his own Hands.

e 11 Rep. 14.
1 Cro. 479,
578, 579.

If a Parishioner sows his Lands, and before severance the Parson dies; the Successor shall have the *Tithes*, and all Profits from the Death of the last Incumbent. But if the Corn is cut down, the Executor of the Parson shall have the *Tithes*, tho' the Corn was not actually tithed.

f 2 Rep. 44.
5 Rep. 15. in
Cawdry's
Case.

Extraparochial *Tithes* (as in several Forests, &c.) belong to the King. For the Council of *Lateran* did not extend to them. [See 2 & 3 Ed. 6. ch. 13. §. 3.]

g 2 Inst. 646,
647, 651,
652.
1 Roll. Abr.
657.
1 Cro. 511.

By 28 H. 8. ch. 11. If a Parson sows his *Glebe* and dies, the Executor shall have the Corn sown by his Testator. But *Tithes* and other Profits arising during Vacancy, belong to the Successor.

h The Executor shall pay Tithe for the Corn to the Successor.
i See p. 19.
ante.
j See p. 129.
ante.

The Executor shall pay Tithe for the Corn to the Successor.

* *Ecclesia decimas ecclesie solvere non debet.* 1 Cro. 479.

If

If the Glebe was in the Hands of a Tenant, and the Parson dies after Severance of the Corn, and before Rent is due; neither the Executor or Successor can claim the Rent, but the Tenant may retain it, and also the Crop; unless there was a special Covenant that the Tenant should pay to the Parson's Executor proportionably to the Rent for so much as he should receive. But it seems that this Case is within the Equity of 11 G. 2. *ch.* 19. for Apportionment of Rent, where the Demise is at an End by the Death of Tenant for Life.

3. Of what Things Tithes are due and payable or not, and the Manner of paying them where due.

Tithes are to be paid of Common Right of such Things only, which do yield an yearly Increase; and but once in the Year. ^{1 F. N. B. 53.} But this is to be understood where Custom does not over-rule. ^{2 Inst. 643.} For by Custom a Parson may have Tithes of such Things, as are not ^{651, 652.} titheable of Common Right. Things *Fere Naturæ* are not titheable where no one hath Property. ^{664.} But what Things are titheable, and what not, and the Manner of paying Tithes where due, will appear from this short Alphabetical TABLE. ^{11 Rep. 16.}

A

A Corns, Masts, or Pannage, if severed and sold, pay Tithe; ^{2 Inst. 643.} not if they drop, and the Hogs eat them. ^{11 Rep. 49.} But if severed and given to Swine, then the Tenth of the Value thereof is due. ^{2 Hefley 27.}

¹ After-moth (or second Mowth) pays no Tithe, unless by Custom. ^{2 Inst. 652.}

² After-Pasture pays only by Custom: For it is the Remains of the Grass before tithed. ^{2 Danv. Abr. Tit. Dismes 589.}

¹ Agistment from (*Giser*, *Jacere* to lay) is a Feeding of Cattle upon Pasture Lands, which pay no other Tithe that Year; where the Cattle are either taken in for Hire, or not fed for Plow or Pail, or otherwise profitable to the Parson by the Tithe of their Milk, Wool, or Labour. If the Ground is let to a Stranger, the tenth Part of the Money receiv'd is payable. Otherwise Respect ought to be had to the Number of the Cattle, and Time of their Depasturing in that Land. If the Owner eats it all up with unprofitable Cattle, the tenth Part of the Value of the Land is payable. But often Custom or Prescription directs the Payment, tho' this Tithe is due *de jure*. ^{1 Ld. Ray. 242.} If they are ^{Cont. 1 Roll. Abr. 640.} Guest Cattle (or taken in for Hire) Suit may be commenced either against the Occupier of the Land, or the Owner of the Cattle. But regularly against the Occupier of the Land. Sometimes a Parishioner will agist till May, and then hain the Land; and give the Parson the Tithe of the Hay that is cut, being a great deal less than if he had hained it from the Beginning. Now it seems reasonable, that Tithe ought to be paid in Proportion to the Agistment, as well as Tithe of the Hay that is made. ^{2 Inst. 621, 652.}

Agreement for Tithes by the Parson with a Parishioner, is good for his own Time only. ^{2 Danv. Abr. 590.}

¹ Alders pay Tithes tho' above twenty Years Growth. ^{2 Danv. Abr. 600, 601.}

² Ash is Timber, and therefore if above twenty Years Growth is free from Tithe. [See Wood.] ^{Cont. F. N. B. 53.}

¹ Asp Trees are exempted, if above twenty Years Growth, in Places where they are used for Timber. ^{Sh. P. C. 192.}

U u

Barley.

Barley. See *Grain.*

^a 11 Rep. 49. ^a *Bark, Root, and Germins* (of what Age soever) which grow upon the antient Stock, are not titheable, if the Tree was Timber.

^b 2 Inst. 655, 656. ^b *Barren Land, Heath or Waste Ground*, which is so of its own Nature, (not by Accident, or ill Husbandry) is not titheable. And when made good by Husbandry, Tithes shall not be paid for the first seven Years, by 2 & 3 Ed. 6. ch. 13. But Lands gained from the Sea, Woodlands converted into Arable, are not within the Statute. And *Barren Land* shall, during the first seven Years of Improvement, pay such Tithes as have been accustomedly paid before, as Wool and Lamb.

Bawks. See *Headlands.*

^c 2 Danv. Abr. ^c *Beech* is titheable; but when used for Timber it is exempted by Tit. Difmes 589. the Statute of *Sylvæ Cædua*, (viz.) 45 Ed. 3. ch. 3.

^d 3 Cro. 404, 559. ^d *Bees* titheable for their Honey and Wax by the tenth Measure, not by the tenth Swarm.

Beans. See *Grain.*

^e 2 Inst. 643. ^e *Birch* is titheable, tho' of twenty Years Growth, because it is not proper for Building.

^f 2 Inst. 651. ^f *Brick* not titheable. It is of the Substance of the Earth, and not an annual Increase.

^g 2 Danv. Abr. ^g *Broom* shall pay Tithe. But if burn'd in the Owner's House Tit. Difmes 597. kept for Husbandry within the Parish, it may be discharg'd. And so it may be discharged by Custom.

^h 3 Cro. 113.

C

ⁱ Raym. 277. ⁱ *Calves* are titheable, and the Tenth is to be taken away ^b when it is weaned, and can live on such Food as the Dam doth. If there are fewer Calves than ten, Custom must direct in the Payment; and a Custom for paying the tenth Part of the Price for every Calf that is sold, is a good Custom. The Tithe is to be ^c apportion'd by the Month-Rate, if they are engendred, brought forth and nourished in different Parishes.

Cattle feeding upon Wastes and Commons where the Bounds of the Parish are not known, pay Tithe to the Parson where the Owner of the Cattle dwelleth, by 2 & 3 Ed. 6. ch. 13. §. 3. If they are kept for the ^k Plough and Pail, they pay no Tithe for their Feeding. The Parson hath the Benefit of their Labour. Oxen or Steer, bred or bought, and then sold, shall pay Tithe for their Pasture; and so shall other fatted Cattle. And barren Cattle, tho' kept for the Plough, if not used for the Plough within the Parish where fed, shall pay Tithe for their Feeding ^l: And so must Cattle when turned off from the Plough to be fatted and grazed for Sale ^m. If they feed one Half-Year in one Parish, and the other Half in another, the Tithe shall be equally divided betwixt the two Parsons, and so proportionably. See *Agistment.*

ⁿ 2 Inst. 651. ⁿ *Chalk, or Chalk-Pits, Clay and Coal* being Part of the Freehold, and not annual, pay no Tithe.

^o 1 Cro. 609. ^o *Cheese* is only titheable, where Tithe is not paid of the Milk. And is due only by Custom.

^p 1 Roll. Abr. 651.

Cherry-

Cherry-Trees, if used for ^a Timber in the County (as in *Buckinghamshire*) are discharged. Otherwise not. ^a 2 Roll. Rep. 83.

^b *Chicken* not titheable, where Tithe Eggs are paid. ^b 1 Roll. Abr. 642.

^c *Clover Seed* titheable to the Vicar. ^c Comyns 633.

Colts are titheable in the same Manner as Calves. ^d Bunb. 344.

^e *Conies* titheable only by Custom for those that are sold, but not for those spent in the House. ^e 2 Danv. Abr. Tit. Dimes 583.

Corn Titheable. And the ^f Parishioners of Common Right ought to cut down the Corn, prepare it and bind up the Wheat-Sheaves. ^f 1 Roll. Abr. 635. And if the Parishioner will not ^g sow his Land, the Parson may have his Action against him for his Due. [*Qy.* for the Case cited, *viz.* ^g 2 Vent. 48. does not warrant this.] See *Grain*. ^h 1 Roll. Abr. 644. ⁱ Sid. 283. ^j Latch 226. ^k 2 Vent. 48.

Cows pay no Tithe for their Pasturage, if they yield Milk.

D.

^a *Deer* not titheable (because they are *Feræ Naturæ*) without Custom. ^a 2 Inst. 651.

^b *Dotards*, or old decay'd Trees, having been once privileg'd as *Sylva Cædua*, shall not pay Tithes, tho' cut down for Fire. See *Wood*. ^b 11 Rep. 49. 81.

^c *Doves* kept in a Dovehouse titheable. If spent in the House, not titheable of Common Right. See *Pigeons*. ^c 2 Inst. 643. ^d 1 Vent. 5. ^e 1 Roll. Abr. 635, 644.

E.

^a *Eggs* are titheable when Tithe is not paid for Chicken, or when the Young are not paid in Kind. ^a 1 Roll. Abr. 642.

^b *Elm* being Timber is discharged by the Statute of *Sylva Cædua*. But not if under twenty Years Growth. ^b 2 Inst. 643.

F.

^a *Fallow Ground* is not titheable, because it improves the Land by lying fresh. But if it be kept Fallow beyond the Course of Husbandry to the Prejudice of the Parson, the Parson ought to have Tithes of the Land. *Qy.* ^a 1 Roll. Abr. 642.

^b *Fern* not Titheable.

^c *Fens* being drained are not privileged as Barren Land, by 2 *Ed. 6. ch. 13.* ^c 2 Inst. 652. ^d Moor 430.

^e *Fish* taken in the Sea titheable by Custom in Money, after Costs deducted; because a personal Tithe. *Fish* in Ponds and Rivers inclosed (not common Rivers) ought to be set forth as a predial Tithe in Kind. *Fish* in common Rivers titheable only by Custom. ^e 2 Danv. Abr. Tit. Dimes 583, 584. ^f 1 Roll. Abr. 636, 656.

^g *Flax* is a small Tithe, tho' sown in large Fields; and every Acre of Hemp or Flax sown, shall pay yearly five Shillings for Tithe, and no more; and so proportionably for more or less Ground, according to the 11 & 12 *W. 3. ch. 16.* ^g Bunb. 43, 256. ^h 3 Cro. 264. ⁱ Lev. 365.

Fleeces. See *Wool*.

^a *Forest* (tho' in a Parish) shall pay no Tithes while in the Hands of the King. But a Forest within a Parish in the Hands of a Subject shall pay Tithes. And if a Forest be disafforested, and within a Parish, it shall pay Tithe. ^a 1 Roll. Abr. 655. ^b 3 Cro. 94.

Fowls, as Hens, Geese, Ducks, are to pay Tithes either in Eggs or the Young, according to Custom, but not in both. See *Turkeys post*.

^a *Fruit*, as Apples, Pears, Plums, Cherries, &c. is due in Kind when gathered. If sold on the Trees, the Vendee or Buyer pays the Tithe. ^a Dr. & Stud. Dial. 2. ch. 55. ^b 2 Inst. 621, 652.

Fruit-Trees cut down and sold, pay no Tithe, if they have paid Tithe Fruit that Year, before they were cut down and sold.

Fuel, if spent in the Parishioner's House, not titheable. See *Wood*.

Furzes, if sold pay Tithe. But if used for Fuel in the House, or to make Pens for Sheep by the Husbandman, otherwise.

G.

Bunb. 10.

Gardens are titheable as other Land, and therefore Tithe in Kind is due for all Herbs and Plants, as *Parfly*, *Sage*, *Cabbage*, *Turneps*, *Saffron*, *Woad*, &c. But Money is usually paid by Custom or Agreement.

Geese. See *Fowl*.

Grain (as *Wheat*, *Barley*, *Beans*, &c.) sowed is titheable according to the Custom of the Place; and is commonly tithed by the tenth Shock, Sheaf or Cock, where the Custom of the Place is not otherwise. The Parson, or his Servant may come upon the Land, to see the Tithes set forth, and to carry them away. ^a If Corn, &c. is sold standing, the Vendee or Buyer shall pay the Tithe. But if sold after Severance, the Vendor or Seller must pay it.

^a 2 Danv. Abr. Tit. Dismes 614.

^b 1 Roll. Abr. 644, 645.

^b *Grass* mowed is titheable by Payment of the tenth Cock. But the Manner of Tithing is governed by Custom. As to *Grass* standing, see *Agistment*, ante. If cut down and carried away in Swaths without Fraud, for necessary Sustenance of Plough-Cattle, (Cart-Horses being included under that Term) having otherwise not sufficient to feed them, no Tithe is due.

^c 2 Inst. 651.

^c *Gravel* being of the Substance of the Earth, and not annually Increasing, yields no Tithe.

H.

^d 2 Danv. Abr. Tit. Dismes 589.

^d *Hazle*, *Holly*, *Willow*, *Maple*, *White-thorn*, &c. regularly titheable, tho' of twenty Years Growth; unless they are used for Building by the Custom of the Country.

^e 2 Wms. 523. Contra.

^f 1 Roll. Abr. 643, 647. ^g Str. 245. ^h Hob. 250. Contra.

Hay is titheable by the Payment of the tenth Cock, and (if the Custom is not otherwise) the Parishioner shall make the *Grass* Cocks into Hay for the Parson's Tithe. But if the Parishioner is not obliged to make the Tithe into Hay, he may leave it in *Grass* Cocks or Swaths, as the Custom is, and the Parson must make his *Grass* into Hay; and he may do it on the Lands in which it grew, and go over the Land of the Parishioner in the Way to make it. [See 2 & 3 Ed. 6. ch. 13.] ⁱ And if Meadow Ground is so Rich, that there are two Crops of Hay in one Year, the Parson shall have Tithe of both. [See *Aftermowth*.] Also Tithe shall be paid of Hay made of *Grass* growing in ^h Orchards. It is no good ⁱ Modus, that the Parishioner having spent all his Hay upon the Beasts of the Plow, that therefore he should be free from Payment of Tithe Hay.

^j 2 Inst. 652. ^k 1 Roll. Abr. 650.

^l 2 Inst. 652. ^m 1 Roll. Abr. 646.

^l *Headlands* not titheable, if only large enough for turning the Plow. Therefore of larger *Headlands* Tithe is payable.

Heath. See *Barren Land*.

ⁿ Cro 702.

Hearth Penny or *Smoke Penny*, seems to be a Payment for Wood burn'd in the House, and due only by Custom.

Hemp. See *Flax*.

Herbage is titheable for barren Cattle kept for Sale, which yield no Profit to the Parson.

^o *Herbage*.

Herbage of Ground whereon Corn has grown the same Year, ¹ 2 Inst. 652. and whereof Tithe has been paid the same Year, is not titheable.

Holly. See *Hazle.*

Honey. See *Bees.*

Hops pay Tithe by the Poll or Measure; and the Tenth may be set out after they are picked, and before they are dried. But the Hop-Poles are not titheable. [It hath been lately determined, that they are to be tithed by the Bag after Picking.] There can be no ¹ 1 Roll. Abr. 644. ¹ Sid. 283, 443. ¹ Tyers's Case in the House of Lords 1753. ¹ 11 Rep. 16. ¹ Inst. 659, 660. ¹ Hob. 10. *Modus* for Hops, because lately come into England.

Horses. See *Agistment.*

Houses do not pay Tithes of common Right. But a *Modus* may be paid for Houses in Lieu of the Tithe of the Land, upon which the Houses are built, and may be sued for in the Ecclesiastical Court. [See 37 H. 8. *cb.* 12. 22 & 23 Car. 2. *cb.* 15. For Tithes of Houses in London.] A great many Cities and Boroughs have a Custom to pay a *Modus* for their Houses. [See 2 & 3 Ed. 6. *cb.* 13.] ¹ Banb. 102; 107.

K.

Kids are titheable as *Calves.* See *Calves.*

L.

Lamb is titheable in the same Manner as *Calves.* See *Calves.*

If they are payable at a certain Day, and the Parishioner sells all his *Lambs* before the Day, to deceive the Parson, it is Fraud, and he shall pay the Value. If they are yeaned in another Parish, and do not tarry there thirty Days or more, no Tithe is due for them to the Parson of that Place. A Custom to pay a Half-penny for every *Lamb* under seven, and if there be seven, then the Parson to have the seventh *Lamb*, paying three Half-pence, &c. is good. ¹ 1 Roll. Abr. 652. ¹ Ld. Raym. 677. ¹ Banb. 133. ¹ Lyndwood cap. Quoniam propter. ¹ Cro. 405. ¹ Banb. 308. ¹ 2 Inst. 651.

Lead is only payable by Custom; for it is of the Substance of the Earth.

Lime titheable only by Custom, as *Lead.*

Loppings are titheable, except of Timber-Trees, the Branches being then privileged with the Body, according to the Statute of *Sylvæ Cædua.* If the Trees were usually lopped, the Age of the Loppings is not material. Tho' they were cut before within twenty Years, yet they still continue privileged. See *Wood.* ¹ Dr. & Stud. Dial. 2. ch. 55. ¹ 11 Rep. 48. ¹ 2 Inst. 643.

M.

Maple. See *Hazle.*

Mast of Oak or Beech. See *Acorns.*

Milk is titheable, when Tithe is not paid of Cheese, all the Year, unless Custom over-rides. And it is to be paid to the Parson of that Parish for that time where the Cows feed, at every tenth Meal, not by the tenth Part of every Meal, by reason of the Trouble that would arise in collecting such small Parcels. And of common Right, it must be fetched away from the Place of Milking, by the Parson in his own Pails, before the next milking Time, unless there is a particular Custom to bring it to the Church-porch, or other Place; which if there is, the Parishioner must observe it. ¹ 2 Danv. Abr. Tit. Dimes, 596. ¹ Ld. Ray. 359. ¹ Banb. 73.

Mills are of two Sorts, *Corn-Mills*, or *Mills* for other Uses, as *Paper-Mills*, *Fulling-Mills*, *Iron-Mills*, &c. *Corn-Mills*, driven by Wind or Water, pay the tenth Toll-Dish to the Parson of the Parish ¹ 2 Danv. &c. 590.

X x

where

where the Mill stands. *Other Mills* pay no Tithe, unless by Custom. *All Corn-Mills* not erected before 9 Ed. 2. ch. 5. are titheable. But if it can be proved, that the *Mill* was erected before the Memory of Man, and that it never paid Tithe, the Law will presume it to be such an ancient *Mill* as is within that Statute. But it is said, that the tenth Toll-Dish is no where paid, and that it is only a personal Tithe, and must be paid, with Deduction of Costs, where the Miller dwells and hears Divine Service: For a Miller is of an Art and Faculty. [See 2 & 3 Ed. 6. ch. 13.] * It is now determined, that *Corn-Mills* are titheable; but that it is only a personal Tithe, and so ought to be paid out of the clear Gain, after all Manner of charges and Expenses deducted.

If one pays Tithe for his Corn, and after grinds the same at a Mill in the same Parish, no Tithe for Meal.

* *Mines* are only chargeable by Custom. For they are of the Substance of the Earth, and not an annual Increase.

Modus. See *Who may be discharged from the Payment of Tithes, infra.*

* *Mortuaries*, or Corse-Presents, are not Tithes, yet they were given for Recompence for personal Tithes and Offerings not paid through Ignorance, Negligence or Fraud, in the Life-time of the Parishioner; as the best Horse, &c. They are due by Custom only, and are now settled to be paid in Money; for,

By 21 H. 8. ch. 6. Where *Mortuaries* are due by Custom, be that dieth possessed of moveable Goods to the Value of Forty Pounds and upwards (his Debts first paid) pays Ten Shillings; be that dies possessed of Goods to the Value of Thirty Pounds, and under Forty Pounds, pays Six Shillings and Eight Pence; dying possessed of Goods to the Value of Six Pounds Thirteen Shillings and Four Pence, and under Thirty Pounds, pays Three Shillings and Four Pence. Goods under Six Pounds Thirteen Shillings and Four Pence yield no Mortuary. No Mortuary is to be paid for any Feme Covert, Child, Person not keeping House, Way-faring Man, one not residing in the Place where he happens to die; for his Mortuary shall be paid in the Place where he had at his Death his most Abode. [See 12 Ann. Sess. 2. ch. 6. For taking away Mortuaries within the Diocese of Bangor, Landaff, St. David's, and St. Asaph, and giving a Recompence to the respective Bishops, &c.]

N.

* *Nag*, or Riding Nag, kept only for the Master to ride on, pays no Tithes for Pasturage. But some insist, that if no Tithes are to be paid for its Pasturing, the Nag ought to be rode by the Master only about his Concerns of Husbandry.

* *Nurseries* shall pay Tithes, if the Owner digs them up, and makes Profit of them, and sells them into another Parish; or if the Owner pulls them up, he pays Tithes. But if the Owner sells them standing, and the Vendee pulls them up, he shall pay the Tithe.

O.

* *Oak*, together with *Ash* and *Elm*, is privileged, as Timber, from paying Tithe by the Statute of *Sylvæ Cædua*, if of or above twenty Years Growth. Oaks under twenty Years Growth, which may be Timber, are also privileged. And though they become dry and rotten,

rotten, and not fit for Timber, they shall pay no Tithe if they were once privileged.

Oblations, Obventions, Offerings, * (one and the same Thing, though *Obvention* is the largest Word) are in the Nature of Tithes. *Offerings* are reckoned amongst personal Tithes, and such as arise from the Labour and Industry of the Parishioner, payable according to Custom to the Parson or Vicar, either occasionally at *Sacraments, Marriages, Burials, Churching of Women*; or at constant stated Times, as at *Easter*, &c. They are to be paid to the Parson of the Parish where the Party dwells. *Easter Offerings* have been held to be due of common Right at Twopence per Head *. [See 2 Ed. 6. ch. 13. s. 10.]

Orchards pay Tithe of Fruit. And if the Soil of an Orchard is sown with any Kind of Grain, the Parson shall have Tithe of the Fruit-Trees and of the Grain, as also of the Grass; for they are of several and distinct Kinds. If one cuts down Trees which have born Fruit, whereof Tithe has been paid that Year, no Tithe shall be paid of the Faggots or Billets of the Trees.

P.

Park pays Tithe for the Deer, and for the Herbage by Custom. If converted into Tillage, it shall pay Tithe in Kind. [See who may be discharged from the Payment of Tithes, post.]

Partridges and Pheasants, being *Fera Natura*, yield no Tithe of Eggs or Young. And though they are tame and kept in a Place inclosed, and lay Eggs, and hatch young Ones, yet they pay no Tithe.

Pasture. See *Agistment*.

Pease gathered for Sale, or to feed Hogs, are titheable; but not Green Pease to eat in the House.

Pension. [See how *Mortuaries* and *Pensions* may be recovered, infra.]

Pidgeons ought to pay Tithe, if they are sold, and not spent in the House. This is also true if they lodge in Holes about a House, as well as in a Dove-House. But by Custom *Pidgeons* spent in the House may be titheable, though not of common Right.

Pigs are titheable as *Calves*, as soon as they are weaned, and can live without the Dam. Usually when three Weeks old. See *Calves*.

Pits and Quarries pay no Tithe.

Plants. See *Nurseries*.

Pollards of fifty Years Growth, when felled, pay Tithe. *Pollards* are Trees usually lopped, and therefore distinguished from *Timber-Trees*.

Rakings are not titheable of common Right; but this is to be understood of *Rakings* involuntarily, not fraudulently, scattered.

Rate-Tithe is a Payment by Custom for feeding of Sheep, &c.

Roots not titheable, unless by Custom, if the Wood paid Tithe; because they do not renew annually. *Roots* of *Timber-Trees* of what Age soever are exempted, as Parcel of the Inheritance. And so the *Germins* that grow out of the *Roots*.

S.

¹ 1 Cro. 467. ^a *Saffron* is a Predial and small Tithe, and is titheable, tho' gathered but once in three Years.

Salt not titheable but by Custom only.

¹ 1 Roll. Abr. ^b *Sheep* are titheable for *Lamb* and *Wool*. [See *Lamb* and *Wool*.]
642, 647.

³ Cro. 237. If killed and eaten in the House, no Tithe is to be paid for their Feeding.

^c 2 Inst. 651. ^c *Slate* is not titheable of common Right, but only by Custom.

^d 2 Inst. 652. ^d *Stubble* pays no Tithe, because this is only Part of the *Stalk*, upon which the *Corn* (which was tithed before) did grow.
Sylva Cædua. See *Wood*.

T.

^e 1 Cro. 139. *Tares* or *Vetches*, and other coarse Grain, pay Tithe. But if they are cut down Green, and given to the Cattle of the Plough, no Tithe shall be paid of them, if there is not sufficient Pasture in the Parish for the Cattle that pay Tithe.
^f Bunb. 279.

^g 2 Inst. 651. ^g *Tile* is not titheable, being of the Substance of the Earth, and no annual Increase.

Trees. See *Nurseries*.

^h Ibid. ^h *Turf* is Tithe-free, as Part of the Freehold.

ⁱ 2 Danv. &c. ⁱ *Turkeys* and their Eggs are said to be exempt from Tithe, because *Fera Naturæ*. *Quare*.

^j 3 B3. ^j *Turnips* (sown after the Corn is cleared) fed with Sheep or
^k 2 Wms. 463. ^k *Turnips* (sown after the Corn is cleared) fed with Sheep or
contr. barren Cattle shall pay Tithes.
^l Bunb 314.

U.

Venison. See *Deer*.

^m 2 Inst. 642. ^m *Underwood* is titheable, and the Tithe shall be paid of *Underwood* digged up by the Roots. If *Underwood* is sold standing, the Tithe shall be paid by the Buyer.

W.

Warren. See *Conies*.

Waste, where Cattle feed, pays Tithe. And, By 2 Ed. 6. ch. 13. f. 3. Cattle feeding on large Wastes, where the Parish is not certainly known, shall pay Tithe to the Incumbent of the Parish, in which the Owner of the Cattle does dwell.

Wax. See *Bees*.

Wheat. See *Grain*.

ⁿ 2 Inst. 642, ⁿ *Willoughs* ought to pay Tithe, if not used for Timber.

^o 643. ^o *Wood* growing in the Nature of an Herb, is a Predial and small
^p Hob. 219. Tithe.
^q 2 Danv. &c. 594.

^r *Wood* is titheable, because it is of annual Growth, tho' the Tithe is not of annual Payment. It is a Predial and great Tithe, due of common Right, though some say it is due by Custom only, [which seems to be the better and later Opinion, and now established.]
^s Dr. & Stud. Dial. 2. ch. 55. But between Parson and Vicar, either by Virtue of the Endowment,
^t 13 Rep. 13. or by Prescription, it has sometimes been construed to be a small
^u 1 Ld. Raym. 137. Tithe, and to belong to the Vicar.

^v 2 Inst. 642, It may be discharged of Tithe. 1. With Regard to the Age, as
^w 643, 644. Timber of or above twenty Years Growth, by the Statute of *Sylva Cædua*, 45 Ed. 3. ch. 3. Some have affirmed it may be discharged
^x 2 Danv. 597. &c. if
^y Bunb. 126.

if under twenty Years Growth, if it is or may be Timber. [But it seems that tho' above twenty Years Growth, yet if it is cut and corded for Fuel, it is titheable.] 2. With Regard to the Use it is a Bunt. 99. put to, as for the Owner's Firing in a House of Husbandry, or to burn Brick to repair the House; or for hedging and fencing the Estate in the same Parish; unless it is titheable by Custom. 3. With Respect to the Place of its Growth, as in the Wilds or Wealds (Sylva, the Woody Part) of Kent and Sussex, it is discharged by Prescription. For a County may prescribe to be quit of the Tithe of Wood, or any other customary Tithe, but a Town cannot. 2y. Dial. 2. ch. 55. 2 Inst. 645. 4 Hob 250.

When it is titheable, it is set out while standing by the Tenth Acre, Pole or Perch, or when cut down, by the tenth Faggot or Billet, as the Custom has been. If he that sells the Wood doth not set out the Tithe, he is liable to pay treble Damages by the 2 Ed. 6. ch. 13. and the Parson may sue either the Buyer or the Seller by the Spiritual Law; but the Buyer only by Common Law. But Quere, for perhaps the Vendee may not be known. Dr. & Stud. 646, 647. F. N. B. 51. Roll. Abr. 645, 646, 649. 2 Inst. 652. 1 Roll. Abr. 642. 1 Roll. Abr. 648. Lyndwood cap. Quoniam Propter. cap. Quoniam Audivimus.

Wool is a mixed and small Tithe. All agree that it is titheable of Common Right, when it is clipped. It is due and payable of Sheep killed and spent in the House, of rotten Sheep which die, of Neck-wool cut off for the Benefit of the Wool (not if it is to preserve the Sheep from Vermin, nor of Locks of Wool) because otherwise there might be Fraud, or an Opportunity of spoiling the Fleece under the Pretence of Neck-shearings; of the Wool of Lambs shorn at Midsummer, tho' Tithe was paid of the Lambs at Mark-tide, for this is a new Increase. If there is under ten Pounds of Wool at the shearing Time, a reasonable Consideration shall be paid, because being due of Common Right, a Modus in non Decimando cannot be allowed. So if less than ten Fleeces, they shall be divided into ten Parts, or an Allowance otherwise made. If Sheep are removed from one Parish to another between the Times of Shearing, each Parson must have Tithe pro Rata. But for Feeding under thirty Days, no Rate-Tithe is to be paid. Likewise, if Sheep feed all the Year in one Parish, and couch in another, the Tithe shall be equally divided betwixt the Parsons. If Sheep are brought from one Parish, to be shorn in another, where they were not before, the Tithe is payable to the Parson of the Parish whence they came, if the Parish is known; otherwise the whole Tithe is payable where they are shorn. Lastly, If a Son or Daughter have five or six Sheep in the Father's Flock, the Father shall pay Tithe for them with the rest, if he takes the Profits of them to his own Use. Lyndwood cap. Quoniam Propter. verb. Decima Lanu. Degg's Parl. Counf. Par. 2. ch. 6.

In a Word, it is to be observed, that the Manner of Payment of Tithes is for the most part governed by the Custom of every Parish. [See Bishop Gibson's Codex Jur. Eccles. Angl. pag. 706, &c.]

3. How Tithes may be recovered; as also how Mortuaries and Penfions may be recovered.

By 9 Ed. 2. ch. 2. If Debate arise upon the Right of Tithes (having its Original from the Right of the Patronage) and the Quantity of the same Tithes amounts to a Fourth Part of the Goods of the Church, The King's Prohibition will lie to the Spiritual Court, and the Right must be tried at Common Law. See of an Inducavit, post. B. 4. ch. 4.

By 27 H. 8. ch. 20. If a Judge of an Ecclesiastical Court makes Complaint to two Justices of the Peace (one Quorum) of any Contumacy

macy or Misdemeanor committed by a Defendant in any Suit depending for Tithes, Offerings, and other Duties of the Church; the said Justices shall commit such Defendant to Prison, there to remain without Bail, till he find sufficient Surety to be bound by Recognizance, or otherwise, to give due Obedience to the Process, Decrees and Sentences of the said Ecclesiastical Court.

² 2 Inst. 662. This act extends to ^a Predial, Personal, and Mixed Tithes, due to Ecclesiastical Persons, and their Farmers only, and out of the City of London. It does not extend to give Remedy to Lay Impropropriators. Therefore for the Relief of ^b Impropropriators and Laymen that had Right to Tithes afterwards upon the Dissolution of Monasteries, &c. It is enacted,

By 32 H. 8. ch. 7. That if Tithes and Offerings are not set out and paid, the Party grieved, Ecclesiastical or Lay, and his Farmers, may convene him that detains them before the Ecclesiastical Judge, &c.

But all Persons that are disseised, or kept from their lawful Inheritance, Freehold, Term, Right or Interest in any Parsonage, Vicarage, Pension, Tithes, Oblations, or other Ecclesiastical or Spiritual Profit, which are made Temporal, and abide in Temporal Hands to Lay Uses by Law, may have like Remedy in the Temporal Courts, as for other Lands and Tenements.

This Act does not extend to the City of London, or Suburbs thereof.

Note, That the former Part of this Act does only extend to Tithes and Offerings, not to other Church-Duties. But this Statute gives Remedy in the Temporal Courts to Lay-men, not only for Tithes and Offerings, but for any Ecclesiastical or Spiritual Profit, where the Owner is disseised, or otherwise put from the same. Yet the Owner may sue for the Substraction of the same in the Ecclesiastical Courts, or at the Common Law, at his Election. For the Suit here is commenced against them that ought to pay the Tithes, and not against those that were wrongful Takers of them.

^c 1 Inst. 159. a.
² 2 Inst. 640.
641, 646.
² Rep. 44, 45.

Note also, That by this Statute the Party cannot be compelled in the Ecclesiastical Court, to give Security for his Obedience, but only to the definitive Sentence, and that the Security must be by two Sureties. Whereas by the 27 H. 8. ch. 20. before-mentioned, Surety may be demanded by Ecclesiastical Persons and their Tenants, upon Contumacy in any Part of the Proceedings; and one Surety sufficeth.

² 2 Inst. 648.
662.

By 2 & 3 Ed. 6. ch. 13. ^a Remedy is given both to lay and ecclesiastical Persons for predial, personal, and mixed Tithes. For it is enacted, to supply former Defects, that every Subject shall without Fraud yield and pay all predial Tithes in Kind, as hath of Right been yielded and paid within forty Years before the making of this Act, or Of Right and Custom ought to have been paid. And if any carries away such Tithes, before he hath justly divided and set forth the same, or otherwise agreed for them with the Parson, Owner, or Farmer thereof, he shall forfeit treble Value of the Tithes so taken away.

² 2 Inst. 650.

^a The Sense of these Words, As hath of Right been yielded, relates to Tithes in Kind yielded within forty Years. And the Words Of Right and Custom ought, &c. relate to a rightful Custom, De modo Decimandi; which ought to be paid.

If

If the Tithes are set out and severed from the nine Parts by the Owner, they are become so far Lay-Chattels, as that, if after the Severance they are carried away by a *Stranger, the Remedy against, 1 Cro. 607. the Stranger is in the Temporal Courts for treble the Value. If the Owner of the Land carries them away after Severance, this is 2 Inst. 613. no setting forth. Turning of Cattle into Tithe makes it a fraudulent Severance: [But the Parson must carry away the Tithes in a convenient Time after Severance, or he will be liable to an Action on the Case for Damages, for the Parishioner cannot put in his Cattle to eat the Tithes in such Case.] 188. Str. 246.

Observe, that the treble Damages are to be recovered in the Temporal Courts by Action of Debt; for the treble Damages are given generally, not limiting where to be recovered; and that the Forfeiture is to be given to the Party *grieved, not to the King; tho' it is not given to any Person in Certain by the Statute. But the Forfeiture cannot be claimed of Executors, because the Wrong was personal, and it was a personal Contempt of the Statute. 1 Inst. 159. 2. 2 Inst. 612. 650. 4 Inst. 84.

It is enacted also, That at all Times, and as often as the predial Tithes shall be due, and at the titthing Time of the same, it shall be lawful for the Party to whom the same are payable, or his Deputy or Servant, to view and see their Tithes justly set forth, and the same quietly to take and carry away. And if any Person carry away his Corn, or other predial Tithes, before the Tithe thereof is set forth, or willingly withdraw his Tithes of the same, or do stop or let the Owner thereof, or his Deputy or Servant, to view and carry away the Tithes, to the Loss or Hurt of the same; then upon due Proof before a Spiritual Judge, the Party shall pay double the Value of the Tithes, besides Costs of Suit, and may be excommunicated for Disobedience to the Sentence of the Judge.

Note, These two Clauses of the Statute extend to Predial Tithes only, and give Remedy as well to Laity as Clergy. Mixt and Personal Tithes are provided for in a Clause afterwards.

The Laws of the Church oblige the Owner of the Corn, Hay, &c. to give Notice to the Parson, &c. But by Common Law such Notice is not necessary; and the Statute gives the Parson, &c. only a Right of seeing the Tithes set out; but does not oblige to Notice. 2 Danv. &c. 595. 2 Ventr. 48.

The double Value to be recovered in the Ecclesiastical Court, is equivalent to the treble Forfeiture to be recovered in the Temporal Courts; because one may sue in the Ecclesiastical Court for the Tithes themselves, i. e. a Recompence for them, and have more over the double Value. So that the Suit in the Ecclesiastical Court is more advantageous than the Suit for the treble Forfeiture in the Temporal Courts; because in the Temporal Courts he shall recover no Costs, as he may in the Ecclesiastical Court with the Tithes themselves, and a double Value. But then it is to be considered, that tho' the Plaintiff is cast in the Temporal Courts, he shall pay no Costs to the Defendant, as he may in the Ecclesiastical Court. But now, 13 Rep. 24. 1 Inst. 159. 2. 2 Inst. 612. 651. 2 Inst. 651.

By 8 & 9 W. 3. ch. 11. Costs are given with the treble Value in the Temporal Courts, where the single Value or Damage found by the Jury shall not exceed twenty Nobles. And by this Statute the Defendant shall recover his Costs.

Again, By 2 & 3 Ed. 6. ch. 13. Small Tithes, Offerings, Mortuaries, Penfions, Synodals, Proxies, &c. and Personal Tithes may be sued

sued for in the Ecclesiastical Courts. But for Personal Tithes, the Ordinary cannot examine the Party upon Oath. Offerings are to be yearly paid to the Parson of the Parish where one does dwell or abide.

Note, That the taking away of the Oath to prove that Personal Tithes are due, has rendered the Recovery of Personal Tithes almost impracticable. And this seems to be the Reason why they are not now demanded or paid, as formerly.

^a 2 Infl. 662. This Act seems to extend to *predial* and *personal* Tithes only; but as it rehearseth the 27 H. 8. ch. 20. and the 32 H. 8. ch. 7. which extend to all Kinds of Tithes, it includes *mixt* Tithes also.

² Infl. 648. [See in the said Act of Ed. 6. concerning a Suggestion for a Prohibition, and Costs for want of Proof of the Suggestion within six Months, &c.]

By 7 & 8 W. 3. ch. 6. Small Tithes of or under the yearly Value of forty Shillings from any one Person, if not paid within twenty Days after Demand, may be recovered at any Time within two Years after due, before two Justices of the Peace not interested in the Tithes, who may summon the Party in Writing, and after Appearance, or in Default thereof, upon due Proof of Summons, hear and determine the Complaint, and award in Writing such Compensation for the Tithes as they shall judge reasonable, with Costs not exceeding ten Shillings; with Liberty of Appeal to the Quarter-Sessions, whose Judgment shall be final, unless the Title to such Tithes be in Question. The Justices in this Case have Power to administer an Oath to Witnesses, and to levy the Money adjudged by Distress upon Refusal to pay within ten Days after Notice. And the Judgment shall be enrolled by the Complainant at the next Sessions. But if the Defendant insists upon a Modus, Prescription, or Title of Exemption, and gives Security to pay Costs and Damages in the Courts above, the Justices shall not proceed.

This Act is intituled, *An Act for the more easy Recovery of small Tithes*. But in the Body of the Act, Oblations, Offerings, Obventions, and Compositions too are included.

But this Statute does not extend to the City of London, or to any other Corporation, where the Tithes are settled by Act of Parliament.

By 7 & 8 W. 3. ch. 34. Quakers refusing to pay great or small Tithes, or to pay Church-Rates, may upon Complaint to the two next Justices of the Peace (not interested in the Tithes) be convened by Warrant under their Hands and Seals; who shall examine Witnesses upon Oath, and by Order under their Hands and Seals direct Payment, so as the Sum ordered to be paid do not exceed ten Pounds. And any one of the said Justices may levy the Money so ordered by Distress and Sale of the Offender's Goods. But any Person finding himself aggrieved may Appeal to the next Quarter-Sessions, and the Justices then present may finally determine the Matter, and may either reverse or confirm the Judgment, and, if they confirm, give Costs against the Appellant, to be levied by Distress and Sale of his Goods. And the Cause cannot be removed by Certiorari, unless the Title of the Tithes comes in Question. Provided, if Appeal be made, no Warrant of Distress shall be granted, till the Appeal is determined. And

By 1 Geo. 1. St. 2. ch. 6. The 7 & 8 W. 3. is extended to the Recovery of any Rates, Dues, or Payments, payable for the Stipend or Maintenance of any Minister or Curate officiating in any Church or Chapel,

Chapel, and the Justices may order reasonable Costs not exceeding ten Shillings.

By the Statute of Circumspecte agatis, or 13 Ed. 1. St. 4. *A* Mortuary^a and a Pension may be recovered in the Ecclesiastical Court, ^{a See Tithing Table, ante} and no Prohibition shall lie.

By 34 & 35 H. 8. ch. 19. ^b Pensions, Portions, Corrodies, Indemnities, Synodics, Proxies, and all other Profits due out of religious Lands dissolved, shall be paid to Ecclesiastical Persons by the Occupiers of the said Lands. And the Plaintiff may recover the Value thereof in Damages in the Ecclesiastical Court, together with Costs of Suit. The like he shall recover at Common Law, when the Cause is there determinable. ^{b 12 Rep. 45.}

^c Pensions due by Virtue of an Ordinance made by the Ordinary ^{c F. N. B. 51.} upon a Controversy for Tithes, or the like (as in the Endowment ^{52.} of a Vicar, where one shall enjoy the Tithes and pay to another a ^{1 Cro. 675.} Pension for them,) shall be recovered in the Ecclesiastical Court, ^{1 Vent. 3.} because it beginneth by an Ecclesiastical Act, and by Ordinance of an Ecclesiastical Judge. But if a Pension be claimed by Prescription, ^{120.} the Prescription shall be tried at Common Law, or in the Ecclesiastical Court. A Bishop may sue for a Pension, &c. due by Prescription (not by Deed) out of religious Lands dissolved, before his ^{Contra,} Chancellor, and an Archdeacon before his Official. ^{2 Inst. 491.}

But notwithstanding all these Statutes, Tithes, &c. (if of any considerable Value) are generally sued for in the Courts of Equity by English Bill, and for the most part in the Exchequer; but not upon the Statute for treble or double Value. ^{d 4 Vent. 3.} For there can be no Suit ^{Hardr. 190.} in Equity for the Recovery of the double or treble Value.

By 37 H. 8. ch. 12. Tithes in London are to be recovered before the Lord Mayor. [See the 22 & 23 Car. 2. ch. 15. An Act for the better Settlement of the Maintenance of Parsons in London.]

But if Tithes in London are due by Custom, they may be sued for in the Exchequer, notwithstanding the Statute; because there are ^{Hardr. 116.} no negative Words in the Statute, to restrain that Court.

4. To what publick Payments are Tithes subject?

Tithes are at this Day chargeable with all Payments imposed by ^{See p. 25.} Act of Parliament, if they are not excepted. They are subject by ^{ante.} Statutes to contribute to the Poor, maimed Soldiers, King's Bench and Marshalsea Prisons, the Militia, Highways and Bridges, Watch and Ward, Constables Rates, Robberies committed in the Hundred, and are liable to be taxed by Commissioners of Sewers, &c. though they were not subject to any Temporal Charges at Common Law. They are likewise subject to the Payment of First-Fruits ^{See p. 37.} and Tenths. ^{ante.}

5. Who may be exempted or discharged from the Payment of Tithes.

Lands may be exempted or discharged from the Payment of Tithes.

1. By real Composition. 2. By Custom or Prescription. 3. By Act of Parliament.

1. By real ^e Composition, as when an Agreement is made with a ^{e Dr. & Stud. Dial. 2. ch. 55.} Parson or Vicar with the Consent of the Patron and Ordinary, that ^{F. N. B. 44.} such Lands for the Future shall be discharged from the Payment of ^{2 Inst. 490.} Tithes in Specie, by Reason of a Recompence made to the Parson ^{655.} or Vicar for them out of other Lands. ^{2 Rep. 43.}

44, 45.

See of Leases
ch. 3. post.

But since 1 *Eliz. ch. 19.* in the Case of Archbishops and Bishops, and 13 *El. ch. 10.* in the Case of other Ecclesiastical Corporations, sole or aggregate, no Alienations can be made, other than for twenty-one Years, or three Lives, &c.

So that a real Composition, tho' made by Consent of Parson, Patron and Ordinary, shall not now bind the Successor beyond that Term.

^a 2 Inst. 490.
610.
Hob. 297.

^a Real Compositions cannot be tried in Court Christian; but must be tried at Common Law, if there is a Suit in the Court Christian for Tithes in Kind. But one may sue in the Ecclesiastical Court for a Composition, as well as for a *Modus Decimandi*.

^b See ch. 3.
f 4. post.

2. By *Custom* or *Prescription*^b; either, 1. *De modo Decimandi*, or 2. *De non Decimando*.

^c 2 Rep. 48.
13 Rep. 40.
Co. Select
Cases 40.
2 Inst. 490.
610.

1. A *Modus Decimandi* is when Land, or some annual Profit, Pension, or Rate-Tithe, hath been given Time out of Mind to a Parson and his Successors, in full Satisfaction and Discharge of all the Tithes in Kind in such a Place.

This *Prescription* arose at first from a real Composition, which was made beyond the Memory of Man, and now lost, so that the Parson is forced to claim by Prescription for Want of it.

^d 13 Rep. 15.
Hob. 40, 41.

This *Modus* is supposed to be the ^d full Value of the Tithe at the Time of the original Composition. If it appears to be greatly above the Value, it is a rank *Modus* and not good^e. And if it does not now come up to the Value, it is to be intended, that the Tithes are either improved, or else, that Money is become of less Value than it was at the Time of the *Modus* agreed on; which occasions the present Inequality.

^f 2 Rep. 47.
1 Cro. 784,
599.
^g 1 Cro. 587.

A *Layman*, Lord of a Manor, may prescribe *De modo Decimandi* for himself and Copyholders; or a Copyholder may prescribe in the Name of his *Lord*, or a ^h *Parish* or *Hamlet* for this or that Sort of Tithe; as to be quit of Wood or Hay, &c. or a *private* Person for his own Lands, or Part thereof; paying a Pension or Rate-Tithe in Money, or so much yearly to the Parson in lieu of the Tithes. But to make a good Prescription, the *Modus* must be, 1.

ⁱ 1 Roll. Abr.
649, 650.
1 Cro. 276.
1 Roll. Abr.
651.
1 Cro. 446,
475, 786.
1 Cro. 609.
2 Salk 656.
1 Ld. Ray.
242.

For the ^h Benefit and Advantage of the Parson, not for the Benefit of another only. 2. One Tithe must not be in Consideration of another, as Tithe of Cows for the Tithe of Oxen, &c. 3. It must be something different from the Thing that is due. Therefore it is a void Prescription, to pay a Load of Hay yearly in Discharge of all Tithe Hay; for that is to pay a Part in Discharge of the Whole. But this holds only where Tithes are payable of Common Right, not by Custom only. For less than a tenth Part of ^k Fish taken in the

Bunb. 307.
^k 1 Lev. 179.
1 Hob. 40.
1 Cro. 139.

Sea, and due by Custom only, may be a good Recompence. 4. It must be something as ^l certain and *durable* as the Tithe, tho' it may not be so valuable.

Bunb. 105,
126, 171, 198.
2 Wms. 462,
572.
^m 2 Danv. Abr.
Tit. Dismes
607, 608.

But a *Modus*, tho' founded upon a good Consideration, may be several Ways discharged, and Tithes may then become due in Kind, As, 1. Where the Land is converted to ⁿ other Uses, or the Thing altered or destroyed, for which the *Modus* was paid. So a Prescription for a *Modus* for Hay or Grass specially, in so many Acres of Land, is gone; if the Land is converted into a Hop-Garden, or into Tillage, so long as it continues a Hop-Garden or in Tillage. But when laid for Hay or Grass again, it shall revive. So where a Park is disparked, and the Lands are converted to Tillage, &c. if the

Modus

Modus was general for the Park; but it is otherwise if the *Modus* is for the Tithe of so many Acres of Land contained in the Park; or if a *Modus*, or certain Sum of Money, is for all the Tithes of such a Park, the *Modus* shall stand, tho' the Park is disparked; because the Prescription is in the *Soil*, and not in the *Park*, which is a Franchise, and a Thing incorporate and imaginary. Thus by Alteration of a Fulling-Mill into a Corn-Mill, the *Modus* for the Fulling-Mill is gone, and Tithes for the Corn-Mill must be paid in Kind: But if the Land is discharged by a *Modus*, and the Owner builds a Corn-Mill on the same, he shall not pay Tithe for the Mill. 2. By Non-payment of the Consideration, or by Payment of Tithes in Kind for so long Time, that the Prescription for a *Modus* cannot be proved. But a short Interruption shall not destroy it. A Payment of different Sums is Evidence that there is no *Modus*.

There may be a *Modus* for *personal Tithes*.

[See 2 & 3 Ed. 6. ch. 13. and 7 & 8 W. 3. ch. 6. Where the Cause may be removed (giving Security for Damages and Costs) upon pleading a *Modus* before the Justices of Peace of small Tithes.]

A Parson may sue in a Court Christian for a *Modus Decimandi* or Rate-Tithe, allowed between the Parties. But if the *Modus* is denied, it must be tried at the Common Law. This Distinction arises upon the Words of the Statute of 2 & 3 Ed. 6. ch. 13. Or of Right and Custom ought to be paid. [See the Statute *De Circumspecte Agatis*, 13 Ed. 1.] So where a *Modus Decimandi* is pleaded in the Spiritual Court to a Demand of Tithes in Kind, a Prohibition lies, upon Supposition, that the Spiritual Court will not admit of any Plea against Tithes.

2. A Custom or Prescription *De non Decimando* is to be discharged absolutely of Tithes, and to pay nothing in Lieu thereof. Thus the King shall pay no Tithes, tho' his Lessee shall pay them, even for the antient Demesnes of the Crown. Thus Spiritual Persons and Spiritual Corporations, as Bishop, Dean and Chapter, may prescribe by the Common Law *De non Decimando*, because they are capable of Tithes, and the Tithes are not taken from the Church. Their Tenants may have the like Privilege. But it is a general Rule, that a Layman cannot prescribe, either against a Lay or Spiritual Rector, by the Common Law *De non Decimando*, tho' his Lands may be discharged by Way of Retainer. The King is *Persona Mixta*, and not said to be a Layman in Law. But a Layman is capable of a Discharge of Tithes for Lands in his own Hands by Grant from Parson, Patron and Ordinary; tho' not by Prescription. A Church-warden (admitting that he may have Lands by Prescription) may not prescribe *De non Decimando* for Lands holden by Prescription, and given for the Reparation of the Church; for he is not a Spiritual Person. A Parish or a particular Hamlet cannot prescribe *De non Decimando*, for particular Tithes, much less from the Payment of all Tithes, tho' it may prescribe *De modo Decimandi*. But a County, Wild, or Hundred, may prescribe to be free from the Payment of Tithe Wood, or any other particular Thing due by Custom only: For as such Tithes are due by Custom only, they are discharged of them without a Custom to the contrary, and they do but insist on their ancient Right, and that Custom

^a 1 Ld. Ray. Custom hath not prevailed against it. ^a But where the Thing is titheable *De jure*, it hath been determined, that (notwithstanding what is said in some of the old Books to the contrary) a County or Hundred, cannot prescribe *in non Decimando* any more than a private Person.

All Prescriptions in these Cases are triable at Common Law.

Thus of *real Compositions* and *Prescriptions*, which are continued by 2 & 3 Ed. 6. ch. 13.

3. By *Act of Parliament* Lands may be discharged from Payment of Tithes.

^b 2 Rep. 44.

47.
2 Inst. 652,
653, 661.
2 Cro. 58,
452, 559.
Hob. 296,
297.

^b Abbeys, &c. before their Dissolution held their Lands discharged by *Bulls* of Popes, by *real Composition* with the Parson, Patron and Ordinary, by *Prescription*, by Order, (as of the *Cisterians*, *Hospitallers* of *St. John of Jerusalem*, *Templers*, [See 17 Ed. 2. St. 3.] so long as their Lands remained in their own Hands, and were manured by them :) [See 2 H. 4. ch. 4.] But *Monasteries*, *Abbeys*, &c. being dissolved, this Privilege of Exemption, and all Appropriations had fallen with them, if they had not been upheld and continued by the *Act of Parliament* that did dissolve them. For

^c 2 Rep. 47.
Hob. 297,
309.

By 31 H. 8. ch. 13. *The Lands, Parsonages appropriate, &c. of Abbeys, &c. which were of the Value of above Two Hundred Pounds, (called the greater Abbeys) are dissolved and given to the Crown, with a Proviso in the Act, That the King and his Patentees, and all and every other Persons, their Heirs and Assigns, which have, or shall have hereafter any Lands, &c. belonging to the said Monasteries, and other Religious and Ecclesiastical Houses and Places, shall keep and enjoy them discharged of the Payment of Tithes, in as large a Manner as the said Abbots, &c. enjoyed the same at the Day of their Dissolution.*

So that Purchasers now shall hold the Lands discharged, in the same Manner as they were in the Hands of the Abbots, &c.

^d 2 Rep. 47.
48, 49.

^e 11 Rep. 10,

14.

2 Inst. 655.

Hob. 298,

306, 307, &c.

1 Cro. 206.

2 Cro. 452.

3 Cro. 424.

By this Act ^d perpetual Unity of the Possession of the Lands, and the Rectory in the same Hands, is made an Exemption; which was not so before at Common Law. For if the Monastery, &c. was seised of the Lands and Rectory, and paid no Tithes within the Memory of Man for the Lands; those Lands shall now be exempted from Payment of Tithe by a supposed perpetual Unity of Possession, &c. But the Unity of Possession of a Manor and Rectory will not exempt the Demesne Lands from the Payment of Tithes, when

^e Comyns 498.

they come to be severed. ^e Religious and Ecclesiastical Corporations are only within this Act. Therefore *Bishops*, *Deans*, *Dean and Chapter*, *Archdeacons*, *Colleges*, *Hospitals*, &c. that were not religious, or which were not regular but secular, are not to be understood here. If it be Ecclesiastical only, it is out of the Act.

^f 2 Rep. 48,
49.

^g Hardr. 174.

Note also, That the King, and his Patentees for Life or Years, shall enjoy the Lands discharged, because the King cannot manure them; but the King's Patentees in Fee, and others shall enjoy the Lands only in the same Manner as the Abbots, &c. or the above-mentioned three Orders held them, *i. e.* whilst in their own Hands, or not let out or manured by another.

The Act says, discharged from Payment of Tithes, not discharged of ^h Tithes; because such Discharges of the *Monasteries*, &c. cannot be found.

^h 2 Rep. 47.
ⁱ 11 Rep. 10,
14.

A Catalogue of several Monasteries within England and Wales, which were return'd to be of above two hundred Pounds *per Annum*, discharg'd of Tithes, and dissolv'd by 31 H. 8. ch. 13, may be seen in the Exchequer; and in many modern Books that have treated of the Law concerning Tithes. [See *Degge's Parson's Counsellor*, *Godolphin's Repertorium Canonicum*, *Watson's Clergyman's Law*, *Bishop Gibson's Codex*, &c.]

Other Lands belonging to the greater Monasteries, &c. which were not discharged before the Dissolution of them, are still subject to the Payment of Tithes. No other Lands that came to the Crown are discharged, but by the Statute above-mentioned. For it is to be observed, that tho' by 27 H. 8. ch. 28. the Lands, &c. of Religious Houses, which were not above the clear yearly Value of two hundred Pounds, (commonly called, *the smaller Abbeys*) were given to the Crown, yet they were not discharged of the Payment of Tithes.

For there are no special Words in this Statute that the Lands, &c. given thereby, shall be discharged, as the Abbots, Priors, &c. held them discharged before the Statute. So that if there had been any Discharge before, the Privilege now as to Lands, &c. under, or of the Value of two hundred Pounds *per Annum*, is determined, and the Prescription *In non Decimando*, as well as the Privilege. But if the lesser Abbeys, &c. had Right to a *Modus Decimandi*, Real Composition or Prescription may be pleaded.

But again observe, that not all the religious Houses of or under two Hundred Pounds *per Annum* were dissolved by 27 H. 8. ch. 28. for some of them were dissolved by 31 H. 8. ch. 13. by Virtue of a *Proviso* in 27 H. 8. (left out of the Statute in the Book of *The Statutes at large*) That notwithstanding that Act, the King might, by Letters Patent, continue any of the said Monasteries, &c. which he did; and so they were not dissolved till 31 H. 8. and therefore are within the Branch of the said Act concerning the Discharge of Tithe.

And now tho' Titles of Discharge under 31 H. 8. are lost, and the Manner of Discharge cannot be made out at this Day; yet if the Lands of a religious House, dissolved by that Statute, have been held since the Dissolution freed from the Payment of Tithes, it shall be intended that they were held so before; and Prescription shall be allowed for a Discharge of Tithes under that Statute, either absolutely *De non Decimando* for all Tithes, or for this or that Sort, &c.

All these Titles may be supported by * Prescription; and from hence all other Prescriptions *De non Decimando* are supposed to have their beginning.

So that by Virtue of 31 H. 8. a Layman Patentee of the King may prescribe (generally without shewing how) *In non Decimando* for Abbey Lands, as under an Abbot's Title; which he could not do for any Lands by the Common Law upon any account.

By 32 H. 8. ch. 24. *The King shall enjoy the Manors, Parsonages, Tithes, Privileges, &c. of the Hospital of St. John of Jerusalem.*

But *Quære* Whether these Lands are freed from the Payment of Tithes.

Hob. 295.

Bunb. 37, 122;

* 2 Rep. 48.

11 Rep. 14.

Hob. 297.

* Raym. 225;

Contra,

2 Cro. 58.

Bunb. 214.

See 2 H. 4. ch. 4. 7 H. 4. ch. 6. And see the Notes on 27 H. 8. ch. 28. and 31 H. 8. ch. 13, &c. in *Danvers's Abr. Tit. Dismes* 618, 619, 620. See also 1 Ed. 6. ch. 14. The Act for Chantries Collegiate, and 2 Rep. 46, 47, 48, 49.

^a Inst. 649, &c.

By 2 & 3 Ed. 6. ch. 13. *None shall pay the Tithes for Lands otherwise than they were paid forty Years before, nor where by the Laws and Statutes of this Realm, or by any Privilege or Prescription, they are not chargeable, or that are discharged by any Composition real.*

Since the Dissolution of Monasteries, &c. the Learning of Profession, Deraignment, &c. is out of Use.

Of Tenures and Services.
^a 1 Inst. 1. a.
93. a.
See P. 68 and 133. ante.

IV. A Tenure is the Manner whereby Tenements are holden of a Lord; or the Service that the Tenant oweth to the Lord. There can be no Tenure without some Service; because the Service makes the Tenure. These Tenures and Services were divided into twelve Parts, (*viz.*) *Homage, Escheage, Knight-Service, Homage Ancestral, Burgage, Villenage, Grand Serjeanty, Petit Serjeanty, Frankalmoign, Fealty, Socage and Rents.* But,

By 12 Char. 2. ch. 24. *All Tenures are turned into free and common Socage; and all Tenures by Knight Service of the King or other Person, and by Knight-Service in Capite and Socage in Capite of the King, and the Fruits and Consequences thereof are taken away. And all Tenures to be created by the King shall be in free Socage only, and not by Knight-Service or in Capite; saving Rents certain, Heriots and Suits of Court, and Services incident to common Socage, and saving Tenures in Frankalmoign, by Copy, and the honorary Services of Grand Serjeanty, other than Charges incident to Knight-Service.*

^b F. N. B. 5.
¹ Inst. 108. a.
7 Rep. 11.
² Inst. 64, 65.
Dav. 66, 67.

^b A Tenure in Capite, in common Understanding, was only applied to the King as of his Person and Crown, that is, as he is King, (for the Defence of him and his Crown) and not when the Land his holden of the King, as of any Honour or Manor. The original Tenure must be created by the King. It was not sufficient, that it was held only of the Person of the King; for the Land might come to him by Escheat. Tenure in Capite, largely taken, was sometimes applied to a Subject, when one held of a common Person, as of his Person.

It remaineth therefore that I speak only of *Grand Serjeanty, Petit Serjeanty, Frankalmoign, Fealty, Socage and Rents.*

^a Lit. 153.
¹ Inst. 105. b.

1. ^a *Grand Serjeanty* (from *Serjeant*, a Waiter) is a Tenure whereby one holds his Lands of the King by such Services, as he ought to do in his proper Person to the King. It may concern Matters Military within the Realm, or Services of Honour in Peace; as to be the King's Carver, Butler, &c. at his Coronation. Tenant by Grand Serjeanty was said to hold by Knights-Service, because the King had Ward and Marriage of such Tenant; and tho' these are taken away by 12 Car. 2. ch. 24. yet the honorary Services of Grand Serjeanty still remain. [See 1 Ed. 3. St. 2. ch. 12.]

^a Lit. 159.
¹ Inst. 108. a.
b.

2. ^a *Petit Serjeanty* is, where a Man holds the Lands of the King, to yield to him a Bow, a Sword, or certain Thing, to be rendered yearly, as one pays his Rent.

3. * *Frankalmoign* (*Libera Eleemosyna*, Free Alms) is the only spiritual Service; and is where an Ecclesiastical Corporation, sole or aggregate, holdeth to them and their Successors, of some Lord and his Heirs in *pure* and *perpetual* Alms. *Perpetual* supposes it to be a Fee-simple, tho' it may pass without the Word Successors. The Word *frank* or *free* distinguishes it from a Tenure by divine Service; for that Service is certain, but in *Frankalmoign* no certain Service is mentioned; tho' both now are reduced to a Certainty, according to the Form of our Liturgy. A lay Person cannot hold in *free* Alms. And when a Grant is in *free* Alms, no Mention is to be made of any Manner of Service, for it is free from any temporal Service, and is of the highest Nature, because it is a Tenure by spiritual Service. None can hold in *Frankalmoign*, but only by Prescription, or by Force of some Grant made before the Statutes of *Mortmain*, 7 Ed. 1. *ch.* 36. and *Quia Emptores Terrarum*, or 18 Ed. 1. *ch.* 1. So that the Tenure cannot be created at this Day to hold of a Founder and his Heirs in *Frankalmoign* or free Alms. But the King is not restrained by the Statutes, nor a Subject, that is licensed or dispensed with by the King, to make such a Grant. [See 7 & 8 W. 3. *ch.* 37, by which the King himself may dispense with the Statutes of *Mortmain*.] For tho' the Alienation is prohibited, yet if all parties consent in whose Favour the Prohibition is made, the Grant is good. And the Reason, why a Grant in *Frankalmoign* since the Statute of *Quia Emptores Terrarum* is void, except in Case of the King, is because none can hold in *Frankalmoign* but of the Donor; whereas, that Statute obliges to hold of the chief Lord, by the same Service by which the Feoffor himself held. But the King may Grant away any Estate and reserve the Tenure to himself.

If an Ecclesiastical Person holds by Fealty and certain Rent, the Lord at this Day may confirm his Estate to hold to him and his Successors in *Frankalmoign*. For the former Services are extinct, and nothing is reserved but that he should hold of him, which he did before. So that this Change is not within the Statute of *Quia Emptores Terrarum*.

A Tenure in *Frankalmoign* is incident to the inheritable Blood of the Donor or Founder; except in Case of the King, who may grant in *Frankalmoign* to hold of him and his Successors. And if those, that hold their Tenements in *Frankalmoign*, fail to do such Divine Service as they ought, the Lord may complain of it, according to the Course of the Ecclesiastical Law, to their Ordinary or Visitor, which is the King, if he is Founder, or a Subject, if he was appointed Visitor upon the Foundation. And the Ordinary or Visitor ought to punish the Neglect according to the Ecclesiastical Laws. But for Divine Service in certain (as to read Prayers every Friday or to Distribute Alms to poor Men, &c.) The Lord may distrain for it, and Fealty is incident to this Tenure which is different from *Frankalmoign*.

* *Alienatio licet prohibeatur, consensu tamen omnium, in quorum favorem prohibita est, potest fieri.* 1 Inst. 98. b. 99. a.

Quilibet potest renunciare juri pro se introducto. 1 Inst. 99. a. 223. b.

This Tenure in *Frankalmoign* is an ancient Grant; and therefore shall be allowed as the Law was then taken. It is chiefly to be met with in Grants to *religious Houses, Bishops, Deans, Deans and Chapters, Colleges, Hospitals, &c.* But tho' it may possibly be made at this Day, it is out of Use.

^a Lit. 91.
¹ Inst. 67. b.
68. a.

^b Lit. 132.
¹ Inst. 93. b.

^c Lit. 131.

^d Inst. 68. a.

^e Lit. 117,
119.
¹ Inst. 86. a.

^f Lit. 118.

^g Lit. 119,
160, 162.
¹ Inst. 86. a.
& b. 108. b.

^a Inst. 141.
b. 142. a.
10 Rep. 128.

¹ Inst. 47. a.

¹ Inst. 143. b.
213. b.

¹ Inst. 47. a.
142. a. 144. a.
213. a. & b.

^m Inst. 292. b. a

ⁿ Inst. 96. a.
142. a.

^o Lit. 213,

214, 215.
¹ Inst. 87. b.
141. b. 142. a.

4. ^a *Fealty*, (*Fides, Fidelitas*) signifieth an Oath taken at the Admittance of every Tenant to be true to the Lord, of whom he holdeth his Land. And he that holdeth Land by this Oath only, holdeth in the freest Manner, that any Subject can do. But bare Tenant at ^b Will at the Common Law shall not do Fealty, for he hath no certain Estate; and because the Matter of an Oath ought to be certain. Lessee for Life or Years ought to do Fealty to the Lessor; for they hold of him, and there can be no Tenure without some Service. The Service makes the Tenure; ^c Fealty is incident to all Manner of Tenures, except *Frankalmoign*.

This Oath of Fealty is not abolished, but it is ^d neglected.

5. ^e *Socage* (*à Socá*, a Plough) is when the Tenant holdeth of the Lord by certain Service for all Manner of Services, so that the Service be not Knights-Service. Since 12 Car. 2. ch. 24. abovemention'd, every temporal Tenure of a Subject is in *Socage*. But *Grand Serjeanty* holden of the King, and *Frankalmoign* (being a spiritual Service) is not in *Socage*. If a Man holds by Fealty only, ^f such Service is Tenure in *Socage*. ^g In ancient Time, Tenants in *Socage* at certain Days in the Year plough'd and sow'd the Lord's *Demefnes*. Under the Service of the Plough all Services of Husbandry were included. But afterwards such Services were changed into annual Rent of Money, &c. yet the Name of *Socage* remaineth. And in divers Places Tenants do such Services with their Ploughs. Tenure by *Petit Serjeanty* and in *Burgage* are but Tenures by *Socage* in Effect.

6. ^h A *Rent* (*Redditus*) is a Sum of Money or other Consideration issuing yearly out of Lands or Tenements. It is reserved out of the Profits of the Land, and is not due till the Tenant takes the Profits. Yet a Rent may be reserved every ⁱ two, three or more Years; but it must be reserved to the *Feoffor, Donor* or *Lessor*, and not to a *Stranger*; except in the Case of the King who may reserve Rent to a *Stranger*. Regularly it must be reserved out of a ^j corporeal Inheritance, whereunto the Grantor may have Recourse to distrain. But as to incorporeal Inheritances the Reservation may be good by way of *Contract*, to have an Action of Debt. A Rent may be reserved out of a Reversion or Remainder of Lands, for the apparent Possibility that they may come in Possession. *Rent* is not ^k a Thing merely in Action, because it may be ^m granted over. It must be ⁿ certain, or that which may be reduced to a Certainty; and may be of *Hens, Pepper, Attendance, &c.* as well as Money.

For a farther Enquiry into the Nature of *Rents* it may be needful to consider, 1. How *Rents* are divided. 2. The Payment of *Rents*. 3. The Acceptance of *Rent*. 4. Demand and Tender of it. 5. Distresses for Non-payment. 6. The Apportionment and Extinguishment of *Rents*.

1. How *Rents* are divided. There are ^o three Sorts of *Rents*. *Rent-Service*, *Rent-Charge*, and *Rent-Seck*. *Rent-Service* (so called, because it is ever accompanied with some corporal Service, as Fealty at least) is where one upon a Gift in Tail, or Lease for Life

or

or Years, does reserve to himself a certain *Rent*, while the Reversion of the Lands and Tenements continues in him. Therefore if a Termor grants all his Term, rendering *Rent*, he cannot distrain for it. This is a most certain Mark to know it to be a *Rent-Service*. But the *Rent*, tho' it be incident to the Reversion, it is not inseparably Incident; for one may grant the *Reversion* and not the *Rent*. If *Rent-Service* is behind at the Day on which it ought to be paid, the Landlord may distrain for it by the Common Law, without any particular Agreement or Provision; tho' a Clause of Distress is usually added in a Lease in Writing. It cannot be reserved out of any Inheritance, but such as is manurable, whereunto the Landlord may enter and take a Distress; as out of Lands and Tenements, Reversions, Remainders; but not out of Inheritances incorporeal, except in case of the King.

A *Rent-Charge* is where a Man by Deed maketh his Estate over to another in Fee, or by Gift in Tail, the Remainder over in Fee, or a Lease for Life, Remainder over in Fee, or any other Grant where the whole Estate passeth, and by the same Deed reserveth to him and his Heirs a certain *Rent*, and that if the *Rent* be behind, it shall be lawful for him and his Heirs to distrain. Such a *Rent* is called a *Rent-Charge*, because such Lands are charged with such Distress by Force of the Writing only, and not by Common Law; as in the Case of a *Rent-Service*. It must be a Conveyance in Fee either in Possession, or Remainder, or a Grant of the whole Estate, to make a *Rent-Charge*; for the Reversion is not to be in the Feoffor, as is requisite in a *Rent-Service*. Also, if one seised of Land grants by Deed an yearly *Rent* issuing out of it to another, in Fee, Fee-tail, for Term of Life, or Years, with a Clause of Distress, such *Rent* is a *Rent-Charge*. And if one seised of Lands in Fee binds his Goods and Lands for the Payment of an yearly *Rent*, this is a good *Rent-Charge*, with Power to distrain. So that a *Rent-Charge* may be either by *Reservation* or *Grant*.

Rent-Seck (*Redditus Siccus*) is where a Man by Deed maketh over his Estate to another, and reserveth to him and his Heirs a certain *Rent*, or granteth a *Rent* issuing out of his Estate in Fee, Fee-tail, for Life, or Years, without any Clause of Distress in the Deed. Now he cannot distrain, because no Distress is incident to it; but he may have other Remedy when he hath had Seisin of it. And because he cannot have a Distress, it is called a *dry Rent*; there being no Reversion, or particular Charge to enable him to distrain for it. But if the King hath a *Rent-Seck*, he may distrain for it. [See 4 Geo. 2. ch. 28. which gives Remedy by Distress for all Rents, that have been paid within twenty Years next before the making of the Statute, or that shall be afterwards created.]

To these three Sorts of Rents may be added a *Rent* reserved upon a Lease at Will, called *Rent distrainable of Common Right*. Also a Man may have a *Rent* issuing out of Land by *Prescription*. And there are other Rents (tho' not properly called Rents) reserved by Contract or Deed, which creates them with Clause of Distress without a Tenure, against the natural Course of the Law, as in Common Practice. Such *Rent* is rather a Penalty of an annual Sum in Gros. But Note, That in all Cases by late Statutes hereafter-mentioned,

tioned, a Landlord may distrain for his Rent upon any *Contract*. So that I do not understand the great Use now to be made by distinguishing upon these several Kinds of Rent as to Distresses.

You will often hear of *Fee-Farm Rent*, *Quit-Rent*, *Rack-Rent*, *Old-Rent* and *Improved-Rent*. * A *Fee-Farm Rent* (*Feodi Firma*) is where Land is held of another in *Fee*, for so much Rent as it is reasonably worth, or at least to the fourth Part of the Value. *Quit-Rent* (or *White-Rent*, because paid in Silver; or *Quiet-Rent*, because upon Payment the Tenure is quiet, quit and free for that Time) is a certain *small Rent*, payable yearly by the Tenant to his Landlord. The Tenants of most Manors pay such a small yearly Rent. *Rack-Rent* is supposed to be the full yearly Value of the Land, payable by the Tenant for Life, Years, &c. *Old-Rent* is that yearly Rent, which was always paid, neither more nor less, the Tenant being supposed to have a good Bargain. Improved Rent is where the old Rent has been raised, or where an Improvement has been made of the Rent. Here Purchasers are more cautious, than where Lands are let at the old Rent.

2. Concerning Payment of Rent, it is to be observed, that Money given as Parcel of the Rent by Way of Seisin shall not be abated out of the Rent; or that if Money is given as Payment of the Rent, or as Parcel of it, it shall not be applied to the Payment of any other Debt, as for Wares sold, &c. by the Receiver; for the Payment is to be in that Manner, which one would pay it; and not according to the Words of the Receiver how he would accept it, that is, if the Debtor signify for what Purpose he pays it; * for otherwise it is *ad modum recipientis*.

If one seised of Lands in Fee maketh a Lease of the same Land for ten Years, yielding to him and his Heirs a yearly Rent of twenty Pounds at the Feast of St. Michael, or * within one Month after; if the Lessor dieth between the Feast of St. Michael and the End of the Month, the Rent must be paid to the Heir as incident to the Reversion, (and not to the Executors as where Rent is due and behind,) because this was not due until the End of the Month. So the Rent must be paid to the Heir, if the Lessor dies before any fix'd Day of Payment. If the Lessor dies upon the Day of Payment, if the Rent is unpaid, the Heir shall have it: For the Rent is not due till the last Minute of the natural Day. * But if it be paid that Morning, before the Lessor dies, his Executor shall retain it against the Heir, but not against the King: [It seems to be the better Opinion, that if the Lessor dies before Sun-set on the Day of Payment, the Rent unreceived does not belong to his Executor, but to his Heir, or to him who takes the Estate; but if he dies after Sun-set, tho' before twelve at Night, the Executor shall have it, as having become due and payable in the Testator's Life-time *.] If the Lessor lives to the Day of Payment, a Payment before the Day appointed, is in Law, a Payment at the Day; and a Payment at another Place is as good, as if received at the Place limited in the Condition. If one seised in Fee lets Lands for certain Years, and reserves a Rent to *himself*, not to him and his Heirs, the Rent shall determine by his Death, if he dies within the Term. If he reserves a Rent * generally, without shewing to whom it shall go, it shall go to his Heirs. If he reserves it to himself or his Heirs, it is void as to the Heir. If he reserves a Rent

* F. N. B. 210.
10 Rep. 58.
1 Inst. 143. b.
2 Inst. 19, 44.

1 Inst. 315. a.

* 5 Rep. 117.
1 Cro. 68.

* Brampton v. Bolas in Chan. 25 April 1755.

* 10 Rep. 127.
1 Saund. 287.
2 Salk. 578.

* 10 Rep. 127.
1 Inst. 212.
a. & b.

* Pr. Ch. 555.
1 Wms. 179.

* 2 Inst. 47. a.
214. a.
5 Rep. 111.
2 Saund. 371.
1 Vent. 161.
2 Lev. 13.

a Rent to him and his *Assigns*, the Rent shall determine by his Death, because the Reservation is good only during his Life. So if he reserves a Rent to him and his Executors, it shall End by his Death; because the Heir hath the Reversion, and the Rent is incident to the Reversion. But it has been resolved, that a Rent reserved to the Lessor, and his Executors and Assigns, *during the Term*, shall go to the Heir, because the Rent after the Decease of the Lessor comes in Lieu of the Land, which had descended to the Heir. *But if the Rent is reserved to the Lessor, his Heirs and Assigns, a Plowd. 167. then the Assignees of the Reversion shall enjoy it, for the Rent is incident to the Inheritance. 1 Inst. 47. a.

If a Lease is made for Years, yielding a yearly Rent at the Feasts of *St. Michael*, and the *Annunciation* of our Lady, or within twelve Days after every of the said Feasts, upon Condition, that if the said Rent be not paid within twelve Days after any of the said Feasts^b, 10 Rep. 129. or Days of Payment thereof, that then the said Lease shall be void; the Tenant or Lessee, as to the Preservation of his Lease, has twelve Days after the twelve Days to pay the said Rent; for the Twelfth Day after the Feast was the *Day of Payment*. But if the Clause in the Lease had been, that if the Rent is behind for the Space of twelve Days next after either of the said Feast-days of Payment, that then, &c. here the Tenant hath but twelve Days allowed him.

If a Tenant for *Life* lets a Lease for a certain Number of Years, if he shall so long live, the Rent to be paid at the four most usual Feasts in the Year; if the Tenant for Life dieth before a Quarter-Day, or Day of Payment, the Tenant is discharged of the Rent for that Quarter by the Act of God. And Equity would not apportion it. 10 Rep. 127, 129. So a Parson made a Lease for Years, rendring Rent at the Feast of *St. Michael*, or within one Month after, and the Parson died ten Days after the Feast of *St. Michael*, and was barred of his whole Rent, because he died before the Rent was due. 1 Wms. 392. If a Tenant for Life dies but an Hour before the Day of Payment, there can be no Rent due to him. 179. Therefore, those that have Estates only for Life, would do well to divide the Rent, and make it payable weekly or monthly, tho' they receive it but Half-yearly, &c. or else let them have a Covenant in their Leases, to oblige their Tenants to pay to their Executors for so much of the Profits as they shall receive, in Proportion to the whole Rent, in Case the Landlord or Lessor should die before any Day of Payment. There can be but little Loss by a weekly or monthly Reservation. Otherwise without this Care the Tenant may receive the Profits of the Estate, and detain the Rent too, by quitting the Estate upon the Death of his Landlord, who did not live till the Rent was due; by this Way barring those in Remainder and Reversion of the Rent, because he hath taken Care not to be their Tenant at the Day of Payment. This has been often done by the Tenants of Bishops, Deans, Archdeacons, Prebendaries, Parsons, Vicars, Widows, endowed by Common Law, or having Jointures in lieu of Dower according to the Statute, for want of due Care and Foresight. Prec. Ch. 555.

But now these Inconveniencies are remedied; for by 11 Geo. 2. ch. 19. *Where any Tenant for Life happens to die before or on the Day on which any Rent was reserved or made payable upon any Demise*
or

or Lease, which determined on the Death of such Tenant for Life; the Executors or Administrators of such Tenant for Life may, in an Action on the Case, recover from the Under-tenant, if such Tenant for Life die on the Day of Payment, the Whole, or if before such Day then a Proportion, of such Rent, according to the Time such Tenant for Life lived of the last Year, or Quarter of a Year, or other Time in which the said Rent was growing due, making just Allowances.

^a 5 Rep. 81. ^b If a Rent is reserved upon a Lease for Years of Lands at four usual Feasts in the Year, the Lessor shall have an Action of Debt after the first Day of Failure, because the same is accounted in Law a Reservation of Parcel of the Profits of Land. So that every Quarter's Rent is a ^b several Debt. ^c Thus on a Covenant, or Promise or Recognizance to pay a hundred Pounds at five several Days, an Action lies after the first Default. Yet if one leaseth a Stock of Cattle, or other ^d personal Goods, and the Rent is to be paid at several Days, the Lessor must tarry until all the Days are expired, because it is all but one personal Contract. And so it is of a Bond or Contract for Payment of ^e several Sums of Money. Note, a Diversity between real and personal Contracts, and between Debts ^f and Covenants, or Promises.

^g When one is to pay Rent at a certain Day, he hath all that Day until Night to pay it, ^h but so that the Receiver may see to tell it. And when a common Person appoints ⁱ no Place of Payment of his Rent, the Law appoints it to be upon the Land; but in Case of the King, the Payment must be at the Exchequer, or to his Receiver. ^j If a Man is bound in an Obligation to pay his Rent at a Day, ^k he must seek out his Landlord to pay him.

By 8 An. ch. 14. An Action of Debt may be brought for Rent reserved upon a Lease for Life or Lives, in the same Manner as in the Case of Rent reserved upon a Lease for Years.

[See 18 El. ch. 6. Concerning Rent in Corn payable to Colleges, &c. See also of an Acquittance, post, ch. 3.]

3. Acceptance is as it were an Agreement unto some Act done before, which might have been avoided, if such Agreement had not been. So Acceptance of a next Rent due at a Day ^l afterwards, shall bar one to enter for a Condition broken before by Reason of the Non-payment of the Rent, because he now affirmeth the Lease to have Continuance, which he might have avoided, had he not accepted the Rent. So a Distress affirmeth the Continuance of the Rent in such Case. But if the Rent was due before, and thereby the Condition broken, one may receive that Rent, and yet re-enter.

^m And if he accepteth ⁿ Part of the Rent, he may enter for a Condition broken, and retain the Land until he hath the whole Rent. If there is a Lease for Years rendring Rent with Condition, that, if the Lessee assigns his Term, the Lessor may re-enter, the Lessee assigneth, and the Lessor receiveth the Rent of the Lessee, not hearing of the Assignment, ^o or not having Notice of it, he may re-enter notwithstanding the Acceptance of the Rent.

^p If a lesser Sum is paid in Satisfaction of the Whole, this cannot be Satisfaction for the Whole, unless acknowledged to be so by Acquittance under Seal. And so when a Contract is made by Writing to do any collateral Act, it cannot be altered without Writing.

But

^a 5 Rep. 81.
¹⁰ Rep. 128.
¹ Inst. 47. b.
292. b.

^b 1 Ventr.
129.

^c 4 Rep. 94.
¹⁰ Rep. 128.
¹ Inst. 292. b.
² Inst. 395.
471.

^d 4 Rep. 94.
⁵ Rep. 81.
^e 1 Inst. 47. b.
292. b.

^f 5 Rep. 81.
¹⁰ Rep. 128.
^g See of Obligations, ch. 3.
post.

And of Actions, B. 4.
ch. 4. post.

^h 5 Rep. 114.
¹ Inst. 202. a.
¹ 4 Rep. 72.

73.
¹ Inst. 201. b.
¹ Noy's Max.
79.

^l 3 Rep. 64.
65.
² Inst. 211. b.
¹ Cro. 528.

^m 1 Inst. 203. a.

ⁿ 3 Rep. 65.
¹ Cro. 553.
572.
² Cro. 334.
398.

^o 1 Inst. 212. b.
⁵ Rep. 117.
⁹ Rep. 78, 79.
B. 4. ch. 3.
f. 3. post.

But Note, that where an Estate or Lease for Years is *ipso facto* void by the Condition or Limitation, no Acceptance of the Rent afterwards can make it have a Continuance: Otherwise, if it is an Estate only voidable by Entry, tho' it is said, it shall be *ipso facto* void, as if it be a Lease for Life, or an Estate of Freehold; for an Estate of Freehold cannot begin or end without Ceremony. Here Acceptance of the Rent due at a Day afterwards, shall bar the Lessor of his Entry. For this voidable Lease may be affirmed by Acceptance of the Rent, and neglecting to re-enter. But as no Entry is required upon a Lease for Years, it is utterly void, *if such is the Condition*, and cannot be made good by Acceptance of the Rent. So if a Parson, Vicar or Prebendary, makes a Lease for Years rendering Rent, and dieth, tho' the Successor accepteth the Rent, it is not good; for the Lease was void by his Death: Otherwise of a Lease for Life. The Acceptance of Rent by the Master of an aggregate Body, shall not hurt the aggregate Body where the Lease is void. If Tenant for Life leaseth Lands for Years and dies, the Lease is void. And tho' he in Remainder accepts the Rent, it is void. So if Tenant in Dower leaseth for Years and dies, and the Heir accepts the Rent. But if a Man and his Wife, seised of Land in Right of the Wife, make a Lease by Deed reserving Rent, and the Husband dieth, yet if the Wife accepts the Rent, after the same was due to her, the Lease is thereby affirmed.

4. Of Demand and Tender of Rent.

It behoveth all Persons that would re-enter upon their Tenants, to make a Demand of their Rent, and it behoveth Tenants to tender their Rent to prevent the Re-entry.

1. A Demand is a Calling upon a Man for any Thing due. It is twofold, *express* or *implied*. *Express*, when one bringeth an Action for his Rent, &c. *Implied*, is done without any Words, as by Entry into the Land, Distress for the Rent, &c. A Demand must be in Person, or by lawful Attorney, in the Presence of Witnesses. If one is to bring an Assise, or distress for Rent, after Demand to be made, he ought to demand the Rent upon the Lands out of which the Rent is issuing. But if there is a House and Land, a Demand at the House or Land is sufficient; and it need not be demanded at the very Time it is due, but at any Time after, whether the Tenant be present or no. But observe that in Case of Re-entry for Breach of a Condition tending to the Destruction of the Estate, he that would enter for such Breach, must, 1. Demand the Rent. 2. Upon the Land, if there is no House. 3. If there is a House, at the Fore-Door, the most notorious Place. It is not material whether any Person be in the House or no. So if a Feoffment is of Wood only, the Demand must be at the Gate of the Wood, or other most notorious Place. 4. If the Appointment is at any other Place from the Land, the Demand must be at that Place. 5. The Time of Demand must be certain, that the Tenant may be there to pay the Rent. The last Time of Demand of the Rent, is such a convenient Time before the Sun-setting of the last Day of Payment, as that the Money may be numbered. The Lessor, or his sufficient Attorney, must remain upon the Land the last Day on which the Rent due is to be paid, until it be so dark that he cannot see to tell the Money. And if the Money is not paid (whether the Tenant is absent or present) this is a Denial in Law, tho' there are no Words

C c c

of

^a Lit. 327.

¹ Inst. 203. a.

of Denial. ^aOne may reserve a Rent on Condition, that if the Rent is behind he shall re-enter, and hold the Land till he is satisfied or paid the Rent behind. In this Case if the Rent is behind, or all or Part unpaid at the Day, he may re-enter. But when the Feoffee pays or tenders on the Land all the Arrears, he may enter again. For the Feoffor has only an Interest, not the Freehold, to take the Profits in the Nature of a Distress. Here the Profits shall not go in Part of Satisfaction of the Rent. Otherwise, if he was to hold the Land till he was paid by the Profits thereof.

^b 4 Rep. 73.

⁵ Rep. 56.

In the Case of the ^bKing a Demand is not necessary. But if the King grants over the Reversion of his Lease to a common Person and his Heirs, he in the Reversion ought to make a Demand upon the Land, &c.

[By 4 Geo. 2. ch. 28. *The Landlord, who hath Right of Re-entry for Non-payment, may, in Case of Half a Year's Rent being in Arrear, deliver a Declaration in Ejectment without any actual Demand or Re-entry.*]

^c 7 Rep. 28.

² Inst. 89.

Hob 82, 133.

⁴ 3 Cro. 76, 77.

¹ Roll. Abr.

443.

A Demand of Rent cannot be made by a Bailiff upon Condition of Re-entry. When any Sum is to be forfeited ^c*Nomine Penae* for Non-payment of the Rent at the Time, &c. the Demand of the Rent ought to be precisely at the Day in respect of the Penalty: And if there is a general Obligation for the Performance of Covenants^d, it doth not alter the Nature of the Rent; but it ought to be demanded, notwithstanding the Obligation.

¹ Inst. 211. a.

¹ Inst. 208. a.

2. A ^eTender is an Offer to pay the Rent. ^fIt may be of Money in a Purse or Bag, without telling the same. For it is the Duty of him that is to receive it, to put it out and tell it. But a Tender of Rent must be of the whole Rent without Deduction of Taxes, &c. (for Stoppage is no Payment) unless it is agreed to be otherwise. ^gA Tender upon any Part of the Land or at any Time of the last Day of Payment, saveth the Condition for that Time, tho' the Landlord refuseth it.

¹ Inst. 202. a.

This is the strict Law concerning Demand and Tender of Rent. But by Agreements these Niceties are usually prevented, either by Covenant to pay on Demand in Writing left at such a Place, or absolutely by Covenant to pay at such a Place, on such a Day, ^hwithout Demand.

⁵ Rep. 40.

5. There may be a Distress for Non-payment of Rent. Therefore enquire, 1. What is a Distress. 2. For what one may distrain. 3. What Things may be distrained or not. 4. How it may be made. 5. Of Replevin and Rescous.

¹ Terms of

the Law, v.

Distress.

¹ Inst. 96. a.

But see below,

11 Geo. 2.

chap. 19.

² Terms of

the Law, v.

Distress.

1. A Distress (*Districcio*) is a Thing found upon the same Land, and taken for Rent behind, or other Duty, or for Damage-feasant, (*i. e.*) Hurt done, tho' the Property of the Thing belongeth to a Stranger. ^aA Distress is either *finite* or *infinite*. *Finite* is that which is limited by Law how often it shall be made, to bring the Party to Trial of the Action, as once or twice. *Infinite* is without Limitation, until the Party appears; as against a Juror that refuseth to appear, &c. But I am speaking of a Distress for Rent. Therefore,

¹ Dr. & Stud.

Dial. 2. ch. 9.

Lit. 72, 331.

¹ Inst. 57. b.

205. a.

2. For what may one distrain? A Landlord may distrain of ^acommon Right for Rent-Service, and all Manner of Services certain, or for a Rent reserved upon a Gift in

in Tail, Lease for Life, or Years, or at Will, tho' there be no Clause of Distress in the Lease, provided that he reserves the Reversion to himself. And tho' the Distress is reserved, if the Rent is *behind or unpaid* for ten Days, after the Day of Payment, yet the Lessor may distrain the next Day after it is due. For the Words are affirmative, and cannot restrain that which is of common Right.

But a Man may not distrain for Rent, after the Lease is expired^a. One cannot distrain upon a Feoffment in Fee for Rent, unless a Distress is expressly reserved in the Deed; nor for Debt, Trespass, &c.

^a But see below, 11 Geo. 2. ch. 19.
^b Dr. & Stud. Dial. 2. ch. 9.

3. A Distress may be of several Things, but not of all Things. A Distress taken for Rent must be, 1. Of a Thing whereof a valuable Property is in some Body, either general or special^a, therefore Dogs, Conies, and Things *Fera Naturæ* cannot be distrained. But

^c 1 Inst. 47. a. & b.
¹ Roll. Abr. 666, 667.

2. When one is riding on a Horse, or hath an Ax in his Hand cutting down Wood, or when one carries any Thing about him, these cannot be distrained. But a Horse with the Rider on it may be distrained *Damage-feasant*, and led to the Pound with the Rider upon him. *Quære*. 3. Valuable Things that are in Trade, shall not be distrained for Rent; as a Horse that is shoeing in a Smith's Shop shall not be distrained for the Rent of the Shop, nor a Horse in an Inn, nor Materials in a Weaver's or Taylor's Shop for making Cloth or a Garment, nor Sacks of Corn or Meal in a Mill, for the Rent thereof. For the common Presumption is, that such Things belong not to themselves, but to others. For this Reason a Horse, &c. put out to Pasture by Way of Agistment (because it is presumed to belong to the Owner of the Ground) may be distrained.

^d See ch. 5. post.

If he is put in but for a Night by Leave of the Lessor and Lessee, yet the Lessor may distrain him. Goods in a Fair or Market shall not be distrained, for they are brought thither for the Good of the Publick. But if they are driving to Market, and by the Way they are put into Pasture, otherwise. Utensils and Instruments of Trade, or Tools of one's Profession, ought not to be distrained.

^e 1 Sid. 422.
¹ Inst. 47. a. & b.

4. Nothing shall be distrained for Rent, that cannot be rendered again in as good a Plight, as it was at the Time of the Distress taken. So Victuals cannot be distrained, and formerly (until 11 G. 2. ch. 19.) Sheaves or Shocks of Corn, or Corn growing. But for *Damage-feasant* they may be distrained. Carts with Corn may be distrained, for they may be safely restored. For this Reason Money in a Bag sealed may be distrained, not if out of a Bag. 5. Beasts belonging to the Plough, or Beasts of Husbandry (*Averia Caruæ*) or Sheep, or Horses joined to a Cart with a Man upon it, (but both Cart and Horses may, if a Man is not upon the Cart, and the Horses may be severed from the Cart laden with Corn) ought not to be distrained; if there are other Beasts or Things besides which may be distrained. But for *Damage-feasant* all these may be distrained. And indeed this Order is seldom observed; for Tenants are forced to submit to the Pleasure of their Landlords, because the Remedy would be worse than the Disease. 6. Furnaces, &c. fixed to the Freehold (tho' the Tenant might remove them as his own during the Term) Doors upon the Hinges, the Windows of the House, cannot be distrained. 7. Beasts of a Stranger that escape into the Landlord's Ground may be distrained for Rent, tho' they have not been *Levant* and *Couchant*, i. e. tho' they have not been in the Ground for a good Space of Time, or so long as to have

^f 1 Vent. 50.
² Danv. Abr. 639, 640, 641, 642.

¹ 1 Inst. 47. a. & b.
¹ Roll. Abr. 664.

¹ 1 Vent. 36.
¹ Sid. 440.
¹ Ld. Raym. 385.

¹ 1 Inst. 47. a. & b.

¹ 2 Saund. 290.
¹ Hob. 265.
¹ Ld. Raym. 169, 308, contra.

laid

laid down and rose up again to Feed. [2y.] Otherwise if the Tenant of the Land is in Fault, in not keeping up his Mounds, by Reason whereof the Beasts come upon the Land.

By 7 Ann. ch. 12. *The Goods of an Embassador or other publick Minister, or of his Servants, shall not be distrained: If so, the Distress is void.* [But this Act does not seem to relate to Distresses for Rent, and does not say the Distress shall be void, but that all Writs and Processess, whereby their Goods may be distrained, seized, &c. shall be void.]

4. How must a *Distress* be made?

A *Distress* must be made on the *Land or Premises*, not when the Goods are removed from the Premises. [But see the Statutes *infra*.]

^a 1 Inst. 153. b. If Lands let by one Demise lie in several Counties, one may distress in one County for the whole Rent. But where the Demises are distinct there can't be a joint Distress for both Rents. One cannot break open Gates, or throw down an Inclosure, to take a Distress. He may enter into the Tenant's House, if the Doors are open, otherwise not.

^a 1 Inst. 47. b. A Distress must be made in this Manner. A Distress taken by one or his Bailiff or Servant, of ^alive Cattle for Rent arrear, &c. may be brought to a *common Pound* within three Miles in the same County; or the Landlord may keep it in an open Place in his own Ground, or the Ground of another by his Consent. If the Cattle are kept in a *common Pound*, the Landlord need not give Notice to the Owner to feed them, but the Owner is to take Notice at his Peril. If they are kept in any other open Place, he must give Notice to the Owner, that he may give them Food; and then if the Cattle die for want of Food, he that was distrained shall bear the Loss, and the Landlord may distress again for the same Rent or Duty. Both these are Pounds *overt* or open, tho' there is a Difference as to Notice of giving the Cattle Food. One may also impound Cattle in Pound *covert* or close, as in some Part of one's own House, &c. but then the Cattle are to be fed at the Peril of the Landlord without any Satisfaction for it. He that distresseth Cattle cannot work them, or use them, unless for the Benefit of the Owner; as by milking a Cow distrained, &c. for he hath no Property in them. But Cattle taken in *Withernam* may be used.

^a See B. 4. ch. 4. f. 9. post. When one takes a Distress of *dead* or ^binanimate Things, as Household Goods, &c. They must be impounded in a House, or other Pound *Covert* within three Miles in the same County. For if they are put in a Pound *overt*, and damaged or stolen, the Landlord must answer for them; as he must answer, if he himself doth any Harm to them, or to any other Distress.

^a But see the several Statutes below. A Distress for Rent cannot be in the Night; otherwise for Damage-feasant, lest the Beasts should escape before they are taken. [See 9 Ed. 2. ch. 9.]

^a 1 Inst. 142. a. 7 Rep. 7. 5. Of *Replevin* and *Rescous*.

^a 1 Inst. 145. b. 161. a. See B. 4. ch. 4. f. 9. post. 1. A *Replevin*, (*Replegiare*, à *Re* and *Plegiare*; ¹to re-deliver upon Pledges or Sureties) is grounded and granted upon a Distress, and is a Re-deliverance of it, that the Thing distrained may remain with the first Possessor, upon Security given by him, to try the Right with the Distrainer, and to answer him in a Course of Law.

2. * *Rescous* (from *Rescouter*, *Recuperare*) is a Resistance and a Rescuing of any Thing (or of a Person arrested) and procuring an Escape against Law. There must be a Distress or an Arrest, or else there cannot be a *Rescous*. If a Distress is taken without Cause, as where no Rent is due, or where one distrains out of his Fee; or (if in his Fee) in the Highway; or distrains *Averia Caruca*, where there is a sufficient Distress besides; or if the Landlord distrains any Thing, that is not distrainable, one may make *Rescous*. This may be done by the Tenant, when any Thing of his is wrongfully distrained; or by a Stranger, when his Goods are distrain'd without Cause, &c. If the Distress was made upon good Cause, the Owner cannot rescue them, as they are going to the Pound. And tho' the Distress was without Cause, yet if it is impounded, the Owner cannot break the Pound and take away the Distress. If he doth, the Party distraining may have his Action, and re-take the Distress where-ever he finds it, and impound it again. But in *Damage-Feasant*, if the Pound Door is unlock'd, the Owner may take them out. If the Cattle distrained, as they are driving to the Pound, go into the House of the Owner, and the Owner do not deliver them upon Demand, it is a *Rescous* in Law. For there is a *Rescous* in Law as well as in Deed. If the Landlord comes to distrain Cattle, which he seeth upon the Ground, and the Tenant, or any other (to prevent the Landlord from Distraining) drives the Cattle off the Ground; yet the Landlord may make fresh Pursuit, and distrain them. [See 8 Ann. ch. 17. and 11 Geo. 2. ch. 19. post.] Otherwise for *Damage-Feasant*; for the Distress must be while *Damage-Feasant*.

If the Owner of the Cattle before Distress tenders his Rent, if a Distress is afterwards taken notwithstanding the Tender, it is wrongful, and he may make *Rescous*. But if he tender after Distress, and before the Impounding, the Owner cannot rescue them; for the Taking was lawful, tho' the Detainer is wrongful. A Tender after the Impounding, makes neither the one nor the other wrongful; for then it cometh too late. The same Law for *Damage-Feasant*, if before the Distress there is a Tender of sufficient Amends. And in *Damage-Feasant* the Party may tender Amends, before the Cattle are impounded; and then the Detainer is unlawful. [See 21 Ja. 1. ch. 25. For Relief of Patentees, &c. of Crown Lands and Dutchy Lands, &c. in Cases of Default for Non-payment of Rent, &c.]

A Tender of Amends to a Bailiff is not good, for he cannot deliver the Distress once taken. [See 2 W. & M. ch. 5. infra.]

* If a Landlord distrains two or three Oxen, &c. for twelve Pence, or such small Sum, and the Owner brings a Replevy, and the Landlord avows the Taking of them for the Twelve-pence, &c. the Landlord shall be fined, and the Party may have his Action on the Statute; provided there was other Distress upon the Land holden of less Value. [See 52 H. 3. ch. 4. against unreasonable Distresses.]

By 52 H. 3. ch. 15. None (except the King) shall take a Distress out of his Fee, or in the King's Highway, or in the common Street. [See 3 Ed. 1. ch. 16. and 17.]

See 32 H. 8. ch. 37. For Recovery of Arrearages of Rents by *Executors* and *Administrators*; and by the *Husband* for Rent due in the Right and Life-time of his Wife; and the Remedy for Rent, where the Estate was for the Life of another, that is dead. For the Exposition of this Act, 1 *Inst.* 162. a. & b.

By 1 & 2 Ph. & M. ch. 12. No Distress of Cattle shall be driven out of the Hundred where it is taken, except to a Pound-Overt within the same Shire, not above three Miles distant from the Place, where it was taken, nor shall it be impounded in several Places, in Pain of five Pounds and treble Damages. And no Person shall take above four Pence for Impounding, under the like Penalty, any Prescription notwithstanding.

See 22 Car. 2. ch. 6. 22 & 23 Car. 2. ch. 24. 10 Ann. ch. 18. concerning Fee-Farm Rents sold by the Crown.

Thus the Matter of Distresses stood at the Common Law, and under the old Acts of Parliament. But now there are four excellent Statutes for Recovery of Rents by Distresses, (*viz.*) 2 W. & M. Sess. 1. ch. 5. 8 Ann. ch. 14. 4 Geo. 2. ch. 28. and 11 Geo. 2. ch. 19. which have greatly altered the Common Law, and have regulated the Method of taking Distresses.

At the Common Law no Sheaves or Cocks of Corn, or Corn loose, or in the Straw, or Hay in any Barn or Granary, or upon any Hovel, Stack or Rick, could be distrained for Rent. But,

By 2 W. & M. ch. 5. It shall be lawful to distrain for Rent arrear any such Sheaves, &c. and to lock up and detain the same in the Place, (for they cannot by Virtue of this Statute be removed, but must be secured upon the Land) where they shall be found. And,

By 11 Geo. 2. ch. 19. It shall be lawful to take and seize as a Distress, for Rent, any Cattle or Stock of the Tenant feeding upon any Common, any ways belonging to all or any Part of the Premises demised; and also all Sorts of Corn, Grass, Hops, Roots, Fruits, Pulse, or other Product, growing on any Part of the Estate demised; and the same to cut, gather, make, cure, carry, and lay up when ripe, in the Barns or other proper Place on the demised Premises; and if no such Place there, then in any other which the Landlord shall procure, as near as may be to the Premises, and in convenient Time appraise and sell the same towards Satisfaction of the Rent, and Charges of Distress, Appraisement and Sale, in the same Manner as other Goods. The Appraisement to be taken when cut and cured, and not before. Provided, that Notice of the Place where the Goods are lodged shall within a Week after the Lodging thereof be given to the Tenant, or left at the last Place of his Abode; and that if after Distress of such Corn, or other Product growing, and before the same be ripe and cut, cured or gathered, the Tenant shall pay the whole Rent in Arrear, together with the full Costs and Charges of making such Distress; then upon such Payment, or lawful Tender thereof actually made, such Distress and every Part thereof shall cease; and the Corn, or other Product so distrained, shall be delivered up to the Tenant.

At the Common Law Distresses were not to be sold, but only detained as Pledges for enforcing Payment of the Rent; but now, by 2 W. & M. ch. 5. If a Tenant or Owner of Goods shall not within five Days after Distress for Rent due upon any Demise, Lease, or Contract

Contract whatsoever, and Notice of the Cause thereof, left at the most notorious Place on the Premises, replevy the same with sufficient Security to be given to the Sheriff, according to Law, the Person distraining may with the Sheriff, Under-Sheriff, or Constable of the Hundred or Place where, &c. cause the Distress to be appraised by two Appraisers, to be sworn by such Sheriff or Constable to appraise the same truly; and then sell the same towards Satisfaction of the Rent and Charges of the Distress and Appraisement; leaving the Overplus in the Officer's Hands for the Owner's Use. And in Case of any Pound-breach or Rescous, the Party grieved may, upon a special Action on the Case, recover treble Damages and Costs against the Offender, or Owner of the Goods, if the same afterwards came to his Use. But if any Distress and Sale shall be made where there is no Rent due, the Owner of the Goods distrained may recover double the Value with full Costs. 1 Latw. 213;
4 Mod. 390,

If a Landlord comes into a House and seizes upon some Goods as a Distress, in the Name of all the Goods in the House, that is a good Seizure of all. But the Goods were to be removed immediately, except Corn or Hay, tho' the Appraisement and Sale was not by that Statute to be until after five Days, which was attended with great Difficulties; and therefore now,

By 11 Geo. 2. ch. 19. Any Person lawfully taking any Distress for any Kind of Rent, may impound or secure the Distress, of what Kind soever, in such Place, or on such Part of the Premises chargeable with the Rent, as shall be most fit and convenient for the Impounding and Securing such Distress; and may appraise, sell, and dispose of the same upon the Premises, in like Manner as any Person taking a Distress for Rent may do off the Premises by Virtue of a W. & M. ch. 5. or of 4 Geo. 2. ch. 28. [By which Statute the Remedies by Distress, Impounding and Sale, in Case of Rent reserved upon Lease, are extended to Rents Seck, Rents of Assize, and Chief Rents.] And any Person may come and go, to and from such Place, where the Distress is impounded, to view, appraise, buy, and carry off the same, on Account of the Purchaser. In Case of Pound-breach or Rescous of such Goods, the Persons aggrieved shall have like Remedy as in Cases of Pound-breach or Rescous, under or by the former Act.

At Common Law the Tenant's Goods could not be distrained when removed off the demised Premises. But now,

By 8 Ann. ch. 14. If any Tenant for Life, Years, at Will, or otherwise, fraudulently removes his Goods from the demised Premises, with Intent to prevent the Landlord from Distraining, the Landlord may within five Days [within thirty Days by 11 Geo. 2. ch. 19. §. 1.] take and seize such Goods, where-ever they shall be found, as a Distress for the Arrears of Rent, and may dispose of and sell the same, as if such Goods had been distrained upon the demised Premises. Provided the said Goods were not sold Bonâ Fide for valuable Consideration before such Seizure [to any Person not privy to such Fraud, by 11 Geo. 2. ch. 19. §. 2.] And,

By 11 Geo. 2. ch. 19. Where any Goods or Chattels, fraudulently or clandestinely carried away by any Tenant, his Servant, Agent, or other Person aiding therein, are kept in any House or Place lock'd up, fastened or secured, so as to prevent such Goods from being taken and seized as a Distress for Arrears of Rent, the Landlord, or any Person

Person impowered by him, (first calling to his Assistance the Peace-Officer of the Hundred, or Place where the same are suspected to be concealed, who are required to aid and assist therein; and in Case of a Dwelling-House, Oath being also first made before some Justice of a reasonable Ground to suspect that such Goods or Chattels are therein) may in the Day-time break open and enter into such House or Place, and take and seize such Goods, for the said Arrears of Rent, as they might have done by Virtue of this or any former Act; if such Goods had been put in any open Field or Place.

And if any such Tenant shall fraudulently remove his Goods as aforesaid, or if any Person shall wilfully and knowingly aid and assist any Tenant in such fraudulent Conveying away any Part of his Goods, or in Concealing the same, every Person so offending shall forfeit and pay to the Landlord, from whose Estate such Goods were so carried off, double the Value of Goods by him, her, or them, respectively carried off or concealed; to be recovered by Action in the Courts of Record at Westminster, or of Session in Cheshire, Lancashire, Durham, or Wales. And,

Where the Goods so fraudulently removed exceed not the Value of fifty Pounds, the Landlord from whose Estate the same were removed, his Bailiff, Servant or Agent, in his Behalf, may exhibit a Complaint in Writing against such Offender, before two or more Justices of the Peace of the same County, Riding or Division, residing near the Place whence such Goods were removed, or near the Place where the same were found, not being interested in the Lands or Tenements whence such Goods were removed, who may summon the Parties concerned, examine the Fact, and all proper Witnesses upon Oath, or Quakers upon Affirmation, and in a summary Way determine whether such Person be guilty of the Offence, and inquire in like Manner of the Value of the Goods so fraudulently carried away or concealed; and upon full Proof of the Offence, by order under their Hands and Seals, the said Justices shall adjudge the Offenders, to pay double the Value of the said Goods to such Landlord, his Bailiff, Servant, or Agent, at such Time as the said Justices shall appoint: And in Case such Offender, having Notice of such Order, refuse or neglect so to do, shall by Warrant under their Hands and Seals levy the same by Distress and Sale of the Goods of the Offender; and for Want of such Distress may commit him to the House of Correction, there to be kept to hard Labour, without Bail or Mainprize, for the Space of six Months, unless the Money so ordered to be paid shall be sooner satisfied. The Party may appeal to the next General or Quarter-Sessions; whose Determination shall be final: And in the mean Time the Order shall not be executed on the Appellant in case he shall enter into a Recognizance, with sufficient Surety in double the Sum ordered to be paid, to appear at such Sessions.

At Common Law a Distress for Rent reserved on Lease could be made only during the Continuance of such Lease. But now,

By 8 Ann. ch. 14. Any Person having any Rent in Arrear, or due upon any Lease determined, may within six Calendar Months after the Determination of such Lease, during the Continuance of such Landlord's Title, and of such Tenant's Possession, distrain for such Arrears

Arrears in the same Manner as he might have done if such Lease had not been determined.

After the making of the Statute of 2 W. & M. directing the Sale of Goods distrained for Rent, it often happened that there was some Irregularity in the Disposal of the Distress, which made the Party distraining a Trespasser *ab initio*, and the Tenant recovered the full Value of the Rent for which the Distress was made. Therefore,

By 11 Geo. 2. ch. 19. Where any Distress is made for any Kind of Rent justly due, and any irregular or unlawful Act is afterwards done by the Party distraining, or his Agent, the Distress itself shall not be therefore deemed unlawful, nor the Party a Trespasser *ab initio*; but the Party aggrieved by such unlawful Act shall recover full Satisfaction for the special Damage thereby sustained, and no more, in an Action of Trespass, or on the Case, at his Election; and, if he recover in such Action, shall also have full Costs of Suit. But the Tenant shall not recover in any such Action, if Tender of Amends hath been made by the Party distraining, or his Agent, before such Action brought.

And in all Actions of Trespass, or on the Case, brought against any Person intitled to any Kind of Rents or Services, or his Bailiff or other Person, relating to any Entry by Virtue of this Act, or otherwise, upon the Premises chargeable with such Rent or Service, or to any Distress or Seizure, or Sale or Disposal of any Goods thereupon, the Defendant may plead the general Issue, and give the special Matter in Evidence; and if the Plaintiff be nonsuited, discontinued or have Judgment against him, the Defendant shall recover double Costs of Suit.

And for the further Relief and Assistance of Landlords, as to recovering their Rents and Possession,

By 8 Ann. ch. 14. No Goods or Chattels being on any Messuages, Lands or Tenements, leased for Life or Lives, Term of Years, at Will or otherwise, shall be taken by Virtue of any Execution, unless the Party, at whose Suit the said Execution is sued out, shall before the Removal of such Goods pay the Landlord one Year's Rent, or less, if due. And the Sheriff is to levy and pay the Plaintiff, as well the Money so paid for Rent, as the Execution-Money. But nothing in this Act shall extend to prejudice the King in levying Debts, Fines, &c. due to the King.

By 11 Geo. 2. ch. 19. which recites, That great Inconveniences may happen to Landlords, whose Tenants have Power to determine their Leases by giving Notice to quit the Premises, and yet refusing to deliver up the Possession when the Landlord has agreed with another Tenant for the same; It is enacted, That in Case any Tenant shall give Notice of his Intention to quit the Premises by him holden, at a Time mentioned in such Notice, and shall not accordingly deliver up the Possession at the Time, he shall from thenceforward pay double the Rent which he should otherwise have paid; to be recovered as, before such Notice, the single Rent might be: Such double Rent to continue to be paid during all the Time such Tenant continues in Possession.

And if any Tenant holding at a Rack-Rent, or where the Rent reserved shall be full three Fourths of the yearly Value of the demised Premises, who shall be in Arrear for one Year's Rent, shall desert

the demised Premises, and leave the same uncultivated or unoccupied, so as no sufficient Distress can be had to countervail the Arrears of Rent; two or more Justices of the Peace of the County or Place, (having no Interest in the demised Premises) at the Request of the Landlord, or his Bailiff or Receiver, may go upon and view the Premises, and affix, or cause to be affixed, on the most notorious Part thereof, Notice in Writing, what Day (at the Distance of fourteen Days at least) they will return to take a second View; and if upon such second View, the Tenant, or some Person on his Behalf, shall not appear and pay the Rent in Arrear, or there shall not be sufficient Distress upon the Premises, the Justices may put the Landlord into the Possession of the Premises, and the Lease thereof to such Tenant, as to any Demise therein contained only, shall from thenceforth become void.

Provided that such Proceedings of the Justices shall be examinable into, in a summary Way, by the next Judges of Assize in the County where the Premises lie; if in London or Middlesex, by the Judges of the King's Bench or Common Pleas; if in Chester, Lancaster or Durham, before the Judges thereof; if in Wales, before the Courts of Grand Sessions respectively: Who may order Restitution to the Tenant, together with Expences and Costs to be paid by the Landlord; or if they affirm the Act of the Justices, may award Costs, not exceeding five Pounds, for the frivolous Appeal.

6. There may be an Apportionment and an Extinguishment of Rent.

^a 1 Inst. 147. b.
148. a. & b.
149. a.
² Inst. 503.
¹ Roll. Abr.
834, 235, 236.

1. An ^a Apportionment (from *Portio, quasi partio*) is a Partition or Division of the Rent, which is dividable, as the Thing out of which it is to be paid is divided by Purchase in Fee, Grant, Recovery, Surrender, Forfeiture of Part, &c. Regularly a Rent-Charge cannot be apportion'd, or Things that are entire.

Concerning the Apportionment of Rents, there is a Difference betwixt the Grant and Reservation of a Rent. For if a Man is seised of two Acres, one in Fee-simple, the other in Fee-tail, and by Deed grants a Rent out of both, and dieth; the Land in Tail is discharged, and the Land in Fee remains charged with the whole Rent. For against his own Grant he shall not take Advantage. But if in this Case he had reserved a Rent, the Rent should be apportioned; for it is not fit, the Donee or Lessee should be charged with the whole Rent. [See *West. 3. or 18 Ed. 1. ch. 2.*]

^b 10 Rep. 128.
See p. 187.
ante.

If Land is ^b *reverted* (recovered by Law) or if the Lease determines before the legal Time of Payment, no Rent shall be paid. For it shall not be apportion'd in Respect of Part of the Time, as it shall be upon Eviction of Part of the Land.

^c Terms of the Law, v. Extinguishment.
¹ Inst. 147. b.
⁴ Rep. 38.
Vaugh. 39.

But Apportionment of Rent is usually settled by Covenants.
2. ^c Extinguishment is where one hath a Highway Appendant, Common Appendant, Rent or Service going out of the Land, and he purchases the Land, to which it is Appendant, or out of which the Rent or Service issueth. So then Extinguishment of Rent is a destroying of a Rent by Purchase of the Land. For no one can have a Rent going out of his own Land. Where he hath as high and perdurable an Estate in the Land as in the Rent issuing out of the same Land, there the Rent is extinct; otherwise not.

If one hath a *Rent-Charge* to him and his Heirs, issuing out of certain Land, if he purchases any Parcel of the Land to him and his Heirs, all the *Rent-Charge* is extinct: For the *Rent* is entire and against Common Right, and issuing out of every Part of the Land. But if the *Rent-Charge* be determin'd by Act of God or the Law, the Grantee may have a Writ of Annuity. However, if the Grantee of a *Rent-Charge* purchases Parcel of the Land, and the Grantor by his Deed, reciting the said Purchase of Part, granteth that he may distrain for the same *Rent* in the Residue of the Land, this amounteth to a new Grant. But if one that hath a *Rent-Service* purchaseth Parcel of the Land, out of which the *Rent* is issuing, this shall not extinguish all, but for that Parcel. For in such Case a *Rent-Service* may be apportion'd according to the Value of the Land.

If a Lessor enters upon a Lessee for Life or Years into Part, and puts out the Lessee wrongfully; the *Rent* is suspended in the Whole, and shall not be apportion'd for any Part.

When one commits *Waste* on Part of the Land, the *Rent* shall not be extinct by the *Forfeiture* of Part, but apportion'd; for no Man shall take Advantage of his own Wrong.

Hitherto of *Tenures* and *Services*, (*viz.*) *Grand Serjeanty*, *Frankalmoign*, *Fealty*, *Socage* and *Rents*.

V. An *Annuity* is a yearly Payment of a certain Sum of Money, granted to another in Fee-simple, Fee-tail, for Life or Years, charging the Person of the Grantor only. And not only the Grantee, but his Heirs, and his and their Grantee in Fee shall have a Writ of Annuity. But if a *Rent-Charge* is granted to one and his Heirs, he shall not have a Writ of Annuity against the Heir of the Grantor, tho' he hath Assets; unless the Grant is for him and his Heirs. It may be granted by a Corporation. No Freehold is charged therewith; which shews the Difference betwixt an *Annuity* and a *Rent-Charge*. Therefore a *Rent-Charge* is preferable to a Grant of an *Annuity*.

If one Grants an *Annuity* for Term of Life of the Grantee, as a Physician or Lawyer, *pro Consilio impendendo* to the Grantor, and the Grantor dieth, the *Annuity* does not cease; tho' no Advice or Counsel can be given to the Grantor that is dead.

An *Annuity* granted to a Corporation is not *Mortmain*; cannot be entailed; shall not be Assets in the Hands of the Heir, to whom it descends; shall not be taken in Execution upon a Statute Merchant, Staple or *Elegit*, as a *Rent* may.

A Release of all Actions, before the *Annuity* is behind, shall not release the *Annuity*.

For Recovery of an *Annuity* no Action lieth but a Writ of *Annuity*.

VI. *Common* (because it is common to many) is a Profit that a Man hath in the Land of another. It is either *Common of Pasture*, *Piscary*, *Turbary*, or *Bovers*.

* Nullus commodum capere potest de injuria sua propria. 1 Inst. 148. b.

1. Of Common of *Pasture*; and of the *Interest* of the Lord and *Commoner* therein.

Common of *Pasture* is a Right of putting Beasts to Pasture in another Man's Soil.

Of which there are four Kinds, (*viz.*) Common *Appendant*, *Appurtenant*, *Pur Cause de Vicinage*, and in *Gross*. There can be no other Sort of Common of Pasture, as by Reason of being an Inhabitant in the Town, &c. 1. Common *Appendant* is a Right belonging to one's arable Land, of putting Beasts commonable into another's Ground to feed there. The Commencement of Common *Appendant* was thus; when a Lord enfeoff'd another with arable Land to hold of him in Socage (*i. e.* by Service of the Plough) the Feoffee for the Maintenance of his Service had of Course, as implied in the Feoffment, Common in the Lord's Wastes for his Cattle, which ploughed and manured his Land. This was for the Maintenance and Advancement of Tillage, which is much respected and favoured in Law. So that commonable Beasts are those which are employed for the Maintenance of the Plough, as Horse or Ox, Kine and Sheep to compost the Land. It is of *Common Right*, and one needs not to prescribe for it, tho' it must be by Usage Time out of Mind; but then it is sufficient to say, that it is appendant to antient arable Land; and is only for Cattle to manure the Land. It cannot be appendant to a House, Meadow, or Pasture, unless the House is built on the Land, and the Meadow or Pasture was arable at the Beginning. For tho' it is Meadow or Pasture, yet it is esteemed as Arable, because it may be ploughed. This Sort of Common may be throughout the Year; or limited to a certain Time, or on Condition, to a certain Number of Beasts by Usage; tho' it is in its own Nature without Number, because one must have sufficient Pasture for his Beasts; and *Measurable* according to the Quality and Quantity of the Freehold, to which one claims Common *Appendant*. Regularly this Commoner may not Use the Common, but with his own proper Beasts, that are *Levant* and *Couchant* on the Land. He may not *agist* the Beasts of a Stranger, but he may put in the Beasts of a Stranger, if he hath any temporary or special Property in them; as if he borrows or hires them, to compost the Land. 2. Common *Appurtenant* is a Common belonging to an Estate for all Manner of Beasts commonable or not commonable, as Hogs, Goats (not Geese), &c. If he that hath such Common, put in the Beasts of another, if he has not a temporary Property in them, and they are not *Levant* and *Couchant* on his Land or Messuage, &c. he is a Trespasser. Common *Appendant* and *Appurtenant* are often confounded, but they differ in several Particulars. Common *Appurtenant* may be to a House, Cottage, Meadow, Pasture, as well as to arable Land; and ought to be *prescribed for by special Words*, as against Common Right; altho' it may be created at this Day by *Grant*; and the Common may be severed from the Land, to which it is *Appurtenant*. By purchasing Part of the Land, this Common cannot be apportioned; otherwise by Alienation of Part. Now Common *Appendant* (as hath been said) belongs only to arable Land; for commonable Beasts only; is of Common Right; cannot be created at this Day; may be appor-

1 Inst. 122. a.

2 Inst. 85, 86.

4 Rep. 37.

38, 39.

6 Rep. 60.

1 Ld. Ray.

405.

1 Roll. Abr.

397, 398.

4 Terms of the

Law, v.

Common.

1 Inst. 122. a.

2 Saund. 327.

Plowd. 161.

4 Rep. 37.

1 Roll. Abr.

399, 400.

401.

2 Ld. Ray.

1015.

1 Inst. 122. a.

4 Rep. 37, 38.

8 Rep. 136.

137, 138, 78.

79.

2 Argumentum a divisione est fortissimum in jure. 6 Rep. 60.

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tion'd. 3. Common, by Reason of *Vicinage* (because of *Neighbourhood*) is a Sort of Common appendant, and is where the Tenants of two Lords (which are seised of two Towns lying next to one another) have used Time out of Mind, to have Common promiscuously and proportionably to their Extent of Common on both Sides for all Manner of Beasts commonable. No Man can put his Beasts therein; but they must *escape* of themselves from one Field to another, by reason of the Neighbourhood. And this the Law suffers, to prevent Suits in open Countries. Now this Sort of Common, being but an Excuse for Trespass, one Town or Manor, where the Wastes of two Lords lie together, may inclose against the other. [For *Shack Common* in the County of Norfolk, See 7 Rep. 5.] 4. Common in *Gross* is a Liberty of Commoning conveyed alone without Land by *Deed*, or gained by *Usage* Time out of Mind. So that Common appendant cannot be Common in *Gross*.

Of Common *Appendant*, *Appurtenant*, and in *Gross*, some are for a certain Number of Beasts, directly (as for ten Cows,) or by Consequence, (*viz.*) for such as are *Levant* and *Couchant* on the Land. Some *uncertain*, as Common *Sans Number* in *Gross*; and yet the Tenant of the Land may have Common there also. This Common cannot be divided or apportioned, nor give a Woman Title of Dower. Common appendant by Usage may be limited to a certain Number. But Common appurtenant must always be for those that are *Levant* and *Couchant*. It is called Common *Sans Number*, because it is uncertain how many they are to be; there being more in some Years than others. [But it should seem that Levancy and Couchancy is not material in Common for a certain Number, whether it be Common appendant or appurtenant.]

New erected Cottages, tho' they have four Acres of Ground laid to them, ought not to have Common in the Waste of the Lord. [But a Man may prescribe for Common for Cattle *Levant* and *Couchant* upon a Cottage as well as upon a Messuage.]

Further, in Common of *Pasture*, there is an *Interest of the Lord*, and an *Interest of the Commoner*.

1. As to the *Interest of the Lord*. The Lord of a Manor seised of the Wastes, in which the Tenants have Common, may depasture there of Common Right. A Prescription to exclude him is against Law. His Right is implied in the first Grant, tho' one may prescribe against the Lord or Owner of the Soil, from such a Day to such a Day, or in such a particular Place, and so exclude the Owner. If the Lord grants Common *Sans Number*, yet there must be left sufficient Common for the Lord's own Beasts. If Commoner surchargeth the Common, *i. e.* if he puts in more Beasts than he ought, the Lord may distrain. He may make a Pond on the Common, if there is sufficient Common left. He may have an Action for Trespass done in the Waste or Common, be it little or great.

By Stat. Merton, 20 H. 3. ch. 4. The Lord may approve against his Tenants, (*i. e.* the Lord may inclose Part of the Waste, Woods and Pastures, for himself, and discharge it from being Common) if he leaves Common sufficient.

F f f

But

^a 2 Inst. 86, 87, 474, 475. * But there is no Approvement by this Act against a Common in Grofs, &c. For the Words of the Act are, *That they shall have as much Pasture as sufficeth for their Tenements.*

By 13 Ed. 1. ch. 46. *The Statute of Merton shall not only bind the Lord's Tenants, but Neighbours also, which claim Common of Pasture, as appendant or appurtenant to their Tenements. And none shall be aggrieved by Writ for Common of Pasture, by Occasion of a Wind-mill, Sheep-cote, Dairy, enlarging of a Court necessary, or Curtilage.*

^b 2 Inst. 476. ^c 3 Inst. 204. ^b This the Lord may do; and if the Lord hath Common in a Tenant's Ground, the Tenant may approve, for the Lord is a Neighbour.

A Cow-house, a House for Dwelling of a Beast-keeper, for the safe Custody of the Beasts feeding there, &c. is within the Equity of the Statute, tho' sufficient Common is not left.

² Inst. 474. The Act says further, *If any (upon just Title of Approvement) do make a Ditch or Hedge for that purpose, which afterwards is thrown down by Persons unknown, the Towns adjoining may be distrained, to make such Ditch or Hedge at their own Costs, and to yield Damages.* [See 1 Geo. 1. St. 2. ch. 48. 6 Geo. 1. ch. 16.]

These Statutes are confirmed by 3 & 4 Ed. 6. ch. 3. and treble Damages given.

⁸ Rep. 136, &c. [See 22 Ed. 4. ch. 7. 35 H. 8. ch. 17. 13 El. ch. 25. §. 18. Concerning the Inclosure of Woods in Forests and Chases; and also 29 G. 2. ch. 36. and 31 Geo. 2. ch. 41. *For the Inclosing, by the mutual Consent of the Lords and Tenants, Part of any Common, for the Purpose of planting and preserving Trees fit for Timber or Underwood, and for more effectually preventing the unlawful Destruction of Trees; and 12 Ann. Seff. 1. ch. 4. For making Inclosures of Part of Commons in the West-Riding of Yorkshire for the Endowment of poor Vicarages.*]

2. The Interest of the Commoner appears in these Particulars following with respect to the Lord, a Stranger, and other Commoners.

¹ 1 Roll. Abr. 406. 1. As to the Lord; tho' it is not the Commoner's Common, * until his Cattle hath taken the Grass with their Mouths; yet he may ² 2 Inst. 88. ² Mod. 65. ¹ 1 Roll. Abr. 406. ¹ 2 Cro. 271, 272. Yelv. 201. ^d break down an Inclosure, if the Lord doth inclose Part, and leaves not sufficient Common in the Residue. * If the Lord plows the Land and sows it, yet the Commoner may put in his Cattle, and justify the same, because the Lord hath begun to do Wrong. If the Lord erects a Rick of Hay in the Common, and the Commoner's Beasts eat the Hay, it is justifiable. Neither can the Lord chase the Beasts for the Wrong done by himself. By the same Reason that the Lord may erect one Stack, he may erect twenty, and so defeat his own Grant. If the Lord makes * Coney-Boroughs in the

² 1 Roll. Abr. 90, 405. Common, and stores them with Conies, altho' he had no Warren, the Commoners cannot justify the killing of them; but each Commoner may bring his Action for the Damage. If the Lord * surcharges the Common, the Commoner may not distrain them *Damage-Feasant* in his own Soil, unless by Custom; but he may have an Action. The Lord may not dig * Pits for Gravel or Coal; for the Statutes aforesaid allow *Improvement* only by *Inclosure*. The Lord * cannot without Prescription agist the Cattle of a Stranger.

¹ F.N.B. 125. ⁹ Rep. 112. ¹ 1 Sid. 106. ¹ 1 Roll. Abr. 396. ¹ 9 Rep. 112, 113. ³ Lev. 104. ¹ 1 Roll. Abr. 405. 2. As to Strangers. A Commoner may distrain their Beasts *Damage-Feasant* in his own Name; or every Commoner may have an

an Action of the Case; for the Beasts may be gone, before they can be taken *Damage-feasant*. He shall not have an Action for every small Trespass; but for such, whereby he hath lost his Common. If a Stranger comes, and takes away the 'Turf, the Lord only has an Action; but the Commoner may have his Action, for entering with Horses and Carts, and thereby impairing his Common. A Commoner may license a Stranger to feed in the Common with such a Number of Beasts, as he himself might have done, to manure his Land; but he cannot agist, or take in the Beasts of a Stranger for Money. 3. As to other Commoners; 'If any Commoner incloses the Common, or builds a House on the Common, every Commoner hath his Action for his private Damage. 'No one can maintain an Action on the Case for inclosing Common, but they who have a particular Right, or shew special Damage; and tho' a Man hath special Damage, he hath no Right to his Demand without alledging a Prescription. A Presentment in the Lect for such an Inclosure, to the common Nuisance of the Inhabitants, is void; for it is no publick or common Nuisance. If a Commoner hath Common for ten Beasts, and he puts in more; the Surplusage beyond the ten may be taken, and impounded for *Damage-faisance* by any other Commoner. [24. If the Remedy ought not to be by Presentment in the Court-Baron, or by Action of the Case?] It is certain, that where there is a Colour of Right, one cannot distrain the Cattle of another Commoner. [See 13 Ed. 1. ch. 46. Concerning *Approvement*. And for the Interest and Power of a Commoner more at large, See Bridg. 10, 11. Godb. 123, 124. 2 Leon. 261, 202. 1 Roll. Abr. 405.]

The Writ of Admeasurement of Pasture is disused; and the Commoners usually sue one another by Distresses, Actions on the Case, &c.

The *Apportionment* of Common, as well as of Rents, is usually settled by Agreement, and so is *Extinguishment* of Common (as by Purchase of Part of the Land) prevented by Covenants. 'But if there are no Covenants, Common Appendant shall be apportioned of Course (not extinguished) upon Purchase of Part of the Land, because it is of common Right: But no other Common upon Purchase, without particular Agreement. Common appendant and appurtenant shall both be apportioned by *Alienation* of Part of the Land, to which Common is appendant or appurtenant. A Release of Common in one Acre, is an *Extinguishment* of the whole Common. *Unity of Possession* of the whole Land to which, &c. and of the whole Land in which, &c. makes an *Extinguishment* of a Common appendant.

There may be Drifts of Commons by Custom, and they may be made tho' in Fact there is no Surcharge; for till the Drift is made, it is not possible to know whether there be a Surcharge, and the Intent of the Drift is to discover the Surcharge.

See 32 H. 8. ch. 13. Concerning the putting Stone-Horses and Scabbed-Horses in Commons, and the driving of Forests, Chafes, Commons, &c. every Year; and 8 El. ch. 8. which excepts Stone-Horses above thirteen Hands high in the Fen-Grounds, &c. and 21 Ja. 1. ch. 28. f. 10. which enacts, that 32 H. 8. shall not extend to the County of Cornwall; and 22 Ed. 4. ch. 17. 35 H. 8. ch. 17. 13 El. ch. 25. f. 18. For Preservation of Woods.

Thus

Thus of Common of *Pasture*.

2. Common of *Piscary* is a Liberty of fishing in another Man's Waters. And if one claims to have a Common of *Piscary* or *Free-fishing* to himself, it is against Law, and the Owner shall fish there. But one may prescribe to have a separate Right of fishing in such a Water, and the Owner of the Soil may there be excluded. And if one does grant *Separalem Piscariam*, the Soil doth not pass, nor the Water, but only a particular Right of fishing. And if one grants his *Water*, the Soil doth not pass, but the *Piscary* within the *Water* doth. A *Piscary* incertain (as a Common *Sans Number*) cannot be divided amongst Coparceners.^d

^a 1 Inst. 122. ^a
⁵ Rep. 34.
¹ Ventr. 391.
¹ Saund. 251.
² Saund. 326.
^b 1 Inst. 4. b.
^c 1 Inst. 164. b.
^d See p. 148. ante.
^e 2 Inst. 38.
¹⁰⁰, 199.
¹⁰ Rep. 138.

^e Any Man may make *Fish-Ponds* (*Vivers* or *Viviers*) in his own Ground, because it is Matter of Profit, and for Increase of Victuals. [See *West.* 1. or 3 *Ed.* 1. ch. 20. 5 *El.* ch. 21. 22 & 23 *Car.* 2. ch. 25. 4 & 5 *W. & M.* ch. 23. 7 & 8 *W.* 3. ch. 14. 9 *An.* ch. 26. 1 *Geo.* 1. ch. 16. Concerning the Destruction of Fish in several Waters, &c. But *Kidels* or open *Wears* are forbid by the Common Law. [See *Mag. Char.* ch. 23.]

3. Common of *Turbary* (from *Turba*, an old *Latin* Word for *Turf*) is a Licence to dig *Turf* upon another's Ground, or in the Lord's Waste. The Owner of the Soil cannot be excluded. It must be *appendant* to an *House*, not to *Land*; for *Turfs* are to be spent or burnt in a House. It also may be *appurtenant*, or in *gross*. But this Right of digging *Turf* does not convey the *Land*, nor the *Trees*, *Mines*, &c. There is also a Common or Liberty of digging *Coals*, *Gravel*, *Sand*, &c. which may be easily understood, by what has been already said concerning *Turbary*.

4. ^a Common of *Estovers*, when restrained to Woods, is a Right of taking Wood out of another's Woods for *House-bote*, *Plough-bote*, and *Hay-bote*. *Estovers* in the *French*, and *Bote* in the *Saxon* Language, in this Case denote Allowance, Compensation or Satisfaction for these three Purposes. Hence comes our common Phrase to give to *Boot*. *House-bote* is a Right of taking *Timber*, to build or repair the House, or of taking Wood, to burn in the House, which is also called *Fire-bote*. *Plough-bote* is a Right to take Wood, to repair *Ploughs*, *Carts*, *Harrowes*; and for making *Rakes*, *Forks*, &c. *Hay-bote* or *Hedge-bote* is a Right to take Wood, to repair *Hedges*, *Pales*, *Gates* and *Stiles*, to secure Inclosures.

¹ If I grant to one *Estovers*, to burn in his House, or if he hath it by Prescription, and he only alters the Rooms and Chambers of his House at his own Cost, without making new Chimneys, by which no Prejudice accrues to the Owner of the Wood, and tho' he builds new Chimneys, or maketh a new Addition to his old House, he shall not lose his Prescription. But he cannot spend any of the *Estovers* in the new Chimneys, or in the Part newly added. When a House has *Estovers* appendant or appurtenant to it, and the House is overthrown by Wind, or by any other Act of God, or by Default of the Owner, if the Owner re-builds it in the same Place, and in the same Manner, as it stood before, he shall have the same *Estovers* continued, because the Land, the Foundation of the House, doth continue.

Of a Way.

VII. A *Way* (*Chimin*) here is a Right of going over another Man's Ground.

Ways

Ways may be divided into *Private*, *Common*, and the *King's Highway*. 1. A *Private Way* is a *private* Passage leading from one certain Place to another, as from a House to Church, to a private House, Village, or to the Fields. This is to be repaired by the Village or Hamlet, or sometimes by a particular Person. And if it is straitned, or if a Bridge, which another ought to repair, is decay'd, an Action of the Case lieth here, but not an Indictment. One or more may have a Liberty, to pass there by *Prescription* or by *Covenant*. And this may be a Way in gross, or appendant to a House or Land. 2. A *Common Highway* is that, which leadeth from a Village into the Fields. The Freehold and the Profits are in him that hath the Land next adjoining. And if it be stopped, I have no Remedy, but by Presentment or Indictment. An Indictment will also lie, if it is a common Footway. 3. The *King's Highway* is that which leadeth from Village to Village, or from Town to Town, and is a Way for all Travellers, and doth communicate with a great Road.

VIII. The *Multure* of a *Mill*, (*Molitura*) is the Toll, that a Miller takes for grinding Corn. This Toll ought to be according to the Standard.

IX. A *Corrody* is an Allowance of Meat and Drink, Clothing, Lodging, &c. for necessary Sustenance. Some Corrodies are of *common Right*, and might be assigned by every Founder of a Religious House in the same House, when they were standing, to any Person that he should appoint. But Tenure in Frankalmoign was discharged of all Corrodies. Some began by *Grant* by one Man to another for Life, Years, in Tail or in Fee. A Chamber may be Part of a Corrody: And he that hath the Corrody, hath but his Habitation in the Chamber; as a Fellow of a College hath but an Habitation in his Chamber.

Of common Right *Pensions* are due to the King out of every Bishoprick.

Corrodies are turned into *Pensions* and Money at this Day. [See Statute of *Circumspecte agatis*, 13 Ed. 1. and 34 & 35 H. 8. ch. 19.]

X. 1. Of an *Office*, and its Nature. 2. Who is *capable* of an Office. 3. Where Offices may be executed by *Deputy*. 4. Where Officers may be *ousted*. 5. Where Offices may be *forfeited*.

1. An Office is a Function, by Virtue whereof a Man hath some Employment under the King, or under a common Person or Subject. Such an Office may be of Inheritance in Fee-simple or Fee-tail; or it may be for Life, Years, or at Will. But an Office of Trust, which concerns the Administration of Justice, cannot be granted for Years; for then it would go to the Executors or Administrators. If a House or Land belong to an Office, by Grant of the Office by Deed, the House and Land passeth without Livery and Seisin, as belonging thereunto.

2. The *King* is *capable* of an Office, not to use but to grant. But he cannot by Letters Patent erect new Offices with new Fees, or grant new Fees to old Offices.

^a 1 Inst. 3. b. Every Subject is capable of an Office. But the Grant is void, if he is inexpert in some Sort of Offices, as those that concern the Administration or Execution of Justice. [See 12 Ri. 2. ch. 21.] No Man, tho' never so skilful, is capable of a judicial Office in Reversion. Therefore Stewardships of Court-Leets cannot be granted in Reversion, because Stewards of Court-Leets are judicial Officers. But Stewardships of Court-Barons may be granted in Reversion, because those Stewards are not judicial Officers in all Things, that relate to the Court-Baron. Ministerial Offices may be granted in Reversion. Where one Officer is under the Correction of another, both Offices ought not to be granted to the same Person. Antient Offices must be granted in such Form, and in such Manner, as they used to be; unless the Alteration is by Act of Parliament. An Officer that is constituted by Statute, hath no more Authority than the Statute gives him; for he cannot prescribe, as an Officer at Common Law may. An Infant or Minor is not capable of an Office of Stewardship of the Court of a Manor, either in Possession or Reversion. [But *Quare.*] [See 5 & 6 Ed. 6. ch. 16. *infra.*]

See 6 Ri. 2. ch. 9. 3 H. 8. ch. 8. Concerning Victuallers. By 12 & 13 W. 3. ch. 2. and 1 Geo. 1. St. 2. ch. 4. Aliens, tho' made Denizens or naturalized, are incapable of any Office of Trust, either civil or military.

3. Offices may be executed by ^b Deputy, where the Office may be granted to one, to execute by himself or Deputy, or the Deputy of his Deputy. A Deputy is he, that exercises the Office in another Man's Right. There is a Difference betwixt a Deputy and an Assignee of an Office. For an Assignee hath an Estate or Interest in the Office itself, and doth all Things in his own Name; for whom the Grantor of the Office shall not answer, except in special Cases. And when an Officer hath Power to make an Assignee, he may of Course make Deputies. Also when an Office descendeth to an Infant, Idiot, &c. he may of Course make a Deputy. But the superior Officers must answer for their Deputies in civil Actions. And the Deputies are subject to criminal Prosecutions. [See of Under-Sheriff, B. 1. ch. 7. and of a Steward of a Court-Baron, B. 4. ch. 1. and what Officers may make Deputies, 2 Roll. Ab. 154.]

By 1 H. 4. ch. 13. and 4 H. 4. ch. 20. Customers and Controulers in every Port of England shall be resident upon their Offices in proper Person, without making any Deputy.

By 4 H. 4. ch. 21. Searchers in the Ports of England shall not Act by Deputy.

By 2 H. 6. ch. 10. Patent Officers in the King's Courts, who have used to appoint Clerks and Ministers under them, shall be charged and sworn to appoint such as be sufficient, faithful, and attending; and for whom they will answer.

By 1 W. & M. Sess. 1. ch. 18. Dissenters from the Church of England chosen to any Parochial or Ward Office, who scruple the Taking of the Oaths, may execute the Office by a Deputy, to be allowed as the Officer should have been.

^a Officia judicialia non conceduntur antequam vacent. 11 Rep. 4.

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4. The Grantor may lawfully *oust* and *discharge* his Officer at Pleasure, where he hath no other Profit, but a *collateral* certain Fee; as Bailiff, Receiver, Surveyor, Auditor, and the like, the Exercises of which are but Labour and Charge to them. Yet he must have his Fee after such *Ouster*. But where the Fees are to be taken out of the Profits appertaining to the Grantor within his Office, and where the Office itself is profitable to them, there the Grantor cannot discharge the Officer of his Service. As if a Man doth grant to another the Office of the Stewardship of the Courts of his Manors, even with a certain Fee, he cannot discharge him at Pleasure, because he hath other Fees and Profits belonging to his Office. So it is as to the Office of the Keeper of a Park; for he hath not only his certain Fee, but Profits and Avails in Respect of his Office, as Deer-Skins, &c. And no Man shall make void his own Grant to the Prejudice of the Grantee. But if Bailiffs, Receivers, &c. that have only a collateral Fee, have their Offices granted by Patent for Life or Years, they cannot be removed at Pleasure; much less can Stewards of Courts, if they hold their Offices by Patent. But as to private Offices granted by Deed, the Grantor or his Heirs may lawfully turn out the Grantee, if he doth not well and truly execute the Office. For the Estate which he hath in the Office is upon a Condition in Law, (*viz.*) To do his Duty in it.

5. Offices may be forfeited by Common Law, and by Statute.

1. By Common Law, as

By *Non-user* of publick Offices, which concern the Administration of Justice, or the Commonwealth. Here a *Non-user* is a Cause of Forfeiture. But *Non-user* of itself, without some special Damage, is no Forfeiture of private Offices. But a *Refusal* to execute the Office upon Request, is a Forfeiture.

By *Mis-user*, as if a Keeper of a Park kills any Deer without Warrant, or cuts down any Trees to his own Use, it is a Forfeiture of his Office. For this and such like Offices are founded upon Skill and Confidence, and Conditions are annexed to them by the Law. And thus a Deputy by his Misdemeanour may make his Officer lose his Office. But the Misdemeanour of the Grantee for Life, shall not affect him who hath the Reversion, for he shall forfeit only his own Estate. Thus if a Steward burns the Court-Rolls, taketh a Bribe, &c. he forfeits his Office by this *Mis-user*. Where the Condition in Law requires Skill and Confidence, as in Case of Offices, an Infant or Feme Covert, not observing it, forfeit their Interest, whether they come to the Office by Grant or Descent. But if an Infant or Feme Covert break a Condition in Law, that requires no Skill or Confidence, this is no absolute Forfeiture. Yet a Condition in Deed binds them.

2. By Statute.

By 5 & 6 Ed. 6. ch. 16. None shall sell any Office or Deputation of the same, or any Part thereof, or take any Reward, or Profit, or any Promise or Assurance of any Reward for the same, directly or indirectly, if the Office shall concern the Administration, or Execution of Justice, or Clerkship in any Courts of Record, or concerning the King's Revenue, Account, Customs, or any Attendance in any Custom-

¹ In quo quis delinquit, in eo jure est puniendus. 1 Inst. 233. A.

House, Aulnage, Auditorship, Surveyor of the King's Lands, or the keeping of any of his Majesty's Castles, or Ports; in Pain that the Seller of such Office or Deputation shall not only lose and forfeit his Right and Estate therein, and the Gift or Nomination to the said Office, or Deputation thereof, but that the Buyer shall immediately be disabled to enjoy the said Office or Deputation. Provided, that this Act shall not extend to any Office of Inheritance, or to any Office for the Keeping of a Forest, Chase, Park, House, Manor, Garden, nor to any Office granted by the two Chief Justices, or Justices of Assize, but that they may grant Offices as before. Also all Acts done by any Officer removable by Force of this Act shall be good in Law, until he be removed. [See also 12 Ri. 2. ch. 2.]

See of Bribery
B. 3. ch. 3.
post.

a 2 Ventr. 188.
213, 267.

b 8 Rep. 47.

It hath been resolved, that the Office of Register to an Archdeacon being forfeited by this Statute, the Right of nominating and appointing a Register did devolve to the Crown by Forfeiture, and not to the Bishop of the Diocese. Such Offices (as to the Right) are determinable at Common Law.

By 13 Ch. 2. St. 2. ch. 1. and 5 Geo. 1. ch. 6. No Persons shall be elected into any Office or Place, relating to the Government of any City, Corporation, Borough, or Port Town, who shall not have taken the Sacrament according to the Rights of the Church of England, within one Year before such Election; but a Removal, or Prosecution on Account of such Omission, must be within six Months after Election. Every Person so elected must take the Oaths of Allegiance and Supremacy at the same Time that he takes the Oath of Office.

By 25 Ch. 2. ch. 2. Every Person having, any Office civil or military, or any Place of Trust or Command under the King, or under any Grant from him, shall take the Sacrament according to the Usage of the Church of England, within three Months after his Admission to such Office.

And by 9 Geo. 2. ch. 26. Every such Person must subscribe the Declaration against Transubstantiation, contained in 25 Ch. 2. ch. 2. and also take the Oaths prescribed by 1 Geo. 1. St. 2. ch. 13. (which may by Virtue of that Statute be taken and subscribed by the lawful Deputies of such as enjoy Offices of Inheritance, instead of the Officers themselves) at any of the King's Courts at Westminster, or at the General or Quarter Sessions, within six Months after he shall enter upon such Office, or within six Months after his Return to England, if then abroad, and at the same Time must produce a Certificate of his having received the Sacrament, under the Hands of the Minister and Churchwardens, attested by two Witnesses.

By 1 Ann. ch. 8. No Office civil or military shall be void by the Death of the King. But shall continue six Months, unless superseded, or made void by the next Successor.

See 9 An. ch. 20. for the more easy trying the Rights of Offices.

Of Franchises.

XI. Of Franchises; wherein I shall shew, 1. What is a Franchise. 2. Their several Kinds. 3. What Franchises ought to have Allowance, and what not. 4. How Franchises may be forfeited.

1. What is a Franchise?

c Finch 164.

A Franchise or a Liberty is a Royal Privilege in the Hands of a Subject, either by Charter of Letters Patent or Prescription. All Liberties are derived from the Crown; and therefore they are extinguished, if they come to the Crown again by Escheat, Forfeiture,

Sec.

&c. *A Franchise or Liberty may be vested in Bodies politic or Corporations, aggregate or sole, or in many Persons that are not Corporations, (as Counties, Boroughs, Towns,) or in a single Person. One Liberty cannot be granted to the Prejudice of another, that was granted before: For Priority of Grant is to be regarded.

2. They are of different Kinds. The Chief of them are the *Principality of Wales*, the *Counties Palatine of Lancaster, Durham, Chester*. Next, *Counties, Hundreds, Cinque Ports, Ports of the Sea*. Then there is a Liberty of having a *Leet, Manor, or Lordship*, a Liberty to make a Corporation, to have a *Coroner*, to hold Pleas, and to have *Cognizance of Pleas, Gaols, Bailiwicks of Liberties, and Return of Writs*, the Liberty of a *Forest, Chase, Park, Warren, Fairs and Markets, Felons Goods, Goods of Fugitives*, of those put in the *Exigent, Deodands, Treasure-Trove, Waifs, Estrays, Wreck of the Sea*.

Of the *Principality of Wales*, and the *Counties Palatine*, I shall say something hereafter in the *Fourth Book, chap. 2*. I have mentioned *Counties and Hundreds* in the *Introduction*. *Cinque Ports* shall be spoken of too in the *Fourth Book*. Of *Gaols and Coroners*, see *Book 1. chap. 7*. Of *Corporations*, *chap. 8*. Of *Manors and Lordships*, see *Book 2. chap. 1*. *Book 4. chap. 1*. and of *Leets*, *Book 4. chap. 1*.

It is necessary to speak here only of Liberties to hold Pleas, and to have *Cognizance of Pleas*, of *Bailiwicks of Liberties*, and *Return of Writs*, of the Liberties of *Forest, Chase, Park, Warren, Fairs and Markets, Goods of Felons, Fugitives*, of those put in the *Exigent*, of *Deodands, Treasure-Trove, Waifs, Strays, Wreck of the Sea*; which are Liberties usually drawn into Question.

1. The Liberty to hold Pleas (*Tenere Placita*) is to have a Court of one's own, and to hold it before a Mayor, Bailiff, &c. in such a Place, according to the Course of the Common Law. Herein one may prescribe: But the Causes here may be removed to the higher Courts. Such are the Courts in Corporations, which are merely concurrent Jurisdictions.

2. To have *Cognizance of Pleas*, (*Cognitionem Placitorum*) is to have Power, to draw Causes out of the King's Courts into one's own, with an exclusive Jurisdiction. This lieth not in Prescription, but in Demand of the Lord; and is always of Record, and claimed by Charter. The *Principality of Wales*, the *Counties Palatine*, the *Cinque Ports*, and the *Universities*, are Jurisdictions exempt, and have *Cognizance of Pleas*. But these particular Jurisdictions, derogating from the Jurisdiction of the general Courts of the Common Law, are always to be taken strictly.

3. A *Bailiwick* is that Liberty, which is exempted from the Sheriff of the County, over which the Lord of the Liberty appointeth a Bailiff, to do such Offices within his Precinct, as an Under-Sheriff doth at large under the High-Sheriff in the County. Such is the Bailiff of *Westminster*, of the *Dean and Chapter of St. Paul's*, &c. [See for his Oath 27 *El. ch. 12*.]

These *Bailiffs of Liberties* cannot arrest a Man without a Warrant from the Sheriff of the County. And yet the Sheriff cannot enter the Liberty himself at the Suit of a Subject without this Clause in his Writ. (*viz.*) *Non Omittas Propter Aliquam Libertatem, &c.* [See *West. 2. or 13 Ed. 1. ch. 39*.] Yet he may arrest

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in any such Franchise upon a *Quo Minus* or *Capias Utlagatum*, and in all Writs whatsoever at the King's Suit. If the Sheriff doth enter the Liberty without such a Power, the Lord of the Liberty shall have an Action against him, tho' the Execution of the Writ may stand good. [See 27 H. 8. ch. 24.]

4. Some Franchises (which are not Counties by themselves) have *Return of Writs* (i. e.) they may make Certificate or Answer to the Courts above of that which is done by their Bailiffs, to whom Mandates are directed to execute Writs. ^a This Liberty may be by Grant or Prescription, when the Bailiff returns his Precept, he must set his Name to it. ^b Fines or Amerciaments for insufficient Return of Writs, or other Process made by the Stewards or Bailiffs of Liberties, shall be laid upon the Stewards or Bailiffs, and not upon the Sheriff or Lord of the Franchise. But the Lord shall answer for the Bailiff, if he is insufficient. [See 1 Ed. 3. ch. 5. 27 H. 8. ch. 24.]

5. A ^c *Forest* (*Ferarum Statio*) is a certain Territory of woody Ground and fruitful Pastures, privileged for Beasts of *Venery* (not *Venery*) or those that are gotten by Hunting, or for Fowls of Forest, Chase and Warren, to rest and abide there in Safety. ^d The King may make a Forest in his own Ground at this Day, but not in the Ground of Subjects without their Consent. This Territory of Ground so privileged is meted and bounded, and known to be so, either by Matter of *Record* (by Writ issued to the Sheriff of the County, who shall take an Inquest of the Place and Bounds, and return it into *Chancery*, &c.) or by *Prescription*. ^e By Prescription it may be good in the Grounds of other Men. The King may grant a Forest to a ^f Subject; but in the Hands of a Subject it is not properly a Forest, but rather a Chase. By the Grant of a Forest, not only the Privilege, but the ^g Land itself passeth. ^h A Forest doth consist of ⁱ eight Things, (*viz.*) Of *Soil*, *Covert*, *Laws*, *Courts* of Record, *Judges*, and *Officers* of Record, *Game*, and certain *Bounds*.

A ^j *Purlieu* (from *Pure* clear and exempt, and *lieu* a Place) containeth such Grounds, which *Hen. 2. Ri. 1.* or King *John* added to their ancient Forests over other Men's Grounds, and which were afterwards disafforested by the Statute of *Charta de Foresta*, ch. 1. & 3. The Owner may lawfully hunt there, fell Timber, &c. as if they had never been afforested.

A *Chase* (from *Chasser* to chase) is a privileged Place for the Receipt of Deer and Beasts of the Forest, being of a middle Nature betwixt a Forest and a Park. ^k It is commonly less than a Forest, and not endowed with so many Liberties; as Officers, Laws, Courts, &c. and yet is of a larger Compass than a Park, having more Officers and Game than a Park. Every Forest is a Chase, but every Chase is not a Forest. It differeth from a Park in that it is not inclosed. For if it is inclosed, it is a good Cause of Forfeiture; ^l tho' it must have certain Metes and Bounds. But it may be in other Men's Grounds as well as in one's own. It is not Lawful to make a Chase, Park, or Warren, without ^m Licence under the Broad Seal. For this would be to appropriate Beasts, that are *Fere Naturæ*, to one's own Use.

A Chase is governed by the ⁿ Common Law. One may have ^o Common in a Chase as well as in a Forest; and the Owners of

^a 2 Inst. 452, 453.

¹ Ventr. 405, 497.

^b Dr. & Stud. Dial. 2. ch. 42.

¹ Ventr. 399.

See p. 74. ante.

^c 1 Inst. 233. a.

⁴ Inst. 316.

⁸ Rep. 138.

^{Manw. ch. 1.}

^{num. 1.}

^{ch. 2. num. 2.}

⁴ 4 Inst. 300, 301.

^e 4 Inst. 301.

^f 1 Inst. 1. b.

^{2. a. 233. a.}

⁴ Inst. 314.

^{315.}

¹ Inst. 5. b.

⁴ Inst. 289, 298.

See of the Forest Courts,

^{B. 4. ch. 1.}

^{post.}

⁴ Inst. 299, 300.

⁴ Inst. 303.

¹ Inst. 233. a.

⁴ Inst. 317, 318.

¹¹ Rep. 87.

² Inst. 199.

⁴ Inst. 314.

^{315.}

⁴ Inst. 298.

of Woods there may cut down Timber or Wood without any Licence.

Chases that were never Forests, cannot have any ^a *Purlicu.*

7. A ^b *Park* (from *Parquer* to inclose) is a great Quantity of Ground, inclosed and privileged, for wild Beasts of Chase, by the King's Grant or by Prescription. No Man now can erect a Park without a Licence under the Broad Seal. For the Common Law does not encourage Matters of Pleasure, which bring no Profit to the Common-wealth. The Beasts of Park or Chase properly extend to the Buck, Doe, &c. but in a common and legal Sense to all the Beasts of the Forest. A Park must be inclosed. For if it lies open, it is a good Cause of Seifure into the King's Hands as a Thing forfeited. And the Owner cannot have an Action against those that hunt in his Park, if it lies open. [24.]

To a lawful Park *three* Things are required. 1. A Grant or Prescription. 2. Inclosures by Pale, Wall or Hedge. 3. Beasts of a Park.

There are Parks in Use and Reputation, erected without lawful Warrant, and yet are called Parks. I do not speak of these nominal Parks; tho' the Owner of such a Park may have an Action for killing his Deer.

^c Parks as well as Chases are subject to the Common Law; and are not to be ruled by the Forest Laws.

[See 5 Geo. 1. ch. 15. Of the Punishment of Keepers of Forests, Chases and Parks, &c. for taking or killing Deer without Consent of the Owner. And *West.* 1. or 3 Ed. 1. ch. 20. 3 *Ja.* 1. ch. 13. 7 *Ja.* 1. ch. 13. 13 *Cha.* 2. St. 1. ch. 10. 3 & 4 *W. & M.* ch. 10. 5 Geo. 1. ch. 15, 28. 8 Geo. 1. ch. 19. 9 Geo. 1. ch. 22. 10 Geo. 2. ch. 32. 24 Geo. 2. ch. 57. For the more effectual Discovery and Punishment of Deer-Stealers. And 43 *El.* ch. 7. 22 & 23 *Cha.* 2. ch. 7. 3 & 4 *W. & M.* ch. 10. and 5 Geo. 1. ch. 15. 6 Geo. 1. ch. 16. For breaking down Pales and other Fences.]

8. A ^d *Warren* is a Liberty by Grant of the King, or by Prescription, for Preservation of Beasts and Fowls of the Warren. ^e *Beasts*, as Hares, Conies, &c. ^f *Fowls*, as Partridge, Pheasant, Quail, Rail, Woodcock; or Water-Fowl, as Mallard, Hern, &c. A Chase, Park or Warren, are collateral Inheritances, and not issuing out of the Soil as Common doth. A free Warren may lie open, for there is no Necessity of inclosing it. One may have a Warren in another's Land; for the Grantee may alien the Land and reserve the Franchise. But no one can make a Warren, and appropriate those Creatures that are *Ferae Naturæ*, without the King's Licence, as before observed. No Action lies if Conies eat up another Man's Corn, &c. But the Owner of the Corn may kill them. For no one hath Property in them.

[See 22 & 23 *Car.* 2. ch. 25. 4 & 5 *W. & M.* ch. 23. 5 *An.* ch. 14. 9 *An.* ch. 25. 3 Geo. 1. ch. 11. 8 Geo. 1. ch. 19. 26 Geo. 2. ch. 2. 28 Geo. 2. ch. 12. 30 Geo. 2. ch. 6. §. 47. For the better Preservation of the Game, and the Statutes relating to the Destroying of the Game, B. 3. ch. 3. post.]

9. Of Fairs and Markets. 1. What is a Fair or Market? 2. Of Toll in Fairs and Markets. 3. How Property is altered by Sale in Fairs and Markets?

1. What

1. What is a Fair or Market?

^a 2 Inst. 220, 221, 713. A Fair (from *Forum* or *Feria*) is a great Sort of Market, granted to any Town, &c. for Buying and Selling, and for the more speedy and commodious Provision of such Things, as the Subject needeth. It is usually kept once or twice in the Year. A Mart (*à Merce* or *Mercando*) is a great Fair holden every Year.

A Market (from *Mercando*, Buying and Selling) is less than a Fair, and granted to a Town, &c. for the like Purposes; but chiefly for the Provision of such *Victuals*, as the Subject wanteth. This is usually kept once or twice in the Week. So that every Fair is a Market, but every Market is not a Fair. ^b There may be a Market without an Owner. Where there is an Owner, a Butcher cannot prescribe to sell Meat in his own House upon a Market-Day, for the Market must be in an open Place, where the Owner may have the Benefit of it.

^c 2 Inst. 220, 221, 281. Every one that hath a Fair or Market, ought to have it by Grant, or by Prescription, which supposes a Grant or Charter. And if the King grants to one a Fair or Market, he shall have of Course a Court of Record, called a Court of Pie-Powder ^d as incident thereunto. In common Speech the Fair or Market is taken for the Place where it is kept. If one hath a Fair or Market by Charter or Prescription, and another obtains a Market near it to the Nuisance of the former Fair or Market, ^e he may avoid it. For there are always these Words in the Grant, (*viz.*) *Ita Quod non sit ad Nocumentum Alterius Mercati.*

Every one, that hath a Market, ought to have Pillory, Tumbrel, &c. to punish Offenders.

By 13 Ed. 1. St. 2. ch. 6. *Fairs and Markets shall not be kept in Church-yards.*

By 2 Ed. 3. ch. 15. *Every Lord at the Beginning of his Fair must cry and publish how long it shall endure, and the Fair shall not hold longer than its due Time.*

By 27 H. 6. ch. 5. *All Fairs and Markets are forbidden to be kept on a Sunday, &c.*

2. Of Toll in Fairs and Markets. In most Fairs and Markets Toll is paid to the Owner.

^f 2 Inst. 220. ^g 2 Str. 1239. Toll (or *Tolne*) is properly a reasonable Sum of Money or Payment to the Owner of the Fair or Market upon Sale of Things

^h 2 Inst. 221. It is always to be paid by the Buyer not the Seller, unless there is a Custom to the contrary. Nothing is tollable of Common Right before the Sale. In ancient Fairs and Markets Toll may be paid by Custom for the Standing in the Fair or Market, tho' nothing is sold. Such a Custom must be Time out of Mind; which Custom no one can challenge, that claims the Fair or Market by Grant within the Time of Memory, (*viz.*) since the Reign of R. 1. So that it is better to have a Fair or Market by Prescription than Grant. Toll was first ⁱ invented, that Contracts might be made openly and before Witnesses.

^j 2 Inst. 222. At this Day there is not any certain Toll taken; but if that which is taken be unreasonable, it is punishable by 3 Ed. 1. ch. 31. Of which the Judges shall determine, if it comes judicially before them. Toll may be said to be ^k outrageous, where a reasonable

^l 2 Inst. 220. Toll

Toll is due, and excessive Toll is taken; or where no Toll is due, and Toll is taken and unjustly usurped. The King cannot grant an outrageous Toll. * Outrageous Toll discourages Men from Furnishing Fairs and Markets. If the King doth not grant Toll with the Fair or Market, the Patentee shall have no Toll: For it is not incident to a Fair or Market by a general Grant^b. But such a Fair or Market is a free Fair or Market. [See 10 & 11 W. 3. ch. 24.]^{1171.} Toll in Fairs is generally taken upon the Sale of Cattle, as Horses &c. but in Markets for Grain only. ¹⁵ And the Lord may seize until Satisfaction. ¹ Roll. Abr. 666.

The ⁴ King shall pay no Toll for any of his Goods; and a Man may be discharged from the Payment of Toll by the King's Grant, either generally, or specially in the King's own Fairs and Markets; and of the Toll which together with any Fair or Market is granted after such Grant of Discharge; but the King's Grant cannot discharge Toll formerly due to Subjects either by Grant or Prescription. ¹ Ld. Ray. 386. ² Ld. Ray. 1591. ⁴ 2 Inst. 221. ² Roll. Abr. 198.

* Priority of Grant is to be regarded. Tenants in ancient Demefne are exempted and discharged of Toll for Things coming of those Lands. If Toll is demanded of them, they may sue to have Letters Patents under the King's Seal, directed to all Officers, to suffer them to be Toll-Free, or they may have the Writ *De Effend quiet De Tolonia*. ¹ See p. 141. ante. ¹ F.N.B. 227.

By 3 Ed. 1. ch. 31. If excessive Toll be taken in a Market-Town by the Lord's Consent, the Franchise shall be seized. If by other Officer, he shall pay double Damages, and suffer forty Days Imprisonment. ² Inst. 219. ² &c.

By 23 Ph. & M. ch. 7. Every Owner of a Fair or Market shall appoint a Toll-taker, where Toll is to be taken, or a Book-keeper where no Toll is paid, to sit there from ten of the Clock in the Morning until Sun-set, in Pain of Forty Shillings for every Default.

* There are divers other Sorts of Tolls, as Turn-Toll, where Toll is paid for Beasts that are driven to be sold at Market, and do return unfold; Toll-Traversers, where one claimeth to have Toll for every Beast driven over his Ground; Trough-Toll, where a Town prescribes to have Toll for such Beasts as go through the Town, or over a Ferry or Bridge maintain'd at their Cost. There is also Tronage for a Beam with which Things are to be weigh'd; Pontage, Paviage, Cranage, Wharfage, Anchorage, Stallage, Pickage, &c. ¹ 8 Rep. 46.

3. ^h Property is altered and divested by Sale in Fairs and Markets-Overt. For all Contracts of any Thing vendible there shall bind the Parties, and those that have Right. But this Rule extends only to sales, not to pawning¹. This Rule hath twelve Exceptions, ¹ 2 Inst. 713. ⁵ Rep. 83. ¹ 2 Str. 1187.

1. It shall not bind the King; tho' it shall bind Infants, Feme-Coverts, Idiots, Men beyond Sea and in Prison that have Right.
2. The Sale must be in a Place that is open, so that any one that passeth by may see it; not in a Back-room, Ware-house, &c.
3. It must be in an open and proper Place, and proper to the Trade of him in whose Shop it is sold; as Plate must be sold in a Goldsmith's Shop, not in a Scrivener's, &c. for no one will search there

* Qui prior est tempore, potior est in jure. 4 Rep. 30. 1 Inst. 347. b.

for such Things. 4. It must be a Sale, not a Free-Gift without any valuable Consideration. 5. The Buyer must not know that the Seller hath wrongful Possession. 6. The Sale must not be fraudulent betwixt two, on Purpose to bar him that hath Right. 7. If the Seller acquireth the Goods again, he that hath Right may take them. 8. There must be a Sale and Contract. Therefore a Sale to a Man of his own Goods, or a Sale by an Infant known to the Buyer to be such, or by a Feme Covert known to be a Feme Covert (unless for such Things as she usually trades for, or by Consent of her Husband) bindeth not. 9. * The Contract must be originally and wholly made in the Market Overt, and not have Inception out of the Market, and Consummation in it. 10. The Property is not altered if Toll is not paid, where the Statutes require it. [See 2 & 3 P. & M. ch. 7. 31 El. ch. 12.] Though by the Common Law the Property was altered, tho' no Toll paid. 11. The Sale must not be in the Night, but between Sun and Sun, that is by Day-light; tho' the Sale that is made in the Night is good betwixt the Parties, but not to bind a Stranger that hath Right. 12. If the Party robbed pursues his Suit freshly, and convicts the Felon, tho' the King's Officer, or any other that seized the Goods, selleth them in Market Overt, the King or the other shall make Restitution of his Goods. For the Goods were in the Custody of the Law, and therefore the Property could not be altered by Sale in Market Overt. [See 21 H. 8. ch. 11. and of Bankrupts, ch. 4. post. Concerning Sale of their Goods in Market Overt.]

^a 5 Rep. 83.
² Str. 1187.

* In London every Day except Sunday is a Market Overt, and the Sales in Shops there for valuable Consideration are good.

^b Moore 360.

^b But in the Country where Things are sold in distinct Places in a Fair or Market, the Goods must be sold in the usual Place appointed for the Sale thereof; otherwise the Property is not altered.

Sale upon a Sunday, tho' in a Fair or Market, shall not alter the Property.

By 34 & 35 H. 8. ch. 26. *No Sale of Goods and Cattle stolen in Wales, or sold in any Fair or Market there, shall alter the Property thereof.*

² Inst. 715,
&c.

By 2 & 3 Ph. & Mar. ch. 7. *The Sale of Horses in Market Overt shall not alter the Property therein, unless the Horse be rid, or led about, or stand in the open Part of the Market, (not in any House, Yard or secret Place) for one Hour between ten in the Morning and Sun-set, and all the Parties contracting for the Horse come and enter their Names and Places of Abode, and the Colour and some special Mark of the Horse, with the Toll-taker or Book-keeper, and pay the Toll, or else one Penny for the Entry where no Toll due. And,*

² Inst. 716,
&c.

By 31 El. ch. 12. *The Seller must bring to the Toll-taker, Bailiff, or Owner of the Market a credible Person to vouch for him, that he knoweth him and his Place of Abode and Employment, unless such Toll-taker, &c. will take it of his own Knowledge; the Price for which the Horse is sold shall be also entered in his Book, and the Toll-taker is to give the Buyer a true Note in Writing of the Entry, if required, upon Payment of Two Pence. But notwithstanding these Requisites are observed, the Owner of a stolen Horse may redeem within six Months, upon Payment of the Price. And if*

if any Horse that is stolen shall not be sold, given or exchanged according to the Tenour of these Statutes, the Owner may take again the said Horse where-ever he finds him, or have an Action of Detinue or Replevin for the same.

See 5 & 6 Ed. 6. ch. 14. Against Engrossers, Foresters and Regrators; and of these Offences; B. 3. ch. 3. post.

See 1 & 2 Ph. & M. ch. 7. An Act, that Persons dwelling in the Country shall not sell divers Wares in the Cities or Towns Corporate by Retail, but in open Fairs.

10. There are Liberties of seising Goods and Chattels of Felons, Fugitives, and of those put in the *Exigent*. Also Liberties of seising *Deodands*, *Treasure-Trove*, *Waifs*, *Estrays*, and *Wreck* of the Sea.

1. Goods and Chattels of *Felons* may be forfeited by Conviction, and sometimes without Conviction. But the Forfeiture ought always to appear of Record. So the Goods of one *Felo de se* are not forfeited until presented, or found of Record. Therefore the Goods of *Felons*, or of *Felons* of themselves, cannot be claimed by Prescription. If the King grants the Goods and Chattels of *Felons*, the Goods and Chattels of *Felons* of themselves do not pass.

2. The Goods and Chattels of *Fugitives* are the proper Goods of him that flieth for a Felony; and are forfeited to the Lord of the Franchise, when the Flight is found of Record, either by Indictment upon the Death of a Man before the Coroner, or by Verdict upon Acquittal, if it be found that he fled for the Felony. For tho' one be found Not guilty, yet he may forfeit his Goods by flying.

3. The Goods of those put in the *Exigent* are forfeited, when one appealed or indicted of Felony withdraweth himself so long, that a Writ of *Exigent*, in order to an Outlawry^d, is awarded against him. This Withdrawing is a Flight in Law. And this Forfeiture shall stand, tho' he renders himself upon the *Exigent*, and afterwards is found Not guilty. If the Party was imprison'd, or beyond Sea, &c. the Party, his Executors or Administrators, shall have a Writ of Error reciting the special Case, to reverse the Award of the *Exigent*.

4. A *Deodand* (*Deo Dandum*) is when any moveable Thing inanimate, or Beast animate, doth cause or occasion the untimely Death of any Man by Mischance, (without the Fault of himself or other Person) in any County of England, (but not upon the Sea or Salt Water) and that Thing, and every Thing moving with it, is forfeited to the King or Grantee of the Crown, if he dies within a Year and a Day after. As when a Cart-wheel runneth over a Man, and killeth him, the Cart-wheel, Cart and Horses are given to the Lord of the Liberty, to be distributed amongst the Poor, for the Appeasing of God's Wrath. If the Forfeiture is to the Crown, the Almoner disposes of it. If one under the Age of fourteen falls from a Cart, Horse, &c. there is no *Deodand*. But if a Horse, &c. kills any one within the Age of Discretion, (*i. e.* under fourteen) it is a *Deodand*. Things fixed to the Freehold cannot be *Deodands*,

* *Omnia quæ movent ad mortem, sunt Deo danda.* 5 Rep. 110. 2 Inst. 57.



* 1 Sid. 204. as the Wheel of a Mill, * a Bell hanging in a Steeple, &c. unless severed from the Freehold before the Accident happened. If *A.* killeth a Man with the Sword of *B.* the Sword is a Deodand. If one falls out of a Vessel in fresh Water, the Vessel is a Deodand, but not if he falls out of a Vessel in salt Water; tho' the Arm of the Sea is in the Body of a County; because Persons at Sea are continually exposed to such Accidents from Storms.

See of the
Coroner, B. 4.
ch. 1. post.

* 5 Rep. 110.

1 Inst. 114.

a. & b.

2 Inst. 281.

* 3 Inst. 132,

133.

* 5 Rep. 109.

Kitch. 80.

The Jury, who find or present the Death by such Misadventure, ought also to find and appraise the Deodand. For the Goods are not forfeited in these Cases until the Matter is found of Record; and therefore cannot be claim'd by Prescription. But the following

Franchises may be claim'd by Grant or Prescription. As,
5. * *Treasure-Trove* (or *Treasure Found*) which is Treasure found hid in the Earth, or in the Roofs or Walls of Houses or Ruins, (not lying upon the Earth or hid in the Sea) and which for want of a true Owner belongs to the Lord of the Liberty by special Grant or Prescription. But if the Owner may any Ways be known, then it does not belong to the King, or Lord of the Liberty under him. Nothing is said to be *Treasure-Trove* but Gold and Silver. To conceal it, is Fine and Imprisonment.

* 5 Rep. 109.

Kitch. 81, 82.

6. * *Waifs* (*Bona Waviata*) are Goods which are stolen and waived by the Thief in his Flight, and upon that Account forfeited to the Lord of the Manor; if the Owner does not make fresh Pursuit, and apprehend and attain the Offender. The Reason of this Forfeiture is as a Punishment of the Owner of the Goods, for not pursuing and bringing the Thief to be attainted. If the Thief had not the Goods in Possession in his flight there is no Forfeiture; and then the Owner may seize them where he finds them, without any fresh Pursuit. [See 21 H. 8. ch. 11.]

* Finch 177.

Kitch. 80, 81.

Bacon's Elem.

76, 77.

7. * *Estrays* (*Extrabura*) are Cattle that stray into another Man's Ground, and not own'd by any Man. In this Case, if they are proclaimed on two Market-Days in two several Towns next adjoining, and the Owner doth not claim them within a Year and a Day, they belong to the Lord of the Liberty. If a Lord (who claims under the King) keeps a Stray three-quarters of a Year, and within the Year it strayeth again, and another Lord getteth it, the first Lord cannot retake it; for until the Year and a Day are past, and Proclamation made as aforesaid, he hath no Property; and therefore the Possession of the second Lord is good against him. If the Owner claims the Stray within the Year and

* 1 Roll. Abr.

879.

* 2 Cro. 148.

Day, he must pay for the Keeping. But in the mean Time the Lord cannot use it unless in case of Necessity, and for the Benefit of the Owner; and therefore he may milk a stray Cow within the Year. If the Cattle were never proclaim'd, the Owner may take them at any Time. No Fowl can be Strays but

* 7 Rep. 16,

17.

* 4 Inst. 280.

* 1 Roll. Abr.

878.

* 5 Rep. 106,

* 2 Inst. 167.

8. A * *Wreck* (*Wreccum Maris*) is applied to such Goods as after

a Shipwreck are cast upon the Land by the Sea, and left there within some County. None of those Goods which are called *Jetsam* (from being Cast into the Sea while the Ship is in Danger, and after perisheth,) or those called *Flotsam* (from Floating upon

upon the Sea after Shipwreck) or those called *Lagan* or *Ligan* (Goods sunk in the Sea, but *tied* to a Buoy, &c. that they may be found again after Shipwreck) are to be esteemed Wreck, so long as they remain upon the Sea, and are not cast upon the Land by the Sea. If any of them are cast upon the Land by the Sea, they are Wreck. A Wreck must be within some County, whereof the Common Law taketh Cognizance, and not where the Admiral hath Jurisdiction. *Wreck, Jetſam, Flotſam* and *Ligan*, may be gained by *Grant* or *Prescription*, as well as *Treasure-Trove*, *Waifs*, and *Eſtrays*. If there is no *Grant* or *Prescription*, they belong to the King. For where no Man can claim Property in Goods, the King shall have them by his Prerogative.

By 3 Ed. 1. ch. 4. *Where a Man, Cat, or Dog, escape alive out of a Ship, whereby the Owner of the Goods may be known, neither the Vessel nor any Thing therein shall be adjudged Wreck; but shall be restored to the Owner, if he claims within a Year and a Day.*

A Man, Cat, or Dog, are only put for Examples; but all other living Things are to be understood.

The Year and Day shall be counted from the *Seizure*. Yet if the Owner dies within the Year, his Executors or Administrators may make Proof. But if the King's Goods are wrecked, and cast upon Ground, where a Subject hath Wreck of Sea, the King is not confin'd to any Time to make Proof, as a Subject is.

If the Goods are *Bona Peritura*, the Sheriff may sell such Goods within the Year.

If the Goods are not seized by the Lord of the Liberty, but taken away by Wrong-doers, the Owner may have his Action; and if the Wrong-doers are unknown, he may have a Commission to enquire, &c.

By 17 Ed. 2. ch. 11. *The King shall have Wreck of the Sea, Whales and Great Sturgeons taken in the Sea, and elsewhere throughout the whole Realm; except in Places privileged by the King.*

[See 12 Ann. Sess. 2. ch. 18. and 26 G. 2. ch. 19. For preserving *Ships* and *Goods*, which shall happen to be stranded.]

3. What Franchises ought to have *Allowance*, and what not?

I have said, that some Franchises lie in Point of *Charter*, and cannot be claimed by *Prescription*; and that some lie in *Prescription* and *Usage*, without the Help of any Charter. Now if the Franchises that depend on *Charter* were granted before Time of Memory, (*viz.* before the Reign of *Rich. 1.*) they are not any Records *pleadable*, if they have not the Aid of some Matter of Record within Time of Memory, or since the Beginning of the Reign of *Rich. 1.* as *Allowance* before the Justices in *Eyre*, Justices of the *King's Bench* or the *Common Pleas*, or before the Barons of the *Exchequer*, or by Force of some *Confirmation* by Charter of some King within Time of Memory. These are sufficient without shewing the Charter, to support the Franchises.

But if the Charters were granted within Time of Memory, they are *pleadable* without shewing any Allowance or Confirmation. Yet if they have been allowed or confirmed as aforesaid, the Franchises may be claimed by Force of the Allowance or Confirmation,

K k k

without

without shewing the Charter. [See 3 & 4 Ed. 6. ch. 4. 13 Ed. ch. 6. and 6 & 18 Ed. 1. Stat. de quo Warranto, and the Exposition thereof, 2 Inst. 279, &c.] Usage may uphold such Franchises, as may be claimed only by *Prescription*, without Record either of Creation, Allowance or Confirmation. Neither doth a Grant or Confirmation by Charter destroy such *Prescription*.

^a Finch, ch. 14. p. 164, 165. Kitch. 65.

^b 2 Roll. Abr. 124.

^c 9 Rep. 50. 2 Inst. 282. Kitch. 65. 1 Ld. Ray. 499.

4. How *Franchises* may be forfeited? ^a *Franchises* and *Liberties* may be forfeited by *Mis-user* or *Non-user*. 1. By *Mis-user*, as by keeping a Fair or Market otherwise than it is granted; as by keeping a Fair on two Days, when one only is granted; or by keeping a Market upon a *Monday*, when it is granted to be kept on a *Wednesday*; or for extorting Fees, where none are due, &c. ^b A *Mis-user* of any Point, where there are many in one Franchise, is a Forfeiture of all of them, which depend upon one another; but not of those *Franchises* which are several. When one claimeth or useth *Franchises* and *Liberties*, which he ought not to have, it is said to be an *Usurpation* upon the King; and the King shall have a Writ of *Quo Warranto* for that as well as upon a *Mis-user*. 2. ^c By *Non-user*; for if one hath *Liberties* and doth not use them within Memory, they are lost. *Non-user* of a Market is no Forfeiture. But not to exercise the Office of Clerk of the Market, &c. is a Cause of Seizing, and a Forfeiture by *Non-user*; because it is a necessary Office, and for the Good of the Commonwealth. So they may be lost by *Nonclaim*.

For Statutes concerning *Franchises* and *Liberties*, see 9 H. 3. ch. 9. 37. 3 Ed. 1. ch. 9. 6 & 18 Ed. 1. De *Quo Warranto*, and Stat. De *Tallagio non concedendo*, or 34 Ed. 1. St. 4. ch. 4.—1 Ed. 3. St. 1. ch. 1.—14 Ed. 3. St. 1. ch. 1. 13 H. 4. ch. 1. 27 H. 8. ch. 24. 32 H. 8. ch. 20.—2 W. & M. S. 1. ch. 8. Concerning the Rights of London. 4 & 5 W. & M. ch. 22. and 9 Ann. ch. 20. For the more easy trying Rights and *Franchises* in Corporations and Boroughs.

^d Cowell's Interp. v. Privilege. 2 Roll. Abr. 272, 273, 274, 275, 276. Finch 321.

See of Writs B. 4. ch. 4. post.

XII. ^d A *Privilege* is a private Law, allowed to a private Man or Corporation, to be exempted from the Rigour of the Common Law. It is sometimes used for a *Place*, that hath a special Immunity. Therefore,

A *Privilege* is either *personal* or *real*. *Personal*, as of a Member of Parliament and Convocation, and of their Servants, not to be arrested sitting the Parliament or Convocation, &c. *Real*, as that which is granted to a *Place*, as to the King's Palaces, to Courts at *Westminster*, to the Universities, that their Members or Officers must be sued within their own Precincts or Courts, and not in other Courts.

And now having spoken of the two *Divisions* of Estates in Lands, Tenements or Hereditaments, it will be proper to shew how Lands, Tenements or Hereditaments, may be *acquired* or *conveyed* from one to another.

C H A P. III.

How Lands, Tenements or Hereditaments may be Acquired, (viz.) 1. *By Occupancy.* 2. *By Descent.* 3. *By Purchase, (wherein of Deeds, and the several Sorts of Conveyances, as Feoffment, Fine, Recovery, Indentures to lead Uses, Covenants to stand seised to Uses, Bargain and Sale, Grant, Leases, Lease and Release, Confirmation, Assignment, Exchange, Surrender, Revocation, and New Declaration, Statutes, Obligations, Defeasances, Devise.)* 4. *By Prescription.* 5. *By Escheat.*

Property in *Lands, Tenements, or Hereditaments, may be acquired* How Lands, &c. are acquired or conveyed.
 either, 1. *By Occupancy.* 2. *By Descent.* 3. *By Purchase.*
 4. *By Prescription.* Or, 5. *By Escheat.*

I. *By Occupancy*, where the Title accrues by the first Entry. By Occupancy.
 As when Tenant for Term of another's Life dieth, while he for whose Life the Lease is made is living, he that first entereth shall hold the Land during the other Man's Life, and shall be subject to the Payment of the Rent reserved, &c. and is called *general Occupant*. There can be no such Occupant against the King, nor of any Thing that lieth in Grant, as of incorporeal Rights or Estates. But to prevent general Occupancy, at the making of the Grant it is advisable to add these Words, (*viz.*) *To have and to hold to him and his Heirs*, during the Life of *Cestuy que Vie*, or of him for whose Life the Lease was made; for then it is in the Nature of a descendible Freehold, and the Heir takes as *special Occupant*; or else the Tenant or Grantee (if he hath the Estate without the Word *Heirs*) may assign the Estate over to divers Men and their Heirs in Trust for him and his Heirs during the Life of *Cestuy que Vie*. And at Common Law there could be no general Occupant of a Rent. But it is otherwise now. For

By 29 Car. 2. ch. 3. *Any Estate pur auter vie may be devised by Will attested by three Witnesses. And if the Lessee devise not the Estate, and his Heir becomes special Occupant, it shall be chargeable in his Hands as Assets by Descent to pay Debts, as Lands in Fee-simple, and if there be no special Occupant thereof, it shall go to the Executors or Administrators of the Lessee, and be Assets in their Hands, and after Payment of Debts, by 14 Geo. 2. ch. 20. s. 9. the Surplus shall be distributed as personal Estate.* See p. 128. ante, and ch. 6. f. 6. post. 3 Wms. 264.

There cannot be a general Occupant of a Copyhold Estate *pur auter vie*; because of the Prejudice it would be to the Lord; but upon the Death of Tenant for Life, living *Cestuy que vie*, the Lord shall enter. 1 Roll. Abr. 511. 2 Ld. Raym. 1000.

II. *By Descent*, or hereditary Succession, Property in Lands, &c. may be acquired. *Descent (Descensus)* is a Means, whereby one doth derive his Title to certain Lands as Heir, and by Right of Blood, 1 Inst. 13. b. 237. a. & b.

^a 1 Ventr.
415, 416.
^b See p. 65.
ante.

Blood, to some of his Ancestors; ^a unless hindered by Illegitimation^b, Half-Blood, Attainder, or Corruption of Blood, or by being an Alien, or by Act of Parliament. [See 11 & 12 W. 3. ch. 4. s. 4. Concerning Papists.] This is the noblest and worthiest Means whereby Lands, &c. are acquired.

A Descent is either by *Common Law*, *Custom*, or *Statute*.

1. By *Common Law*, as where one hath Land of Inheritance in Fee-simple, and dieth without disposing thereof in his Life-time, and the Land goes to his Heir of Course. This Descent is either ^c *lineal* or *collateral*. *Lineal* is a Descent downwards in a Right Line, as from Grandfather to Father and Grandson. The *lineal* Heirs in *infinitum* must first inherit. *Collateral* is a Descent, which springeth out of the Side of the whole Blood; as Grandfather's Brother, Father's Brother, &c. Therefore, ^d if a Man purchaseth Land in Fee-simple, and dies without Issue, there for Default of the Right Line, ^e he who is *next of Kin*, either personally, or *jure representationis*, (tho' never so remote) in the *collateral* Line of the whole Blood, comes in by Descent as Heir to him. ^f For there is a *Next of Kin* by Right of *Representation*, and by Right of *Propinquity*, or Nearness of Blood. He that is inheritable, is accounted in Law next of Blood with Respect to Inheritances. As when a Man hath two Sons, *A.* and *B.* and dieth. *B.* hath two Sons *C.* and *D.* and dieth. *C.* the Eldest hath Issue, and dieth. And then *A.* having purchased Lands in Fee-simple dieth without Issue. Now tho' *D.* is nearest of Blood to *A.* he shall not inherit, but the Issue of *C.* who represents the Person of *C.* who, if he had lived, had been legally next of Blood to *A.* But yet there is a Diversity betwixt next of Blood inheritable by *Descent*, and next of Blood capable by *Purchase*. For where Lands are limited to the next of Blood by Conveyance, or come otherwise than by Descent, the next of Blood by Right of Propinquity (as was *D.*) shall first take; tho' he was not legally next, to take as Heir by Descent.

^g Lit. 3.
3 Rep. 40.

Inheritances may lineally ^h descend, but not ascend. So the Father can never come to the Lands which his Son has purchased in Fee-simple by lineal Ascent, tho' he may by collateral Ascent; as when the Son's Lands come to his Uncle (as Lands may ascend in the collateral Line) they may afterwards come to his Father as Heir to the Uncle. ⁱ The Uncle in this Case is Heir, but not absolutely Heir. For if, after the descent to the Uncle, the Father hath Issue another Son or Daughter, that Issue shall enter upon the Uncle, and take the Estate from him. [It hath been held, that if the lineal Ancestor, as Father or Mother, happens to be also Cousin to the Son, and is, as such, his Heir, he or she may take in the Capacity of Cousin^j.]

^k 2 Wms.
(614.)

^l Lit. 8.

^m 1 Inst. 11. b.

ⁿ 14 b. 15. a.
& b.

^o 3 Rep. 41.

One must be Heir to him that was last ^p actually seised, or that hath actually entered on the Lands. For if a Tenant in Fee-simple, hath a Son and a Daughter by one *Venter*, and a Son by

^c *Linea recta semper præfertur transversali.* 1 Inst. 10. b.

Propinquior excludit propinquum, et propinquus remotum, et remotus remotiorem. Ibid.

Quod non valet in magis propinquus, non valebit in magis remotus. 8 Rep. 78.

^p *Possessio fratris de feodo simplici facit sororem esse hæredem.* Lit. 8. 3 Rep. 41, 42.
1 Inst. 15. b.

another, and dies seised; and the elder Son dies without Issue before actual Seisin, (or what is equivalent thereto in *incorporeal Inheritances*;) the younger Brother is Heir to the Father. But if the Elder Brother had entered, the Sister should have been Heir to him. A Seisin in Fee-tail is not sufficient altho' he hath also a Fee-simple expectant upon it. If the Father Tenant in Fee-simple had made a Lease for Years rendering Rent, and died; tho' the elder Brother had died before he had received the Rent, yet the actual Possession of the Lessee for Years was the Possession of the elder Brother, to make the Sister Heir. But not if the Father had made a Lease for Life or Gift in Tail, and died, and the elder Son had died in the Life of Tenant for Life or Tenant in Tail; for then the younger Brother would be Heir to the Father, because the eldest Brother was never seised of the Freehold, but the Tenant for Life or Tenant in Tail: But it seemeth otherwise, if a Rent was reserved on such Lease, and the elder Son had before his Death received the Rent, for the Rent issueth out of the Land and is in Lieu thereof.

None can inherit any Lands as Heir, but only the Blood of the first Purchaser. As if the Father purchases, the Blood of the Mother shall never inherit. But if a Son purchases, and there is no Heir on the Part of the Father, then the Lands shall go to the Heirs on the Part of the Mother. For they are of the Blood of the Son, the first Purchaser. And the Relations on the Father's Side are admitted in *infinitum* before those on the Mother's Side; for in collateral Inheritances the Male Stocks shall be preferred to the Female. But where Lands do descend from the Part of the Mother, the Heirs of the Part of the Father shall never inherit. So on the contrary. Observe then the Difference where the Son purchaseth Lands in Fee-simple, and where he cometh to them by Descent on the Part of the Mother, or on the Part of the Father.

None shall have Land of Fee-simple by Descent as Heir to any Man, unless he is Heir of the whole Blood. As if a Man has two Sons by divers Wives, and the Elder purchaseth Lands in Fee-simple, and dies without Issue, the younger Brother shall not inherit, but the Uncle of the elder Brother, or some other his next of Kin of the whole Blood. A Sister of the whole Blood shall be preferred before the younger Brother of the Half-Blood. But the younger Brother may be Heir to his Father or Uncle, for he is of the whole Blood to them. Half-Blood is no Impediment of Descent as to Fee-simple Lands of the Crown, or to Dignities. Neither is it respected in Estates in Tail; because the Issues do come in by Descent *per Formam Doni*; and the Issue in Tail is ever of the whole Blood to the Donee.

As to the Descent betwixt Brethren, and their Descendants, the Eldest and his Issue must inherit, for he is most worthy of Blood. As if there be three Brethren, and the Middle or Youngest purchaseth Lands in Fee-simple, and dies without Issue, the elder Brother shall have the Lands by Descent. And so wherever there are two or more Males in equal Degree, the Eldest only shall inherit; but the Females all together as one Heir and as Coparceners.

* *Paterna paternis, materna maternis.* 1 Inst. 13. a.

¹ Inst. 164. a. & b. Blackstone on Descents p. 28. ¹ Wms. 64. The *lineal* Descendants *in infinitum* of any Person deceased shall represent their Ancestor, that is, shall stand in the same Place as the Person himself would have done, had he been living, and take just as much of the Inheritance as their Ancestor would have done. Thus the Child, Grandchild or Great Grandchild, either Male or Female of the eldest Son succeeds before the youngest Son, and so *in infinitum*; and if the Father dies leaving Issue only a Daughter and Grand-daughters by another Daughter, the Daughter shall take one Moiety, and the Grand-daughters the other Moiety, which their Mother, if living, would have taken.

² 1 Inst. 50. b. ^a Note, That an Heir shall never enter and take as a Purchaser, if he is named only to take by Way of Limitation of Estate in Course of Descent.

In short, Lands and Tenements in Fee-simple descend, *1st*, To the eldest Son as Heir, and to his Issue; the Sons first in Order of Birth; and for Want of Sons to all the Daughters equally. *2^{dly}*, If the eldest Son has no Issue, then to his next eldest Brother of the whole Blood, and his Issue, and for want of a Brother, to a Sister or Sisters of the whole Blood, and to her and their Issue. *3^{dly}*, For want of Brother or Sister, to an Uncle and his Issue; or for want of Uncle to an Aunt or Aunts, and her and their Issue. *4^{thly}*, For want of Uncle, or Aunt to the next of Kin, either personally or *jure Repræsentationis*, in the collateral Line.

Thus Lands in Fee-simple will descend by the Common Law, if there is no Settlement to the contrary by Conveyance or Testament. ⁶ 1 Inst. 15. b. ^b But you must understand, that the *Jus Coronæ* differeth in many Things as to Descents from the General Law concerning the Subject.

There was a great Deal of nice Learning touching Descents from one dying seised of corporeal Estates in Fee-simple, or Fee-tail, which take away *Entries*, and *continual Claim* (which is an Entry in Law) of Disseisees, and force the Person disseised to an Action; because by Intendment of Law, the Heir of the Disseisor cannot have the true State of his Title. But this is now of very little Use. For,

By 32 H. 8. ch. 33. *Where a Disseisor dieth seised of Lands, the Descent shall not take way the Entry of the Disseisee, or his Heir, unless the Disseisor had peaceable Possession thereof five Years next after such Disseisin committed, without Entry or continual Claim by or of such Person who hath lawful Title thereto.*

² 1 Inst. 238. a. This Statute extends to a Disseisin 'without Force as well as to a Disseisin with Force, and to Successors whose Predecessors were disseised, tho' it only speaks of the Disseisee and his Heirs. After the five Years, the Disseisee must make continual Claim, as before the Statute. It is said, that Abators and Intruders are out of this Statute, because the Statute is penal, and extends to a Disseisin that was the most *common Mischief. The Feoffee of a Disseisor^d is also out of the Statute, and remains as at the Common Law. And,

^d See ch. 4. f. 7. & B. 4. ch. 3. f. 2. post.

^a *Ad ea quæ frequentius accidunt, jura adoptantur.* 1 Inst. 238. a. 5 Rep. 127. 6 Rep. 77.

By 4 An. ch. 16. No Claim or Entry shall be of Avail, to avoid any Fine with Proclamations, or be a sufficient Entry or Claim within the Statute of Limitations, unless an Action be brought upon it in one Year, and prosecuted with Effect.

2. By Custom in Fee-simple.

Descents of Fee-simple by Custom are of several Kinds. Sometimes to all the Sons, or to all the Brothers, where one Brother dieth without Issue; as in *Gavelkind*: Sometimes to the youngest Son, as in *Burrough English*. Sometimes to the eldest Daughter, or to the Youngest.

3. By Statute in Fee-tail according to the Statute of *West. 2.* or *ante.* 13 Ed. 1. ch. 1. These Descents of Estates in Fee-tail are directed by the Manner of the Settlement or Limitation.

III. A Purchase (*Acquisitum, Perquisitum*) is when a Man acquires Possession of Lands, &c. by Deed or Agreement; and unto which Possession he cometh not by Descent. One cometh in by Purchase, when he cometh to Lands by legal Conveyance, and when he hath a lawful Estate; and not when he hath it by Wrong, as *Disseisin*, *Abatement*, *Intrusion*, *Usurpation*, which are not in Law purchases but Injury and Oppression. A Purchase is always intended by Title, either for some Consideration, or by Gift. For a Gift is in Law a Purchase; whereas Descent (as hath been said) cometh of Course by Act of Law. All Contracts are comprehended under this Word Purchase. For it is not much argued in the Laws of England (as in the *Civil Law*) what Difference there is betwixt a Contract, Promise, Gift, Loan, or a Pledge, a Bargain, a Covenant, &c. since the Intent of the Law is to have the Effect of the Matter argued, not the Terms. [See my *New Institute of the Civil Law*, &c. Book 3.]

Let us therefore forthwith proceed to shew, 1. Who may purchase or convey. 2. How one may purchase or convey, (*viz.*) by Deed. 3. The several formal Parts of a Deed of Conveyance. 4. The several Sorts of Conveyances by Deed. 5. How Deeds are made void.

1. Who may purchase or convey?

The King may purchase to him and his Heirs; but he is seised thereof in *Jure Coronæ*. Natural Persons, Incorporate Persons, (sole or aggregate) Idiots, Madmen, Deaf, Dumb, and Blind, Minors, and all other reasonable Creatures may also purchase, except as hereafter is excepted. But some have only Capacity to purchase, not to hold; as Aliens, [See 32 H. 8. ch. 16.] Felons after Felony committed, who then purchase, and are afterwards attainted: In this Case the Lord of the Fee shall have the Escheat. If attainted and then purchase, they can only purchase for the Benefit of the King. Corporations (sole or aggregate, Ecclesiastical or Temporal) purchasing in Mortmain cannot hold; for the King shall have the Lands by his Prerogative. And some have Ability to hold upon purchase, or not to hold, at the Election of themselves or others; as Infants or Minors, who may agree or disagree, when they come to Age; Lunatics and Feme Coverts, whose Heirs or Husbands may agree or disagree to it; tho' the Lunatick himself making a Purchase and recovering his Memory, cannot waive it. [The Law seems to be otherwise now.] He may agree to it; and

and if he doth, his Heir cannot afterwards disagree. But a Feme Covert herself, without any Cause alledged, may waive the same after the Death of her Husband; tho' the Husband agreed thereto. So may her Heir, if after the Death of the Husband she herself do not agree to it.

A *Wife* is a good Name of Purchase without a Christian Name, * or if the Christian Name is added and mistaken; as *Em* for *Emelyn*, &c. Yet in *Pleadings* the proper Name must be set forth.

But Chapters are not of Capacity to take by Purchase without the Dean. Parishioners, or Inhabitants, or Churchwardens Commoners, Papists, [See 11 & 12 W. 3. ch. 4. 1 Geo. 1. St. 2. ch. 55. 3 Geo. 1. ch. 18.] may not purchase or hold Lands. [See 12 & 13 W. 3. ch. 2. and 1 Geo. 1. St. 2. ch. 4. whereby Aliens, tho' made Denizens or naturalized, are incapable to have any Grant of Lands, &c. from the King. Also 5 Geo. 1. ch. 27. By which Artificers, exercising or teaching their Trades in foreign Parts, and not returning within six Months after Warning, are made incapable of taking Lands by Descent, Devise or Purchase.] And some may not purchase particular Things, and some Purchases may be avoided.

The King may convey as well as purchase; and so may all others, except Men attainted of Treason, Felony, *Præmunire*, Aliens born, Idiots and Lunatics, Feme Coverts, Infants, [But Infants, Trustees or Mortgagees, may convey by the Direction of the Court of Chancery or Exchequer, by 7 An. ch. 19.] and Men under Durefs; for tho' they may purchase, the Conveyance of these may be avoided. A Man, deaf, dumb and blind, that hath Understanding, and sound Memory, tho' he expresseth his Intention by Signs, may convey. Some Bodies politick (as Bishops, Colleges or Halls, Dean and Chapter, Guardian of an Hospital, Parson, Vicar,) must convey pursuant to the Statutes to be mentioned hereafter.

* Note, That where one hath two Ways of conveying Lands, both at Common Law, and intends to pass it by one of them, which cannot be done, it may pass by the other, if there are sufficient Words to pass it that Way. But where one may pass Lands, either by the Common Law, or by raising of an Use, and settling it by Statute, there in many Cases it is otherwise.

By 13 El. ch. 5. All fraudulent Conveyances of Lands, Tenements, Hereditaments, Goods or Chattels, to avoid the Debt or Duty of another, shall (only as against the Party, whose Debt or Duty is so endeavoured to be avoided, and his Heirs, Successors, Executors, Administrators and Assigns,) be utterly void. And every of the Parties to such fraudulent Conveyance, and being privy thereunto, and putting in Ure, avowing, or assigning the same, shall forfeit one Year's Value of such Lands, Tenements, or Hereditaments, and the whole Value of such Goods and Chattels. Provided, this Act shall not extend to Grants made *Bonâ Fide*, and upon good Consideration, to Persons not privy to such Collusion, or having no Notice or Knowledge thereof, at the Time of such Grant.

Here two Things are to be considered. The Consideration and *Bona Fides*. The Consideration must be valuable, as Money, Mar-

* *Utile per inutile non vitiatur.* 1 Inst. 3. a.

riage, &c. * *Bona Fides* is opposite to Fraud, and to a Trust expressed or implied. So that there must be a good Consideration, and such a *Bona Fides*, to bring it within the Proviso. See ch. 6. f. 2. post.

This Act against Conveyances to defraud Creditors, makes the Conveyance void as to all Strangers, who are to receive Prejudice by it; but between the Parties it is to stand good. [See the Statutes concerning fraudulent Conveyances of Bankrupts to deceive Creditors, post, ch. 4.]

But if one, that is indebted, doth *Bona Fide* sell his Lands, tho' it be with Intent to avoid Payment of his Debts, this is good, if the Purchaser is not privy to his Intent.

A Man being indebted by Bond, makes a voluntary Conveyance, Com. 255; and then contracts other Bond Debts: The Conveyance is fraudulent as to all.

As this Act was to relieve Creditors against fraudulent Conveyances, and all others who have Cause of Action for any Penalty or Forfeiture; so for the Relief of Purchasers, it is enacted,

By 27 El. ch. 4. That every Conveyance, Incumbrance, or Limitation of Use, of, in or out of any Lands, Tenements or Hereditaments, made to defraud any Purchaser upon good Consideration, shall (only as against such Purchaser, and all claiming under him) be utterly void. And every of the Parties or Privies, who shall put in Ure or avow or justify the same, to the Disturbance of such Purchaser, or any claiming under him, shall forfeit one Year's Value of such Lands, Tenements or Hereditaments. Provided, that Conveyances made upon good Consideration and *Bona Fide* shall be good, notwithstanding this Act.

Note, *The Conveyance is not made void against all, but only against those, who afterwards come to the Land *Bona Fide*, and upon good Consideration. Both *Bona Fides* and a good Consideration are requisite, to bring it within the Proviso. For in a Deed a Consideration may be good, and the Deed not made *Bona Fide*; because the Deed may be fraudulent, and accompanied with a Trust. The Consideration of Nature and Blood is a good Consideration; but not such a valuable Consideration as is intended by the Statute. The Statute means Money paid, or other good Consideration given. The Conveyance being void, it is not material, whether the Purchaser had Notice of the fraudulent Conveyance, or not. For Notice cannot make that good, which an Act of Parliament hath made void as to him. Again, 3 Rep. 83; 5 Rep. 60;

By the said Statute, If Lands are first conveyed with Clause or Condition of Revocation, and are afterwards sold or charged for Money, or other good Consideration paid or given, before the first Conveyance is revoked, according to the Power reserved, such first Conveyance shall be void against the Purchaser, and all others claiming under him. Howbeit, No lawful Mortgage made *Bona Fide* without Fraud shall be impeached by this Act. [See further in the said Act concerning the Entry of Statutes Merchant and Staple in the Office 3 Rep. 82, 83.

* *Fraus et dolus nemini patrocinari debent.* 3 Rep. 78. 7 Rep. 38.
Quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur. 3 Rep. 78.

Fucatus error muda veritate in multis est probabilior. 2 Rep. 72, 73.

Sapientum rationibus vincit veritatem error. Ibid.

of the Clerk of the Recognizances, else to be void against the Purchaser of Lands chargeable therewith. And see of Statute Merchant and Staple, and of Recognizances, *post*.]

By 29 Car. 2. ch. 3. Judgments, as against Purchasers Bonâ Fide for valuable Consideration, shall be Judgments only from the Signing, and Entry of the Day of the Month and Year upon the Paper Book, Docket, or Record by the proper Officer. And no Recognizances shall bind Lands in the Hands of Purchasers Bonâ Fide and for valuable Consideration, but from the Time of the Enrolment; and the Day of the Month and Year when enrolled shall be set down in the Margin of the Roll. And no Writ of Execution shall bind the Property of Goods, but from the Time of its Delivery to the Sheriff.

By 4 & 5 W. & M. ch. 20. Judgments not doggetted and entered as directed by that Statute, shall not affect any Lands or Tenements as to Purchasers or Mortgagees.

See 3 W. & M. ch. 14. For Relief of Creditors against fraudulent Devises; and 4 & 5 W. & M. ch. 16. An Act to prevent Frauds by clandestine Mortgages. Also 9 An. ch. 14. Concerning Mortgages obtained by Gaming.

By 10 Ann. ch. 23. Fraudulent Conveyances made to qualify one to vote for Knights of the Shire, shall be taken as free and absolute against the Persons who executed the same.

[See the Statutes for appointing Registers of Conveyances and Incumbrances of Lands in Middlesex and Yorkshire. 2 An. ch. 4. 5 An. ch. 18. 6 An. ch. 35. 7 An. ch. 20. and 8 Geo. 2. ch. 6.]

See the Statute Against Usury, 12 An. St. 2. ch. 16.

Note, * That Purchasers without Notice of Incumbrances are favoured in the Chancery.

2. How one may purchase or convey.

All Purchases or Conveyances of Lands regularly must be by Deed. And,

By 29 Ch. 2. ch. 3. No Action shall be brought, to charge any Person upon any Contract, or Sale of Lands, Tenements, or Hereditaments, or any Interest in or concerning the same, unless the Agreement be in Writing, signed by the Party to be charged therewith, or by some other Person by him lawfully authorised.

A *Deed* (*Factum*) in the Understanding of the Common Law, is an Instrument written on Parchment or Paper, comprehending a Contract betwixt Party and Party. Ten Things are necessarily incident to it. 1. Writing in any Hand or Language, so that it be legible. 2. Parchment or Paper; not upon Leather, Cloth, &c. 3. A Person able to contract. 4. By a sufficient Name. 5. A Person able to be contracted with. 6. By a sufficient Name. 7. A Thing to be contracted for. 8. Apt Words required by Law. 9. Sealing. 10. Delivery.

Of Deeds, some concern the Realty, some the Personalty, and some are *Misc.* Again, Deeds are *indented*, or *poll*. 1. An *Indenture* (*inftar Dentium*) is a Writing, containing a Conveyance between two or more, indented or cut unevenly, or in and out, on the Top or Side, answerable to another Writing, that likewise comprehendeth the self-same Words. It usually begins thus, *This Indenture*, &c. But if a Deed begins, *This Indenture*, and is not indented, it is no Indenture, but it may work as a Deed-Poll. Yet if the Deed is actually indented, and there are no Words importing an

* 5 Rep. 69.

70.

* See p. 143. ante.

b 1 Inst. 35. b.

171. b. 229. a.

c 1 Inst. 35. b.

143. b. 229. a.

2 Inst. 672.

5 Rep. 20.

an Indenture in the Deed, it is an Indenture in Law. This Indenture may be *Bipartite*, where there are two Parts and Parties to the Deed; *Tripartite*, where there are three Parts and Parties; *Quadripartite*, *Quinquartite*, &c. All which must be indented alike, and then they make but one Deed in Law; every Part of the Indenture being of as great Force and Effect as all the Parts together. It may be made in the *first* or *third* Person. And tho' the Feoffor, Donor or Lessor only seals the Part of the Indenture running in the third Person belonging to the Feoffee, Donee or Lessee, the Indenture is good. For if the Feoffee, Donee or Lessee, never sealeth the Counterpart belonging to the Feoffor, &c. he has an Interest in the Estate, being made Party to the Deed in the Beginning. But if the Indenture is made in the *first* Person, Mention must be made in the Deed, that the Feoffee, &c. hath put his Seal, and he must put his Seal accordingly, to make himself Party to the Deed. For he is not Party to the Deed (being made in the *first* Person) but only by the Clause that he hath put his Seal thereunto. That Part, which the Feoffor, Grantor or Lessor seals, is called the *Original*, and the Rest are said to be *Counterparts*; tho' now of late it is thought more proper, to make all the Parts Originals, and to be sealed as such by all Parties. Otherwise, if the Original and Counterpart disagree, you must judge by the Original. In Deeds indented all Parties are *estopped* (or concluded) to say against any Thing contained in it. It estops a Lessee, to plead that the Lessor had nothing in the Land. But where an Interest passes from the Party, there can be no Estoppel against him. *Lastly*, No Bond, Covenant or Grant, can be made to or with any, that is not Party to the Deed, if the Indenture is reciprocal between Parties of the one Side and Parties of the other; otherwise, if it is not reciprocal, made between Parties, as when the Deed begins, *To all Christian People. Know all Men by these Presents*, without a *Between*. 2. A *Deed-Poll* (so called, because it is cut even, or *polled*) is that Writing which is plain without any indenting. Every Deed that is pleaded shall be intended to be a Deed-Poll; unless it is alledged to be indented. A Deed-Poll is properly single, and but of one Part, and is intended for the Use of the Feoffee, Grantee or Lessee. It commonly begins thus, *To all People to whom these Presents shall come, or Know all Men by these Presents*. In this Deed-Poll a Lessee is not estopped or concluded to plead, that the Lessor had nothing at the Time of the Lease made. For the Lessor only puts his Seal to it, and delivers it only as his Act.

A *Charter* doth touch the Inheritance, but a *Deed* doth not, unless it hath some other Addition.

Where a Feoffor conveys away all his Estate in the Land absolutely, and is not bound to warrant the Land, or defend the Title, but the Feoffee is to defend the Land at his Peril, the Feoffee shall have all the Deeds and Evidences as Incidents to the Land, altho' they be not granted to him by express Words; for the Feoffor cannot reap any Benefit by them. But if the Feoffor warrants the Land generally, there, without express Grant, the Feoffee shall not have any Deeds, which do comprehend Warranty, but the Feoffor shall have all the Evidences, which are requisite, to defend the Title of the Land. The Feoffee must trust to his Warranty; and have only such Evidences, which do concern the Possession, and

not

not the Title of the Land, as Court-Rolls, &c. as Incidents to the Possession. So if a Man makes a Feoffment with Warranty and dieth, the Heir of the Feoffor shall have all Deeds and Evidences, which the Feoffor himself might detain. All this is to be understood, where there is no express Grant of the Deeds and Evidences. [But now, since express Warranties in Deeds have been out of Use, the Purchaser usually takes such Title Deeds as relate only or principally to the Estate purchased, and where they relate as well to other larger Estates as to the Estate purchased, the Seller keeps them, and gives the Purchaser only attested Copies of them, and enters into a Covenant to produce the Originals at the Request of the Purchaser. And on the other Hand the Seller takes attested Copies of such Deeds, as comprehend not only the Estate sold, but also any smaller Estate, and the Purchaser who has the Originals enters into a Covenant to produce them at the Request of the Seller.]

3. What are the several formal Parts of a Deed of Conveyance?

Deeds by which Lands, &c. pass, have usually these several and formal Parts, (*viz.*) The *Premises*, *Habendum*, *Tenendum*, *Reddendum*, the Clause of *Warranty*, *Covenants*, *Conditions*, *Date* and *Sealing*. But to make it a Deed, there must be a *Delivery* of it.

1 Inst. 6. a.
Noy's Max.
54, 133.

1. The *Premises* set forth the proper Names of the Feoffor and Feoffee, Donor and Donee, Lessor and Lessee, with a Description of what *Parish* and *County*, with their *Addition* or *Quality*; as *Esquire*, *Gentleman*, *Yeoman*, &c. and comprehend the Certainty of the Lands or Tenements to be conveyed, either by express Words, or by Implication, with the *Consideration* of the Conveyance. The *Consideration* is the Motive or Cause of the Contract. As in Consideration of natural Love and Affection, for Settlement in the Stock or Blood, for Money paid or secured to be paid, for Payment of Debts, for Marriage already had or to be had. There is a *good* Consideration, and a *valuable* Consideration. Natural Love and Affection is a *good* Consideration, but not a *valuable* Consideration, as Money, or Marriage. There is no Consideration so much respected in Law, as the Consideration of Marriage, in respect of Alliance and Posterity. The *Premises* also set forth the *Exceptions*, if there are any; as excepting all Timber-Trees. Which must be a Particular out of a General, as Timber-Trees out of a Grant of Lands, a Room out of an House, an Acre out of a Manor; and not a Part of what is granted, as one Acre out of twenty, the Services out of a Manor. But this may be done by Covenant.

3 Rep. 85.
1 Inst. 9. a.

1 Inst. 47. a.
2 Cro. 296,
487, 524.

In many Deeds also there may be Occasion for a *Recital* of Part of ancient or former Deeds in the *Premises*; but chiefly upon Assignments of Leases and Mortgages. Yet a *Recital* is not *conclusive*, because it is no direct Affirmation. By feigned Recitals in a true Deed, Men might make what Titles they please, since false Recitals are not punishable.

1 Inst. 352. b.
Vaugh 74, 75.
2 Lev. 108,
109.

Plowd. 152.

160, 161.

2 Rep. 23.

24, 55.

8 Rep. 56.

154.

1 Inst. 6. a.

183. a. & b.

190. b. 299. a.

Noy's Max.

54, 150.

2. The Office of the *Habendum* (*To have*) is to name again the Feoffee, and to express the Certainty of the Estate, which the Party is to have, for what Time, and to what Use. And it sometimes *qualifies* the Estate, so that the general *Implication* of the Estate,

Exceptio semper ultimo ponenda est. Regist. 1. 9 Rep. 53.
Ex verbo generali aliquid excipitur. 1 Inst. 47. a.

which

which by Construction of Law passes in the Premises, may be controlled by the *Habendum*; but not if the Estate is *expressed* in the Premises. As if a Man by Deed gives Lands by the Premises to one and his Heirs, *Habendum* to him for Life; this *Habendum* is void, because repugnant to what is expressed; not if the *Habendum* had been to the Heirs of his Body. But if the Estate had only been *implied* in the Premises, as if *A.* grants a Rent to *B.* generally in the Premises, the same by Implication and Construction of Law is an Estate for Life; yet an *Habendum* for Years is good, and shall qualify the Generality and Implication of Law in the Premises. It is required of the *Habendum*, to comprise and include the Premises; and it must be consistent with that which was there expressed. If it is not, the precedent Estate given by the Premises shall stand, and the Estate by the *Habendum* shall be void. Note therefore the Difference betwixt an Estate *implied* in the Premises, and an Estate therein *expressed*. An *Habendum* also may sometimes explain the Premises, to prevent Wrong; and sometimes *enlarge* the Premises; as if a Man giveth Lands in the Premises to one and the Heirs of his Body, *Habendum* to him and his Heirs, he hath an Estate-tail and a Fee-simple expectant. For when the Deed at first doth contain special Words, and afterwards concludes in general Words; both Words, as well general as special, shall stand.

3. The *Tenendum* (To hold) at this Day, where the Fee-simple passeth, must be of the Chief Lord of the Fee, by the same Customs and Services, as the Feoffor held. For since the Statute of the 18 Ed. 1. (entituled, *Quia Emptores Terrarum*, no one can convey Lands in Fee to hold of himself, except the King. Before the Statute the *Tenendum* was usually from the Feoffor and his Heirs, and not of the Chief Lord of the Fee; whereby Lords lost their Escheats, Forfeitures and Services. This Statute therefore does not extend to a Gift in Tail; for the Donee shall hold of the Donor. [This Clause, as distinct from the *Habendum*, is now seldom inserted in Deeds; but if there is any Chief Rent, or the like, payable out of the Estate, it is generally mentioned after the *Habendum* by the Words *Subject nevertheless to a certain Chief Rent payable, &c.*]

4. The *Reddendum* is that Clause in the Deed, which *reserveth* or *provideth* some new Thing to the Grantor, as Rent, Suit, or Service, and is usually made by the Words Yielding, Paying, Doing, Reserving, Finding. An *Exception* is always of Part of the Thing granted in *General*, and of a Thing in *Being*. But a Reservation is always of a Thing not in being, and is newly created out of the Lands or Tenements demised; tho' Exception and Reservation are sometimes used promiscuously. The Lessor cannot reserve to any other but himself; but some do hold, that it is otherwise in the Case of the King. Neither can he reserve to himself 'Parcel of the annual Profits themselves, as to reserve the Vesture or Herbage of the Land, for that would be repugnant to the Grant.

If a Man in the Month of *February* makes a Lease for Years, reserving a yearly Rent payable at *Michaelmas* and *Lady-Day* during the Term; the Law (in this Case of a Reservation) will transpose the Days of Payment, so that the Grant may take Effect, and that the Rent may be paid yearly during the Term, (*viz.*) at *Lady-Day* and *Michaelmas*.

N n n

Antiently

which

Antiently the Reservations were for the most part in Victuals; as *Corn, Flesh, Fish*. But about the Reign of H. 1. the Reservation of Victuals was changed into ready Money.

The proper Place for a Reservation is after the Limitation of all the Estates.

Next to the *Reddendum*, the *Re-entry*, *Nomine Panae*, and Clause of *Distress* may be inserted in the Deed.

5. * A *Warranty* is a Covenant real annexed to Lands or Tenements, whereby the Bargainor or Seller, and his Heirs are bound to warrant and secure the same to the Bargainee or Buyer, and his Heirs, and that they shall quietly hold and enjoy the same, and either upon Voucher, or by Judgment in a Writ of *Warrantia Chartae*, to yield other Lands and Tenements to the Value of those, that shall be evicted by a former Title. Warranties are favoured in Law, being Part of a Man's Assurance. The Word *Warrantizo* (or *Warrant* in English) maketh the Warranty, and is the Cause of it; and it cannot be expressed by any other Word, as *Defendo*, &c. But this is to be understood of a Warranty annexed to a Freehold or Inheritance, corporeal or incorporeal. Tho' it is not expressed to whom the Warranty shall extend, yet the Law gives the Benefit of it to the Feoffee. The Feoffor may by express Words warrant the Land for the Life of the Feoffee or of the Feoffor. But the Recovery in Value shall be in Fee. The Words *Grant* or *Demise*, do make a Warranty in Law, if spoken of *Chattels real*. A *Warranty*, which is a Covenant real, bindeth to yield Lands in Recompence. A *Covenant* annexed to Land yieldeth only Damages. And tho' by the Civil Law every one is bound to Warrant the Thing he sells, tho' there be no express Warranty; yet by the Common Law he is not bound, unless there be an express Warranty at the Time of the Sale, or in Law.

Of Warranties annexed to Freeholds and Inheritances some are Warranties in Deed, some in Law. 1. A Warranty in Deed is an express Warranty by the Word *Warrantizo*. 2. Warranties in Law are those, which are created by other Words; as *Dedi*, is a Warranty in Law to the Feoffee and his Heirs during the Life of the Feoffor, but not in the King's Case. They are called Warranties in Law, because in Judgment of Law they amount to a Warranty without the Word *Warrantizo*. [See 4 Ed. 1. St. 3. ch. 6.] Also this Word *Exchange* implies a Warranty in Law, even in the Case of the King. Warranty in Law and Affets in some Cases are a good Bar. It binds the Heir of him that made it, in many Cases, tho' not named; which an express Warranty cannot. So a Warranty in Law may be by Will. But an express Warranty cannot be created by Will.

Again, Warranties are either *General*, (*viz.*) by one and his Heirs to another and his Heirs; or *Particular*, and restrained to a certain Person.

Warranties also are * *lineal*, *collateral*, or commencing by *Disseisin*. 1. *Lineal* Warranty is a Covenant real; where a Man (either as Owner, or that might have inherited the Land, and from whom his Heir lineal or collateral might by Possibility have claimed as Heir) bindeth himself and his Heirs by his Deed to Warranty and dieth, and the Warranty doth descend to the Heir. He must bind his Heirs, otherwise the Heirs are not bound. And the Reason why

* 1 Inst. 365.a.

6 Lit. 733.

1 Inst. 366.a.

383.b. 384.a.

4 Rep. 80.

* 1 Inst. 101.b.

102.a. 365.a.

384.b. 385.a.

389.a.

1 Ld. Ray.

593.

* See of Ac-

tions of Deceit

B. 4. ch. 4.

post.

* 1 Inst. 384.a.

386.a.

2 Inst. 269,

275.

4 Rep. 81.

* 1 Inst. 386.a.

8 Lit. 697,

703.

1 Inst. 370.a.

383.b. 384.b.

386.a.

why this is called lineal Warranty, is not because that must descend upon the lineal Heir, but because if there had been no such Deed of Alienation with Warranty, the Right of the Tenements, and the very Lands had descended to the Heir of him, that made the Warranty, either lineally or collaterally. ^a Lineal Warranty doth bind the Right of a Fee-simple. It doth not bind the Right of an Estate-tail; for that is restrained by 13 Ed. 1. *De Donis Conditionalibus*. But a lineal Warranty and Affets is a Bar of the Right in Tail, and is not restrained by the said Act. ^b Affets signify here sufficient by Descent, or Lands of equal Value at least by Descent, not by Purchase or Gift. It must also be Affets in Fee-simple, and descend to him as Heir of the same Ancestor, that made the Warranty. Warranty lineal or collateral descendeth always to the Heir at Common Law, and bindeth him. But the Heir cannot be bound by express Warranty, if the Ancestor is not bound in his Life-time. Therefore an express Warranty by Will cannot bind.

2. ^c Collateral Warranty is where the Party, upon whom the Warranty descendeth, cannot convey the Title, which he hath in the Land, from him that was the Maker of the Warranty, or shew that he is his Heir, inasmuch as he that maketh the Warranty, is collateral to the Title of the Tenements. Thus for an Example; If Tenant in Tail discontinues the Tail, (*i. e.* alienates the Lands, and thereby gives away the Possession,) and hath Issue and dieth, and the Uncle of the Issue, having no Right to the Land entailed, releases to the Discontinuee (or to him to whom the Possession is given away) with Warranty, and dieth without Issue; this is a collateral Warranty to the Issue in Tail, and bindeth his Right without Affets; because the Warranty descendeth upon the Issue, that cannot make Title to the Entail from his Uncle. This was suffered, because the Law presumed, that the Uncle would not disinherit the lawful Heir of his own Blood without a Recompence some other Way. Collateral Warranty binds the Right of an Estate in Fee or Tail with or without Affets; for it is not ^d restrained by 13 Ed. 1. *St. 1.* tho' a lineal Warranty without Affets is restrained, as aforesaid. But,

By 4 Ann. ch. 16. *All collateral Warranties to be made of Lands, Tenements or Hereditaments, by any Ancestor, who has no Estate of Inheritance in Possession of the same, shall be void against his Heir.*

It is a Maxim in Law, ^e that no Warranty shall extend to bar any Estate of Freehold or Inheritance, which is *in esse* in Possession, Reversion or Remainder (and not displaced and put to a Right) before or at the Time of the Warranty made, tho' afterwards, and at the Time of the Descent of the Warranty, the Estate of Freehold or Inheritance be divested and displaced.

3. Warranty by ^f *Disseisin* is where one that hath no Right to enter upon the Freehold of another, entereth, and conveyeth it away, with Warranty. ^g It is also called a Warranty that commenceth by *Disseisin*, where the Conveyance, whereunto the Warranty is annexed, doth work a *Disseisin*. As when Lessee for Years, or at Will, or Tenant by *Elegit*, by Statute-Merchant, or by Statute-Staple, makes a Feoffment with Warranty. Or if one enters into Lands, to which he has no Title, and presently makes a Feoffment with Warranty, this Warranty commences by *Disseisin*. But it barreth not.

^h Warranty

* 1 Inst. 371.
a. & b.

Warranty may be annexed to any Conveyance of Lands, Tenements or Hereditaments, as Fines, Feoffments, Gifts, Releases and Confirmations, made to the Tenant of the Land, though he that makes the Release or Confirmation hath no Right to the Lands, &c. But,

By 4 Ann. ch. 16. *All Warranties by Tenant for Life of Lands, Tenements or Hereditaments, the same descending to any Person in Reversion or Remainder, shall be void.* [See 6 Ed. 1. ch. 3. and the Exposition thereof, 1 Inst. 365. a. & b. 366. a. 13 Ed. 1. St. 1. ch. 1. 11 H. 7. ch. 20.]

* See B. 4.
ch. 4. post.

Warranties are pleadable only to *real* Actions^b, as in *Recoveries*. [And express Warranties are now seldom inserted in Conveyances, their Place being supplied by particular Covenants, which also restrain any *implied* Warranty in the Deed.]

6. A *Covenant* is an Agreement made by Deed in Writing by the Consent of two or more, to do or not to do. The Words of Covenanting are, *do Covenant, Grant, Promise and Agree*, &c. tho' there needs no great Exactness in the Words, to make a Covenant. For if Words of *Condition* and Words of *Covenant* are coupled together in the same Sentence, as *provided* always, and it is *covenanted*,

* 1 Inst. 203. b.
2 Rep. 71, 72.

&c. in such Case the Words may be construed to make a Condition and a Covenant too.

* 4 Rep. 80.
3 Inst. 384. a.

A Covenant is either *express* in the Deed, or *implied* by Law. By the Words *Demise* and *Grant*, the Law doth *imply* and *intend* on the Lessor's Part, that the Lessee shall quietly enjoy against all Incumbrances during the Life of the Lessor. And this Covenant in Law created by *such* Words, shall go to the Assignee of the Term.

* 4 Rep. 80.

But where there is an express Covenant in Deed for quiet Enjoyment, the *implied* Covenant shall be governed by it. An *express* Covenant is either *real*, whereby a Man obligeth himself to pass Lands, to levy a Fine, &c. or *personal*, where a Man covenants with another to build him a House, to allow Timber, &c. A Covenant also may be in the *Affirmative* or *Negative*, *executed*, i. e. already done, or *executory*, i. e. to be done hereafter.

* Plowd. 284.
5 Rep. 16,
17, 18, 24.
1 Roll. Abr.
915, 916.
1 Cro. 552,
553.
2 Cro. 125.
1 Ld. Ray.
320, 322.

Covenants may extend to *Assigns* in Deed, or *Assigns* in Law. An Assignee in *Deed* is a Person appointed; as when the Lessee of a Term assigns the same to another. An Assignee in Law is he whom the Law makes; as an Executor is such an Assignee to the Testator, and an Administrator to an Intestate. And *Note*, * That when a Covenant does extend to a Thing in Being, Parcel of the Demise, the Covenant shall go with the Land, and shall bind the Assignee, tho' he is not named or bound by express Words; as to repair the House. But if the Covenant doth concern a Thing, which was not in Being at the Time of the Demise made; the Covenantor, his Executors or Administrators shall be bound, but an Assignee shall not be bound; as to make a new Wall, upon Part of the Land demised. For the Law will not annex the Covenant to a Thing that hath no Being. But if a Lessee doth covenant for himself and Assigns in express Words, it is otherwise;

* *Qui sentit commodum sentire debet et onus.* 5 Rep. 24. 2 Inst. 489.

Qui sentit onus, sentire debet et commodum. 1 Rep. 99.

because

because the Assignee shall have the Benefit of it. Yet though the Covenant is express for one and his Assigns, if the Thing to be done doth not concern the Thing demised, there the Assignee shall not be charged; as if the Lessee covenants for himself and his Assigns, to build a House upon other Land of the Lessor, which is no Parcel of the Land demised; or to pay a collateral Sum to the Lessor or to a Stranger. So if in a Demise of Sheep or other personal Things, the Lessee covenants for him and his Assigns, to deliver them up at the End of the Term, and the Lessee assigns them over; the Assignee shall not be bound; for it is but a personal Contract.

The Executors and Administrators of Assigns, and the Heirs of Assigns, and Assigns of Assigns; and Assigns of Heirs are within this Word *Assigns*. Rep. 17.
Inst. 364. b.
385. a.

There are some Covenants, of which none shall have the Advantage but the Party and his Heirs. Covenants of Inheritance, Roll. Abr.
520. 521.
Danv. Abr.
235. Tit.
Covenant. (viz.) such as are knit to the Estate, shall descend to the Heir; otherwise of Covenants in Gross, which go to the Executors.

Covenants made by Deed *Poll* are as effectual, as those made by Deed indented, if the Party hath the Deed to shew. Ld. Ray.
422.
Roll. Abr.
517.

A Bond for Performance of Covenants is termed a collateral Assurance. It is the best Way always, to take a Bond for Performance of Covenants with a Penalty: (For if you sue upon the Bond at Common Law, you recover the Penalty. But if you sue upon the Covenant, the Damages are left to the Jury.) But then the Party, when he sues upon the Bond at Common Law, ought to take Care, that he does not levy much more than his Damage and Costs, for fear of a Bill in Equity for Relief. Of late a Covenant with a Penalty, is usually inserted in the Body of the Deed, to save the Charge of stamp'd Paper upon a Bond. If the Condition of the Bond is, to perform all the Covenants in an Indenture, Covenants in Law, as well as Covenants in Deed are included. 4 Rep. 80.
Sec of Actions
of Covenant,
B. 4. ch. 4.
post. [See 8 & 9 W. 3. ch. 11.]

There may be *Articles* of Agreement or Covenants framed according to the Case, by mutual and reciprocal Covenants only, to be performed by the Parties; and this is good, if in Writing and sealed and delivered by the Parties, without the other formal Parts of a Deed.

[See 32 H. 8. ch. 34. Whereby Grantees of Reversions are enabled to take Advantages of Covenants to be performed by Lessees.]

RULES Concerning COVENANTS.

IF a Covenant is unlawful in the Substance thereof, or impossible, it is void.

If no Time is limited for doing of a Thing, it shall be done in reasonable Time.

A Covenant is most strongly to be taken against the Covenantor, and most in Advantage of the Covenantee. Plowd. 287.
Inst. 36. a.

Where one by his own Act disables himself to perform a Covenant, it is a Breach of it. 5 Rep. 21.

• • •

• Every

* 5 Rep. 26.

* Every Contract or Agreement ought to be dissolved by Matter of as high a Nature, as it was made.

* 1 Inst. 201. a.
See p. 142.
ante.

7. * A Condition is the Suspension of the Execution of an Act, until something is performed, which may be and which may not be. A Condition annexed to ^b real Estates is a Quality annexed by him that hath Estate, Interest or Right to the same, whereby the Estate granted may be defeated, enlarged, or created upon an uncertain Event; as hath been before observed.

A Condition is either in *Deed* or in *Law*.

* Lit. 328,
329.
8 Rep. 44.
10 Rep. 42.
1 Inst. 204. a.
236. b.

1. Conditions in *Deed* may be expressed by ^c these Words; (*viz.*) *Upon Condition, provided, so that.* But these Words, *to the Intent, to pay, to the Effect, &c.* are no Words of Condition in Feoffments and Grants in the Case of a common Person. But in the Case of the King such Words do create a Condition; and so it is in Case of a Will. And for avoiding a Lease for Years, precise Words of Condition are not so strictly required, as in the Case of Freehold; for a Lease for Years is but a Contract, and if for three Years or less, may begin by Words, and be dissolved by Words. [See 29 Car. 2. ch. 3.] Therefore if one makes a Lease for Years, especially by Deed, in which there is a Clause, *that the Lessee shall do such an Act upon Pain of Forfeiture of the said Term*, or the like, these Words amount to a Condition.

* 1 Inst. 201.
a. & b.

Again, of Conditions in *Deed*, some are in the ^d Affirmative, and some in the Negative, and some in the Affirmative which imply a Negative, as *behind* and *unpaid* imply a *Nonpayment*. A Condition, that the Tenant in Tail, ^e nor his Heirs, shall not Alien, &c. is a double Negative; and yet it shall not be construed to be an Affirmative. For in Law grammatical Construction is not always to be followed. Some Conditions make the Estate whereunto they are annexed voidable by Entry or Claim, and some make the Estate void *ipso facto*, without Entry or Claim. ^f *Provided*

* Lit. 362.
1 Inst. 201.
a. & b. 223. b.

always, and it is *covenanted*, &c. is a Condition by Force of the *Proviso*, and a Covenant by Force of the other Words. Yet sometimes a *Proviso* shall amount to a Covenant, and sometimes it shall be taken for a *Limitation* or *Qualification*, sometimes for an *Exception*, *Reservation*, and *Explanation*. ^g A *Proviso* makes a Condition, if it does not depend upon another Sentence, and if the *Proviso* is the Word of the Feoffor, Donor, Lessor, and if it is compulsory, to enforce the Feoffee, Donee, Lessee, to do an Act. Otherwise it may be a Covenant. A *Proviso*, that would take away the whole Effect of a Grant, is void; and so is a *Proviso*, that is repugnant to the express Words of the Grant. And if a *Proviso* is good at first and afterwards it happens that there is no other Remedy, but that which was restrain'd, it shall be had notwithstanding the Restraint. A ^h *Limitation* or *Qualification* is by such Words, as *Durante*, *Dum*, *Dummodo*, *Quamdiu*, *Donec*, *Quousque*, *Usque ad*, *Tam Diu*, and are improperly called Conditions. For a Limitation shall always determine an Estate without Entry,

* 2 Rep. 72.
1 Inst. 203. b.
1 Ventr. 200,
202, 203.
3 Cro. 128,
129.

* 2 Rep. 70,
72.
1 Inst. 146.
a. & b.

* 10 Rep. 41,
42.
1 Inst. 204. a.
234. b. 235. a.

* Nihil tam conveniens est naturali aequitati, unumquodque dissolvi eo ligamine quo ligatum est 2 Rep. 53. * 5 Rep. 26. 6 Rep. 43. 4 Inst. 28, 122.
* Conditio est cum quid in casum incertum, qui potest tendere ad esse aut non esse, confertur. 1 Inst. 201. a.

or Claim, which a Condition doth not*. The Cause is the Consideration of the Grant, which sometimes amounts to a Condition, and sometimes not. *Pro* (as in the Grant of an Annuity, *pro consilio*;) shewing the Cause of the Grant, amounteth to a Condition. But in a Feoffment or Lease for Life, *pro consilio* is the Consideration, and does not amount to a Condition, and the Reason of the Difference is, because the State of the Land is executed; and the Annuity executory, or to be executed hereafter.

Conditions in *Deed* may be subdivided, into Conditions *precedent*, which must be performed before the Estate can take Effect, and Conditions *subsequent* to the Estate or to be executed after it.

A Condition regularly should follow the *Habendum* presently. But the Law hath not appointed any Place in a Deed proper or peculiar to a Condition. Its Place is where the Parties please.

See 32 H. 8. ch. 34. Where Grantees of Reversions may take Advantage of Conditions broken.

2. A Condition in Law is that which the Law implieth without express Words in the Deed; and it may be either by the *Common Law*, or by *Statute*, where an Action or Entry is given.

Conditions may be annexed to Lands of Inheritance, for Life or Years, to Copyhold-Lands, Chattels personal, and personal Contracts.

[See of *Estates upon Condition*, ante, ch. 1. *Acceptance of Rent* and of *Offices*, ch. 2. ante. And how *Estates in Land*, may be forfeited and lost, by Alienation of particular Tenant, Mortmain, by Waste, ch. 4. post.]

RULES concerning CONDITIONS.

Conditions created by the Party are odious, for that they defeat Estates where Right is favoured.

Tho' Conditions are not favoured, yet they are not always to be taken literally.

The Words of a Condition shall be taken out of their proper Sense, to support an Estate.

Conditions repugnant to the Estate, or Grant, are void.

If an impossible Condition is precedent, no Estate is made. But,

An impossible Condition subsequent to an Estate makes it absolute.

Where the Condition (the Performance of which was possible at the Time of making) becometh impossible to be performed by the Act of God, as Death, the State of a Feoffee shall not be avoided; for being settled in him it cannot be defeated but by Performance of the Condition. But in the Case of a Recognizance or Bond with such a Condition, the Recognizance or Ob-

* *Conditio adimpleri debet priusquam sequatur effectus.* 1 Inst. 201. a.

* *Conditio beneficiæ quæ statum construit, benigne secundum verborum intentionem est interpretanda. Odiosa autem quæ statum destruit, strictè secundum verborum proprietatem est accipienda.* 1 Inst. 218. a. 8 Rep. 90.

* *Actus Dei nemini facit injuriam.* 1 Inst. 206. a. & b.

ligation is saved. For they transfer no Interest, but only give a Right of Action upon Default; whereas there is no Default in the Contusor or Obligor.

^a 1 Inst. 223. b. Regularly what is prohibited by Law, may be prohibited by Condition.

^b 1 Inst. 204. a. Words make a Condition in a ^b Will, that make no Condition in a Deed.

No Man shall take Advantage of a Condition broken, but he that is ^c Party or Privy to the Condition. [See 32 H. 8. ch. 34.]

^d 1 Inst. 206. b. If one is the ^d Cause that a Condition cannot be performed, he shall not take Advantage for the Non-performance thereof.

^e Ibid. A Condition ^e against Law is void: Therefore,

^f Ibid. A Feoffment upon Condition to do a Thing that is ^f *Malum in se*, makes the Estate absolute, and the Condition void. But a Bond with such a Condition is void.

When the Thing to be done, or not to be done, is only against some Rule of Law, the Condition is only void, and the Bond good. But the Condition may be good in Part and void in

^g 2 Ld. Ray. Part 5.

^h 459. A Feoffment in Fee upon Condition not to ^h alien, the Estate is absolute, and the Condition void. But a Bond not to alien is good; for he may alien if he will forfeit his Bond. A Condition not to alien for a particular Time, or to a particular Person, &c. is good.

The King may grant Lands in Fee upon Condition not to alien, and the Condition is Good.

ⁱ 1 Inst. 233. b. A Gift in Tail made upon Condition, that the Donee shall not alien against the Statute of *West. 2. De Donis*, or to work a Discontinuance of the Estate-Tail, is Good; [but this must be understood of such Alienation only as is against that Statute, or amounts to a Discontinuance, but not of a common Recovery; for a Condition to restrain any Right incident to the Estate granted is repugnant and void.]

A Lessor in respect of the Reversion may by Condition restrain his Lessee from aliening without Licence. Yet when the Lessor does license; he shall never by Force of the Proviso defeat the Term, which is absolutely aliened by his Licence. For hereby he has dispensed with all Alienations to be made afterwards.

^j Lit. 378. A Condition implied by ^j Law to be annexed to any Thing, is as strong, as if the Condition were made by express Words in Writing.

^k Lit. 378. All Grants of ^k Offices are subject to this Condition in Law, that the Grantees duly execute them.

^l 1 Inst. 233. b. All Conditions in Law requiring Skill and Confidence bind Infants and Feme Coverts, as well as Conditions in Deed. But those that do not require Skill and Confidence, whether by Common Law or Statute, do not absolutely infer a Forfeiture of their Estate, except in Waste.

^m 1 Inst. 233. b. Regularly he that taketh Advantage of a Condition in Law, shall take the Land with such Charge as he finds it.

ⁿ 1 Inst. 208. b. Sometimes Conditions are to be performed in convenient Time, sometimes upon Request, sometimes during the Life of a Party, if he is not hastened by Request.

^o Rep. 30, 31.

A Condition may be ^aapportioned or divided by Act of Law, ^a 4 Rep. 120. and by the Act of the *Lessee*.

None shall by Plea defeat any Estate of ^bFreehold upon Condition, ^b Lit. 365. unless he sheweth the Condition in Writing. Otherwise of Chattels ¹ Inst. 225. a. & b. real, [But see 29 Car. 2. ch. 3.] and personal.

^cRegularly he that will take Advantage of a Condition, must enter ¹ Inst. 218. if he can. If he cannot, he must claim. For a Freehold, whether it lie in Grant or Livery, cannot cease by Condition without Entry or Claim; tho' the Words are, *Provided that if he does not pay, the Estate shall cease and be void*.

He that entereth by Force of a ^aRemainder in a Deed, is bound ⁴ Lit. 374. by the Conditions in the Deed, tho' he does not seal it. But by ¹ Inst. 230. b. special Limitation they may not extend to him. ^{231. a.}

8. ^aThe Date of the Deed is the Description of the Time, in ¹ Inst. 6. a. which the Deed is made.

A Deed is good, tho' it hath ^ano Date of the Day or Place, or ² Rep. 5. if the Date is mistaken, or if it be dated at one Time, and sealed ¹ Inst. 46. b. and delivered at another, or tho' it hath an impossible Date, as the ² Roll. Abr. 27. 30th of February. But he that doth plead such a Deed without any ² Ld. Raym. Date, or with such an impossible Date, must set forth in his Plead- ^{795.} ing the Time, *when it was delivered*. If a Lease for Years be made ¹ Ld. Raym. by Indenture, bearing Date the 26th of May, To have and to hold ^{336, 704.} for twenty-one Years ^afrom the Date, or from the Day of the Date, ⁵ Rep. 1, 94. it shall begin on the 27th of May: [^a But it seems to be the better ¹ Inst. 46. b. Opinion, that if it is To hold for twenty-one Years from the Date, ² Inst. 674. it shall begin on the 26th.] If the Lease bears Date the 26th of ¹ Ld. Raym. May, To have and to hold from the Making thereof, or from hence- ^{480.} forth; it shall begin on the Day on which it was delivered. But ¹ Roll. Abr. every deed shall be intended, to be delivered on the ^{849, 850.} same Day it ² Cro. 135, bears Date, unless the contrary is proved. ^{258, 647.} But if a Deed is dated ³ Cro. 388. at Four o'Clock in the Afternoon on the 20th of June, the whole ³ Lev. 438. Day is to be taken in. For the Law in this Computation doth ² Salk. 413. reject all Fractions and Divisions of a Day for the Uncertainty. ¹ Ld. Raym. As ^{84.} to the Place, if it bears Date at a Place out of the Realm, it is ² Ld. Raym. good, by averring, that the Place, mentioned in the Deed, is in ^{1242.} some County in England. For here the Place is not traversable. ² Inst. 674. But if this is not averred, and it appears, that it was dated beyond ⁵ Rep. 1. Sea, it is otherwise, and the Deed cannot be tried. ¹ Inst. 135. a. & b.

9. The Sealing is comprehended in these Words, (*viz.*) ^a In Wit- ¹ Inst. 6. a. nesses whereof I have set my Seal. Tho' if those Words are wanting, ² Rep. 5. the Sealing of the Deed is sufficient.

The Seal is the essential Part of the Deed. If a Writing is not sealed, it cannot be a Deed. If the ^aPrint of the Seal be utterly ³ Inst. 169. defaced, the Deed is insufficient; so that it cannot be pleaded, tho' ⁵ Rep. 23. it may be given in Evidence. [See of the *Privy Signet*, *Privy Seal*, ¹ Noy's Max. and *Great Seal*, B. 4. ch. 1. post.] ^{55.}

^aThese are the orderly and formal Parts of a Deed; but all are ² Ld. Raym. not essential Parts. For if a Deed of Feoffment is without ^{1536.} *Pre-* ¹ Inst. 7. a. *misses*, *Habendum*, *Tenendum*, *Reddendum*, *Clause of Warranty*, *Date*, ¹ Ld. Raym. and *In Witness*, &c. yet the Deed is good. For if one by Deed gives ^{28.} Lands to another, and to his Heirs, without saying any Thing more, and puts his Seal to the Deed, and delivers it, and makes Livery where necessary, it is good.

For tho' it is never so well written and sealed, it is of no Force if it is not *delivered* by the Party himself, or his special Attorney, to the Party himself to whom it is made, or to his Use. A Delivery (*Traditio*) is a necessary Incident to every Deed; and then when it is delivered, it shall bind him that delivers it, tho' dated before, and tho' another wrote or sealed the same. The Delivery of the Deed may be *absolutely* or *conditionally*. When you deliver a Deed *absolutely*, Words are not necessary; for then a Man that is mute, could not deliver a Deed. It is sufficient, if it is delivered. And as a Deed may be delivered to the Party without Words, so may a Deed be delivered by Words, without any Act of Delivery; as if the Writing sealed lieth upon the Table, and the Feoffee saith to the Feoffee, *Take that as my Deed*, it is sufficient Delivery. In Case of the King's Letters Patents, or of Grants under the Seal of the Dutchy of *Lancaster*, the Seal is Matter of Record, and the Deeds need no Delivery: So the Deed of a Corporation needs no Delivery. The Common Seal is perfect without it. When a Deed is delivered *conditionally*, it is called an *Escrow* (*Escroll* or *Scroll*) as where one doth seal a Deed, and deliver it to a Stranger, [as an Escrow] until certain Conditions are performed, and then to be delivered to him, to whom the Deed is made, to take Effect as his Deed, that so delivered it. For it shall have * *Relation* to that first Delivery. In the Delivery of a Deed as an *Escrow* you must use Words, and say, *I deliver this as my Escrow, to deliver to the Party as my Deed, upon Condition that, &c.* or to the like Effect. For here a bare Act of Delivery to a Stranger without Words signifies Nothing. It must be delivered to a *Stranger*; for if it is delivered to the Party himself, it is an absolute Delivery; tho' Words mention it only as an *Escrow*.

If a Deed is sealed and delivered, there is no Necessity of signing it, tho' it is usually done.

There must be one or more *Witnesses*, to testify the Sealing and Delivery of the Deed. Their Names should properly be either underwritten or indorsed by them.

A Deed may be made to a Feme Covert, Infant, &c.

If any Writing be read in any other Form to an unlearned Man, it shall not be his Deed, altho' he seals and delivers it. But if the Party, who should deliver the Deed, doth not require it to be read, he shall be bound by the Deed, tho' it is penned against his Meaning. So if one declares the Effect thereof, in other Manner, than the Writing doth import, the same shall not bind the Party that seals and delivers the Deed, if there is no Collusion between them. [And *Suppressio veri*, or *Suggestio falsi*,^b is a good Reason for a Court of Equity to set aside any Deed.]

Regularly if a Deed is *alleged*, it must be shewed to the Court, that the Court may judge, whether there are apt Words, to make a good Contract. And when it is shewn to the Court, the Deed by Intendment of Law remains in Court all that Term. But at the End of the Term, if not denied, the Law adjudges it to be in the Custody of the Party to whom it belongs. If the Deed

^a *Traditio loqui facit chartam.* 5 Rep. 1.

^b *Relatio est fictio juris, et est intenta ad unum.* 3 Rep. 28, 29. 2 Inst. 591.

is denied, it shall be intended that it remains in Court, till the Plea is determined.

RULES concerning DEEDS.

SUCH Construction shall be always made of Deeds, that the
 *Intent of the Parties shall take Effect, if the same by any Con-
 struction may stand with the Rules of Law.

^a 2 Rep. 23.
⁶ Rep. 36.
^b If the Words of a Deed have a double Intendment, and the
 one standeth with Law and Right, and the other is wrongful and
 against Law, the Intendment which standeth with Law shall be
 preferred.

The Words of a Deed shall be taken 'most strongly against the
 Party himself, unless it be in the Case of the King.

The Words must be understood according to the 'subject
 Matter.

Thus have I shewn, how one may *purchase and convey by Deed*,
 setting forth the *Nature* of a Deed, and the several orderly and for-
 mal *Parts* of it. Now, because every Deed or Instrument is not
 fit to be used upon all Occasions, I shall give some Account of
 each *particular* Deed or Instrument, and of their peculiar *Use*.
 Therefore,

4. Of the several Sorts of Deeds or Instruments of Conveyance.

Deeds or Instruments, by which *Lands* pass from one to another
 are, 1. *Feoffment*. 2. *Fine*. 3. *Recovery*. 4. *Indentures* to lead
 the *Uses* of Fines and Recoveries. 5. *Covenants to stand seised to*
Uses. 6. *Bargain and Sale*. 7. *Grant*. 8. *Lease*. 9. *Lease and*
Release. 10. *Confirmation*. 11. *Assignment*. 12. *Exchange*. 13. *Sur-*
render. 14. *Revocation and New Declaration*. 15. *Statutes*. 16. *Ob-*
ligations. 17. *Defeasances*. 18. *Devise*.

1. 'A *Feoffment* (from *Feodum*, because it is a Gift of the *Fee*) is
 properly a Conveyance of a corporeal Fee by Livery and Seisin. Yet
 sometimes it is called a Feoffment, when an Estate of Freehold only
 doth pass in that Manner. These Words *his Heirs* make an Estate
 of Inheritance in all Feoffments and Grants. But this Rule hath
 several *Exceptions.

It is the only Conveyance in Law, that cleareth all Disseisins,
 Abatements, Intrusions, and other wrongful Estates, where the En-
 try of the Feoffor is lawful (which a Fine, Recovery, or Bargain
 and Sale by Deed indented and inrolled cannot do) because the
 Feoffor, re-entering to make Livery, re-continues his former Estate.

* *Benigna faciendae sunt interpretationes chartarum, ut res magis valeat quam pereat.*

¹ Inst. 36. a. 183. b.

Verba intentioni, non contra, debent inservire. Ibid. 8 Rep. 94.

Verba debent intelligi ut aliquid operentur. 8 Rep. 94. Bacon 18.

Verba accipienda sunt cum effectu. 4 Rep. 51.

^b *Verba aequivoca et in dubio posita intelliguntur in digniori et potentiori sensu.*
⁶ Rep. 20.

^c *Verba chartarum fortius accipiuntur contra proferentem.* 1 Inst. 36. a. 183. a.
⁵ Rep. 7. 10 Rep. 59. Bacon 11.

^d *Verba debent intelligi secundum subjectam materiam.* 1 Inst. 36. a.

* *Exceptio probat regulam.* 1 Inst. 9. b.

Exceptio in non exceptis firmat regulam.

^a Lit. 57.
² Inst. 295.

^b 1 Inst. 207 a.

^c Lit. 59.

^d 5 Rep. 94.
¹ Inst. 217. a.

^e 1 Inst. 48. a.

^f 1 Inst. 9. a.
49. a.

⁵ Rep. 84.

³ Cro. 94, 95.

388, 389.

Yelv. 151.

^g See p. 154.

ante.

^h 1 Inst. 48. a.

49. b.

⁶ Rep. 26.

ⁱ 1 Inst. 52. a.

181. b.

⁵ Rep. 91.

^k 1 Inst. 49. b.

52. b.

² Roll. Abr.

8, 9.

¹ Lit. 66.

¹ Inst. 52. b.

^a He that maketh the Feoffment is called the *Feoffor*, and he to whom it is made is called the *Feoffee*. It is made by these Words, Have *enfeoffed, given, granted*, tho' the Conveyance is not always so much to be known by the Words of Conveyance, as from the Estate and Nature of the Things conveyed. ^b A Lease and Release to a Man and his Heirs amounts to a Feoffment, if one was bound to make a Feoffment.

There must be ^c *Livery and Seisin* in all Feoffments in Fee, made out of a Court of Record, and in all Gifts in Tail, or Leases for Term of Life, where a corporeal Inheritance or Freehold doth pass; ^d which shews that a Freehold cannot be granted to commence *in Futuro*, or at a Day to come.

^e *Livery and Seisin* (or Delivery of Seisin) is a Solemnity, used in passing or conveying Freehold Lands or Tenements, by Delivery of Seisin thereof. It must be of ^f corporeal Freeholds, as Houses, Lands: Incorporeal pass by Deed only ^g. *Livery and Seisin* was invented, that People might have Knowledge of the Alteration of Estates from Man to Man. It must not be made by an Attorney upon the Day on which the Deed is dated, if the Deed is To have and to hold *from the Day of the Date*. For in such Case, the Feoffment, Gift or Lease for Life, and the Livery are void.

There are ^h two Kinds of Livery of Seisin, (*viz.*) A Livery in Deed, and a Livery in Law. 1. A Livery in Deed is, when the Feoffor taketh the Ring of the Door, Turf or Twig of the Land, or a Ring of Gold or any other Thing, tho' it doth not concern the Land, and delivereth the same upon the Land to the Feoffee, in the Name of Seisin of all the Land contained in the Deed. This Livery in Deed may be either by Words, and some solemn Act, or by Words without any solemn Act, if the Feoffor and Feoffee are upon the Land. In all Cases Words are necessary. If then Words may amount to a Livery within the *View* (as shall be presently set forth) when one is off the Land, much more shall it be, when one is upon the Land. The bare Delivery of the Deed on the Land may make it a Deed; but shall not amount to Livery of Seisin, unless it is delivered in the Name of Seisin of the Land. Livery and Seisin made to one before in Possession is ^{*} void. But if Lessor and Lessee come upon the Ground, on [†] Purpose to make and take Livery, that Entry vests no Possession until Livery. ⁱ A Man may make a Letter of Attorney, to deliver Seisin by Force of the Deed. But the Attorney must pursue his Warrant; otherwise he doth not deliver Seisin by Force of the Deed: If he do less, it is void. For he, that hath but a bare Authority, must pursue his Authority. If a Letter of Attorney is made to three *Conjunctim et Divisim* to make Livery, and two make it, the Third being absent, the Livery is void. A Letter of Attorney also may be made to ^k receive Livery and Seisin. This Warrant of Attorney must be by Deed, and not by Parol or Word of Mouth; because it concerneth the Freehold. The Letter of Attorney may be contained in the Deed of Feoffment, though the Attorney is not made Party. The ¹ Death of the Feoffor, or Feoffee, is a Countermand of the Authority, or of the

^{*} *Quod semel meum est, amplius meum esse non potest.* 1 Inst. 49. b.

[†] *Affectio tua nomen imponit operi tuo.* Ibid.

Letter of Attorney. But not the Death of a Mayor in the Grant of a Mayor and Commonalty; nor of a Dean in the Grant of a Dean and Chapter, for aggregate Bodies never die. But if a Lessor by his Deed *licenses* a Lessee for Life or Years to alien, the Death of the Lessor is no Countermand of the Licence. For the Licence exempts the Lessee from the Penalty of the Condition. 2. A Livery ^a in ^a *Inf.* 48. b. *Law* is when the Feoffor himself (not his Attorney) being in *View* ⁵² of the House or Land, saith to the Feoffee himself, (not his Attorney) after Delivery of the Deed, *I give you yonder Land to you and your Heirs, go enter into the same, and take Possession of it accordingly.* Now if the Feoffee doth go accordingly in the Life-time of the Feoffor and *enters*, or if he makes his *Claim* when he dares not go (for this is an Entry in Law) it is a good Feoffment and Livery to him, tho' the Land lies in another County. But if either the Feoffor or the Feoffee die before the Entry, the Livery is void. This is to be understood of sole Persons, or sole Corporations; not of Corporations aggregate of many Persons, as before hinted.

One may have an Inheritance in an upper Chamber, and pass it by Livery, tho' the lower Buildings and Soil belong to another.

If a Man makes a Lease for Years, and ^b afterwards makes a ^b *Inf.* 48. b. Feoffment, and delivers Seisin, while the Lessee is in Possession, and ² *Rep.* 31. 32. not assenting to the Feoffment, the Livery is void; for he doth not give Livery of the Possession, altho' the Feoffor hath the Freehold and Inheritance. But if the Lessee be absent, and hath neither Wife nor Servants (tho' he hath Cattle) upon the Ground, the Livery is good. If the Lessee, his Wife or Servants, had been in the House, or upon any Part of the Land to him demised, it would have been sufficient to have preserved and continued his Possession in the Whole.

^c If one makes a Lease for Years, Remainder to another for Life, ^c *Lit.* 60. in Tail, or in Fee, the Lessor must make Livery of Seisin (in *Deed*, ¹ *Inf.* 49. not in *Law*,) to the Lessee for Years; otherwise nothing passeth to him in Remainder. This Livery is for the Benefit of him in Remainder, for the Lessee hath only a Term for Years. But if Lessee entereth, before any Livery of Seisin made to him, the Livery is void. ⁴ If one makes a Feoffment to four, and Seisin is delivered ⁴ *3 Rep.* 26. to three, in the Name of all, the Estate is vested in all of them.

^e Tho' Lands and Tenements lie in divers Towns in one County, ^e *Lit.* 61. Livery and Seisin made in one Parcel of the Tenements in one Town, in the Name of all the Rest, is sufficient. But if Lands lie in divers Counties, there ought to be a Livery and Seisin in every County.

A Fee-simple may be got wrongfully ^f by Disseisin, Abatement ^f *Inf.* 10. a. or Intrusion into Lands and Tenements, or by Usurpation of Ad-vowsons, &c. *without* any Livery of Seisin.

If a House or Land belong to an ^g Office; by Grant of the Office ^g *Inf.* 49. a. by Deed, the House or Land passeth *without* Livery. ^h And in an ^h *Inf.* 50. Exchange, a Fine which is a Feoffment of Record, a *Devise*, *Sur-render*, *Lease* and *Release*, *Release* and *Confirmation* to Lessee for Years, or at Will, *Bargain* and *Sale* by Deed indented and inrolled, (because the Statute of 27 H. 8. ch. 10. gives the Possession to the Use,) a *Freehold* may pass without Livery. By Force of that Statute, a Feoffment to the Use of the Feoffor, Feoffee, or any other, supplies

supplies the Place of Livery and Seisin; so that Livery and Seisin upon Feoffments is not so commonly used as formerly; neither can Estates be created now by Livery and Seisin only without Writing. [See 29 Car. 2. ch. 3.]

^a 1 Inst. 159. b.

160. a. 315. a.

There are other *Seisins*, but they do not relate to Feoffments; as Payment of Money, before any Rent due, is a good *Seisin* of the Rent, to bring an Action for it. And so a Gift of a Pair of Gloves, &c. in the Name of Seisin of the Rent, is a good Seisin. Upon a Gift or Bargain and Sale of Goods and Chattels personal, the Delivery of Six-pence, or a Spoon, is a good Seisin of the Whole.

2. Of a Fine.

For the right Understanding of the Nature of a *Fine*, Enquire

1. What is a *Fine*.
2. How divided.
3. Who may levy or take by *Fine*.
4. Of what Estates may Fines be levied.
5. Before whom
6. The Force and Effect of a *Fine*.
7. How Fines may be avoided.

^b 1 Inst. 120. b.

121. a. 262. a.

West. Symb.

2 Part, Sect. 1.

1. ^b A *Fine* (*Finis*, improperly called a Deed) is an Instrument of Record of an amicable Composition or final Agreement, made betwixt Parties in Suit, concerning Lands, Tenements or Hereditaments, by the Consent or Licence of the King, or his Justices in the Court of Common Pleas, or others authorized, to end all Controversies between those that are *Parties* and *Privies* to the same, and all *Strangers* not claiming in due Time. It is called a *Fine*, because it makes a final Agreement of all Controversies. The *Civilians* call it *Transactio Judicialis De Re immobili*. Antiently it was a Composition of a real Controversy. But now it is generally a feigned Action upon a Writ of Covenant, and supposes a Controversy, when in Reality there is none, to secure the Title that a Man hath in his Estate against all Men; or to cut off Entails, and with more Certainty to convey the Interest or Title of Lands, to whom he pleases, either in Fee-simple, Fee-tail, for Life or Years; whereupon also a Rent may be reserved. A Concord cannot be of any other Thing, than what is contained in the Writ of Covenant. This ^a *Fine* is a Feoffment of Record, and doth imply in it Livery and Seisin, as abovementioned.

^a 1 Inst. 50. a.

^a 5 Rep. 38.

39.

^a 1 Inst. 511.

517.

Coke De Fi-

nibus Levat.

Lectio prima.

There are five Parts in every *Fine*. 1. An original *Writ*, usually a Writ of Covenant, taken out against the Conusor. 2. The King's Licence, for which he hath a *Fine* called the King's Silver. 3. The Concord itself, or the Agreement betwixt the Parties, how the Land shall pass, which is the Ground of the *Fine*. It begins thus, *Et est Concordia Talis*, upon which, if the King's Silver is entered, the *Fine* is good, tho' the Conusor dies afterwards. 4. The Note of the *Fine* or Abstract of the Original Writ and Concord, beginning thus, *Inter A. Querentem & B. & C. uxorem ejus Desercentes*. 5. The Foot of the *Fine*, (or the last Part of it) which includeth all, and beginneth thus, *Hæc est Finalis Concordia*, setting forth the Day, Year, and Place, and before what Justices the Concord was made. Of this there are Cyrographs or Indentures made, which is called the Ingrossing of the *Fine*. For the *Fine* is said to be ingrossed, when the Cyrographer maketh the Indentures, and delivers them; one for the Buyer, another for the Seller.

^a F. N. B. 167.

^a 1 Inst. 468.

He who acknowledges the *Fine* is called *The Cognizor* or *Conusor*, or *Desercent* (i. e. he that casteth out by Force,) and he to whom the *Fine* is acknowledged, or levied, is the Plaintiff, called the

the Cognizee. These Terms of Cognizor and Cognizee come from *Cognosco*, which signifies to *acknowledge*, as well as to *know*.

2. Fines may be thus *divided*. They are either *single* or *double*. A *single* Fine is that, by which nothing is granted or render'd back again by the Cognizees to the Cognizors, or any of them. A *double* Fine containeth a Grant and Render-back again, either of some Rent, Common, &c. out of the Land, or of the Land itself.

Also of Fines there are *four* Kinds. 1. ^a A Fine *sur Cognizance de Droit come ceo que il ad de son Done*, (i. e. upon Acknowledgment of the Right of the Cognizee, as that which he hath of the Gift of the Cognizor.) It is a single Fine and admits the Possession (at least in Law) of the Lands by virtue of a Feoffment or former Gift of the Cognizor, and works by Way of Release, a Fee-simple passing without the Word *Heirs*, and nothing being render'd back to the Cognizor. This is the principal and surest Fine, and is a Fine executed; so that the Cognizee may presently enter. 2. A Fine *sur Done, Grant and Render*; which is a double Fine, (being in a Manner two Fines, (viz.) a Fine *sur Cognizance come ceo*, and a Fine *sur Concessit*;) and where the Cognizee, after a Release and Warranty made to him by the Cognizor, doth grant and render-back to the Cognizor the Lands, limiting oftentimes thereby Remainders to Strangers not named in the Writ. If the Party is in Possession, this Fine is executed, otherwise he must enter or have the Writ of *Habere facias seisinam*. 3. A Fine *sur Cognizance de Droit tantum*; which is commonly used to pass a Reversion. It may be expressed in such Fine that the particular Estate is in another, whom the Cognizor is willing should have the Reversion. Sometimes it is used by Tenant for Life, to make a Grant and Release to him in Reversion. In a Fine *sur Cognizance de Droit tantum*, the Cognizee hath a Freehold in Law in him, before he enters. 4. A Fine *sur Concessit* is where the Cognizor is seised of the Lands contained in the Fine, and the Cognizee hath no Freehold there, but it passeth by the Fine. It is commonly used to grant away ^a Estates for Life or Years. And if the Cognizees are not in Possession they must enter, or have a Writ of *Habere facias seisinam*.

Hence also appears ^a another *Division* of Fines, (viz.) that they may be *executed*, where the present Estate passeth to, or is supposed in the Conusee; or *Executory*, to be executed afterwards by Entry, Action, or Writ of *Habere facias Seisinam*, or *Scire Facias*.

Also a Fine is either ^a *without Proclamations* or *with Proclamations*. 1. That *without Proclamations* is a Fine at the Common Law. 2. That *with Proclamations* is a Fine according to the Statutes of 4 H. 7. *cb.* 24. 32 H. 8. *cb.* 36. 31 El. *cb.* 2. They are absolutely necessary upon Fines *sur Cognizance de Droit come ceo*. These Fines with Proclamations are the best, and most used. And if there be Error in the Proclamations, yet the Fine shall be taken as a good Fine at Common Law, (viz.) to work a Discontinuance of the Estate of the Cognizor. But every Fine levied shall be intended to be *with Proclamations*, because most beneficial for the Cognizee; the Proclamations being made to distinguish it from a Fine at Common Law.

By

By 31 El. ch. 2. *All Fines with Proclamations shall be proclaimed only four Times, (viz.) Once in the Term wherein they are ingrossed, and once in the three Terms next following.* [See 1 Mar. Sess. 2. ch. 7.]

3. Who may levy or take by Fine.

* 7 Rep. 32.
West. &c.
Part 2. Sect.
3, 4, 5, 6, 7,
&c.

The King, and all Persons, who may lawfully grant by Deed, may be *Cognizors*, or levy a Fine. Therefore Infants, Idiots, Madmen, Feme Coverts without their right Husbands, Monks, Friars, Nuns, are excepted. But as to Infants, Idiots, Madmen, Feme Coverts without their Husbands, tho' they ought not to be received, yet if they are admitted, their Fines are good and unavoidable; except in the Cases of Infancy and Coverture. If a Feme Covert is of full Age, and joins with her Husband to levy a Fine of her Lands, she must be privately examined whether she parts with the Right in her Land freely, or by Compulsion: But though she is not examined, if the Fine is received and recorded, it is good. Persons outlaw'd in personal Actions, or attainted of Felony and Treason, may be *Cognizors*, and levy a Fine, and it is good against all Persons; except the King, or Lord, of whom the Lands are holden. Civil Corporations, as Mayor and Commonalty, may levy a Fine of Land belonging to their Body. But Bishops, Deans and Chapters, Prebendaries, Parsons, Vicars, Heads and Fellows of Colleges, are restrained by *Statutes*, from levying of Fines of their

* Lit. 669,

670.

10 Rep. 42,

43.

1 Inst. 353. a.

2 Inst. 515.

2 Roll. Abr.

17.

* West. &c.

Part 2. Sect.

13.

11 Rep. 78.

* See of Leases,

post.

Inheritances to bind their * Successors. Tenant in Fee-simple, in Tail General or Special, Tenant in Remainder or Reversion, may levy a Fine. Tenant for Life may levy a Fine of Lands which he holdeth for Life, to hold to the Cognizee for Life of the Tenant for Life. If he grants a greater Estate it is a Forfeiture. So it is of Fines by Tenant in Tail after Possibility of Issue extinct, Tenant in Dower, Tenant by Curtesy. A Tenant for * Years cannot levy a Fine of his Term; nor Tenant by Copy of Court-Roll of his Estate. A Tenant in Common, Jointenant, or a Coparcener, may levy a Fine of their Parts.

* 3 Rep. 77,

78.

5 Rep. 124.

9 Rep. 105.

1 Wms. 520.

* West. &c.

Sect. 15.

Lit. 669, 670.

1 Inst. 353. a.

* See ch. 4.

§. 2. post.

All Persons that may be Grantees, or that may take by Contract, may be *Cognizees*, or take by Fine; as Infants, Persons of full Age, Feme Coverts, Idiots, Lunaticks, Corporations spiritual or temporal, Men attainted of Felony or Treason, Men outlaw'd in personal Actions, Bastards, but not those that are civilly dead, as Monks. An Infant or Feme Covert Cognizee need not to be examined, because the Fine is supposed to be for their Benefit.

Note, That the *Cognizor* or *Cognizee* must be seised of a Freehold, be it by right or wrong.

[See 21 Ja. 1. ch. 26. Which makes it Felony to levy a Fine in the Name of another Person not privy thereto.]

4. Of what Things may a Fine be levied?

* 5 Rep. 39.

2 Inst. 513,

514.

West. &c.

Sect. 25, 50.

Fines may be levied upon every *Writ*, by which Land is demanded, or by which Land is to be charged or bound, or which in any Sort doth concern Land. And Fines may be levied of all Things in Being which are inheritable, whether Ecclesiastical and made Temporal, or Temporal; as of an Advowson, Rectory, Portion of Tithes. Of an Honor, Manor, Leet, Messuage, Dove-house, Garden, Orchard, Land, Meadow, Pasture, Wood, Underwood, Office, Fishing, Warren, Fair, Toll, Waifs, Strays, Rent, Common, Hundred, Shares in the New River Water. [But not of a Peer's

* 2 Wms. 128. a

Peer's

Peer's Title of Honor^a] It may be levied of a Rent-Charge, that^a Sh. P. Cal. had no Being before. And as Fines may be levied of Things in Poss¹¹. session, so may they be levied of a Remainder or Reversion, ^b or of ¹⁰ Rep. 50. a Right in Futuro, or of a Possibility. ³ Rep. 90.

^c Lands given in Tail by the King's Letters Patent, or by Act of Parliament, the Reversion being in the King; or Lands restrained from Sale by Act of Parliament, [See 32 H. 8. ch. 36. *infra*.] Lands in the Right of one's Wife, without the Wife, [See 32 H. 8. ch. 28.] Lands assured for Dower or Term of Life, or in Tail to any Woman by means of her Husband, or his Ancestors, [See 11 H. 7. ch. 20. and 32 H. 8. ch. 36. 34 & 35 H. 8. ch. 22.] cannot be convey'd away by Fine. Of a Lease for ^d Years, the Fine is void as to ⁵ Rep. 124. any Strangers, for a Freehold must be in the Cognizor or Cognizee as before-mentioned; however, it may be good betwixt the Parties by Way of Estoppel, so as to conclude them. A Fine may be levied by Tenant in Fee-simple, &c. for Years, or a Lease for Years may be made by it. But the Lessee for Years cannot levy a Fine of his Lease. A Fine by Copyholder of a ^e Copyhold Estate ³ Rep. 77. is also void, if it tends to the Disinheritance of the Lord. A Fine ⁷⁸. ought not to be levied of Lands in ^f ancient Demesne. For if any ² Inst. 513. Fine be levied of such Lands, it may be reversed by Writ of De- ⁵¹⁸. ceit, brought by the Lord of ancient Demesne. [¹ And such Writ ⁴ Inst. 270. will lie against the Heir of the Conusor or Conusee, and Non- ¹ Ld. Ray. 178, 179. claim is no Bar to it.]

A Fine levied of Lands in ancient Demesne, in the Court of an- ^{Comy. 93.} cient Demesne, is a Discontinuance, but not a Bar; because ¹ Salk. 340. Stat. 4 ^{H. 7.} does not extend to Fines in ancient Demesne.

Lands bought of divers Persons by several Purchases may pass in ^a one Fine. And such joint Fines are proper to save Charges, where ^b West, &c. the Purchases are of small value. ^{Part 2. Sect.}

5. Fines may be ⁱ acknowledged before the Lord Chief Justice of ²⁵ West, &c. the Common Pleas, or two of the Justices in open Court. This is ^{16, 17} Sect. 16, 17. call'd acknowledging a Fine at Bar. [See 18 Ed. 1.] But the Lord ² Inst. 512. Chief Justice may take Fines in any Place out of Court without ^{514, 515}. a Commission, and certify the same. Justices of Assize may do it by the general Words of their Patents. But they do not use to certify the same, before a special Writ of *Dedimus Potestatem* is sued out. Besides these, there may be Commissioners impower'd by *Dedimus Potestatem*, or Commission out of Chancery, to take Acknowledgment of Fines, and to certify them in the Life of the Cognizors into the Common Pleas, that they may be recorded. [See Stat. of Carlisle, 15 Ed. 2.] This last Method is often attended with great Abuses.

A Fine cannot be levied before any that have *Comusance* of Pleas ² Inst. 515. or Power to *hold* Pleas. It must be done only before the Justices of the Common Pleas. For the King cannot grant Power to hold Plea for the Levying of a Fine.

By 34 & 35 H. 8. ch. 26. Fines may be levied in Wales. By 37 H. 8. ch. 19. In the County Palatine of Lancaster. By 2 & 3 Ed. 6. ch. 28. In the County Palatine of Chester. By 43 El. ch. 15. In the City of Chester. By 5 El. ch. 27. In the County Palatine of Durham.

But Fines in these Counties must be of Lands lying in these Counties.

6. Of the Force and Effect of Fines. 1. With respect to *Persons*, that are to be barr'd. 2. With respect to *Estates* that are to be barr'd.

1. By the *Common Law* Fines executed bound all *Strangers* and those in Remainder and Reversion, if Claim was not made within a Year and a Day. But now this is no Bar: For by 4 H. 7. *ch.* 24. Five Years are allow'd. It still remains of Force, to work a *Discontinuance* of the Estate of the Cognizor, if it be executed.

The Force and Effect of Fines must be learn'd by a careful Perusal of the Statutes of 4 H. 7. *ch.* 24 and 32 H. 8. *ch.* 36. From these Statutes you may observe, that Fines do bar the Parties, *Privies* and *Strangers*.

To Bar, is to take away the Entry or Action of him that hath Right. The Parties are those that are named in the original Writ; or those that levy the Fine, and to whom the Fine is levied.

Now the Parties are presently barr'd, tho' they are under *Impediments*, and have no Time given them to avoid the Fine; except that an *Infant* is allow'd Time during his Minority to reverse his Fine, if he has passed away his Estate by it. If he dies in his Infancy, his Heir is not limited to any Time. At full Age he that was the Infant cannot do it, because his Infancy must be tried by Inspection of the Judges. If a married Woman under Age (of which the Judges may examine her upon Oath) doth levy a Fine with her Husband of her own Lands, she cannot reverse it during her Husband's Life; nor after his Death, if she is of full Age when he dies. She can only reverse it, if her Husband dies during her Minority. If the Wife without her Husband doth levy a Fine of her own Lands, wherein she hath a Fee-simple, it will be a Bar against her, and her Heirs, unless the Husband avoid it during her Life; or after her Death, if he is Tenant by Courtesy.

Idiots and *Madmen*, if they are admitted, are barr'd as Parties. *Corporations* which have in themselves absolute Right (not restrain'd by Statutes) are also barr'd presently as Parties. [See 1 Ri. 3. *ch.* 7. 4 H. 7. *ch.* 24.]

Privies (*Privè, Familiaris*) signify those that are Partakers, or that have an Interest in any Action or Thing with another, or any Relation to another. These are either *Privies* in *Estate*, as Donor and Donee, Lessor and Lessee, Jointenants, or *Privies* in *Blood*, as the Heir to the Ancestor, or between Coparceners, by *Privies* in *Blood*, *Privies* in *Blood inheritable* are to be understood; *Privies* in *Representation*, as Executors to Testators, Administrators to Intestates; *Privies* in *Tenure*, as Lord and Tenant. All which may be reduc'd to two general Heads, (*viz.*) *Privies* in *Deed*, and *Privies* in *Law*. *Privies* only in *Estate* are not to be understood here; but *Privies* in *Estate* and *Blood*, and by *Representation*.

Privies therefore, being *Heirs* to the Parties, are bound or barr'd presently for ever by a Fine, if they claim the same Title that their Ancestors had, that levied the Fine, whether under *Impediments* or no. For tho' the Issue in Tail is under *Impediments* (as within Age, under Coverture, *Non Compos Mentis*, in Prison, or beyond Sea,) yet such Issue in Tail is barr'd. For such Issue is out of the Saving of 4 H. 7. *ch.* 24.

* West, &c.
Part 2. Sect.
19.
Lit. 441.
1 Inst. 262.
a. & b.
2 Inst. 516,
518.
* See B. 4.
ch. 3. §. 2.
post.

* 1 Inst. 247. b.
2 Inst. 516,
522.
* 1 Inst. 131. a.
380. b.
2 Inst. 519.
West, &c.
Sect. 4. 8.
2 Roll. Abr.
15.

* 4 Rep. 125.
126, 127, 128.
1 Inst. 247.
a. & b.
* Plowd. 374.
376, 538.
11 Rep. 78.

* 1 Inst. 271. a.
3 Rep. 23.
4 Rep. 124.
8 Rep. 42.
2 Inst. 516,
522.

* 3 Rep. 87,
91.

* *Vigilantibus, non dormientibus, jura subveniunt.* 2 Rep. 26. 4 Rep. 10, 82.
2 Inst. 690. Coke's Compl. Cop. Sect. 55.

By

By 32 H. 8. ch. 36. (which expounds 4 H. 7.) *All Fines levied by any Person of full Age of Lands any wise entailed before the said Fine levied, either to the Person levying the same, or to any of his Ancestors in Possession, Remainder, Reversion, or Use, shall immediately after the Fine levied, engrossed, and Proclamations made, be a sufficient Bar against him, and his Heirs claiming only by Force of such Entail; and against all others claiming only to their Use, or to the Use of any Heir of their Bodies. Provided that this Act shall not extend to any Fine levied contrary to 11 H. 7. ch. 20. by any Woman of the Inheritance of her late Husband, and given or assigned to her in Dower for Life, or in Tail, nor to any Fine levied by him who is restrained by Act of Parliament, nor to any Fine of Lands entailed by Letters Patent or Act of Parliament, the Reversion whereof at the Time of such Fine levied is in the Crown.*

You see (from this Statute) that if the Cognisor is of full Age, he is concluded; and that if the Issue in Tail claims as Heir, by Force of the Estate-Tail, he is also after the Proclamations presently barred. But one that makes his Title as Heir to *another*, and not to him that levied the Fine, is not barr'd by the Fine.

^a If Land is given to the Husband and Wife, and to the Heirs of ^{1 Rep. 87.} their two Bodies begotten, and the Husband levieth a Fine with Proclamations, and hath Issue, and dieth; now this Fine by Force of this Statute shall bar the Issue in Tail, but shall not bind the Wife. So that in respect of the one it is a Bar, but in respect of the other it is no Bar.

^b The Issue in Tail shall be barred by the Fine, tho' the Tenant ^{3 Rep. 90.} in Tail was not seised thereof at the Time of the Fine. For Seisin ^{91.} is not required by the Statute. But the Tenant in Tail must be the Cognizor, to bar the Issue in Tail.

Tho' Land is entailed to one's Ancestor, and tho' the Ancestor is alive, so that no Estate is descended, which may pass, yet because the Statute saith, *Intailed to the Person so levying, or to any of his Ancestors*, in the Disjunctive, the Fine with Proclamations doth bar the Right, which after the Fine should descend to him; not only as to himself, but as to his Issue, tho' he that levied the Fine had but a Possibility.

Strangers to Fines are those, that are neither Parties nor Privies. Strangers have either a *present* or *future* Right, or an apparent *Possibility* of Right growing afterwards, or a Right to something *issuing* only out of Lands.

Strangers having ^a *present* Right, and no Impediment to make ^{West, &c. Part 2. Sect. 183, 184. 2 Inst. § 16. 3 Rep. 79.} their Claims, are bound by five Years after Proclamations, if they make not their Claim within that Time. Therefore if *A.* purchases Lands of *B.* by Feoffment or Bargain and Sale, and enrolls the same; and afterwards perceiving that *B.* had but a defeasible Title, and that *C.* hath Right to it; *A.* levies a Fine with Proclamations to a Stranger, or taketh a Fine from another with Proclamations, to the Intent to bar the Right of *C.* this Fine so levied shall bind all Strangers, that do not pursue their Right by Action or Entry within five Years. The Levying the Fine is lawful; for *C.* might enter or bring his Action within the Time appointed by the Statute. But those that have a present Right, and are under Impediment to make their Claim, as Infants, Feme Coverts, (other than such as are Parties) Persons of unsound Mind, Persons in Prison, or

out

out of the Realm, these and their Heirs have five Years Time to pursue their Right, after these Impediments are removed, *i. e.* Infants after their first coming to full Age, Feme Coverts after the Death of their Husbands, Persons of unsound Mind after the Recovery of their Wits, Persons in Prison after their Enlargement, Persons out of the

^a 3 Rep. 87.
91.

Realm, after their Return from beyond Sea. ^a For it is to be observed, that the *Savings* in 4 H. 7. ch. 24. extend only to Strangers to the Fine, and not to Parties or Privies. ^b But an *Infant* must claim within the five Years, if the five Years, for making a Claim after a Fine, began in the Time of his Ancestor. ^c If a Feme

^b 1 Inst. 246. a.

^c 7 Rep. 8.
10 Rep. 43.

Covert (as a Feme Sole) levies a Fine by herself, of Land whereof she is seised in Fee; this shall bar her and her Heirs, if her Husband doth not enter and avoid it. ^d If a *single Woman*, having present Right, takes a Husband, who suffereth five Years to incur, she

^d Plowd. 366.

is barred for ever; because it was her Folly, to marry such a Husband. ^e If a Feme Covert dies while she is Covert, being no Party to the Fine, [See 32 H. 8. ch. 28. as to Fines levied by the Husband only of the Inheritance or Freehold of the Wife] or *Non Compos* dies while *Non Compos*, or a Person in Prison dies while

^e 2 Inst. 519.
320.

he is in Prison, or one beyond Sea at the Time of the Fine levied never returns, the Heir is limited to no Time. Civil *Corporations*, as Mayor and Commonalty, being disseised, are barred by Fine and Non-claim, and five Years passed after Proclamations.

^f 11 Rep. 78.

^f But Bishops, Dean and Chapter, Prebendary, Parson, Vicar, Master and Fellows of a College, which are restrained by *Statutes* to alienate their Lands, cannot be barred by Fine and Non-claim; for they are prohibited to bar their Right by Conveyances, which Prohibition would have been to no purpose, if Power is left them by their Permission, or Sufferance, or Nonclaim upon a Fine, to bar it.

^g West, &c.
Part 2. Sect.
186.
2 Rep. 93.
9 Rep. 105.
10 Rep. 50.

Those that have no present, but a ^g *future Right*, upon a *present Cause*, and whose Right and Title cometh to them after the Proclamations, such Strangers to Fines being void of Impediments, have only five Years after the coming of such Rights, to enter and make their Claim. [See 1 R. 3. ch. 7. 4 H. 7. ch. 24.] As in the Cases of a Remainder or Reversion hereafter to be mention'd. But if these have Impediments, they shall have five Years after the Impediments removed, before their Laches shall be prejudicial to them. Therefore if a Wife does surcease her Time, and lets five Years pass after the Death of the Husband upon a Fine levied of her Inheritance or Freehold, she is barred of her Right, and cannot enter by Force of 32 H. 8. ch. 28.

^h West, &c.
Part 2. Sect.
188.
10 Rep. 49.
50.

Those that have neither present nor future Right, but only a ^h *Possibility* at the Time of Levying the Fine, or whose Right groweth either entirely after the Proclamations, or partly before and partly after, may enter and claim when they please. As if the Husband doth levy a Fine of his Lands, whereof his Wife is dowerable, and dies, and then five Years pass; yet the Wife is not barred of her Dower. For before his Death, the Wife had only a Possibility of Dower. And not a Title to it.

ⁱ West, &c.
Part 2. Sect.
190.
3 Rep. 124.

Those that have neither present nor future Right, or Possibility of Right to the Lands in the Fine at the Time of levying it, but a Right to something ⁱ *Issuing out* of the same, as Rent, Common, a Way, are not bound at all. For the Fine extendeth only to

secure

secure the Right or Title of the *Estate*, but does not bind the *Profits* to be taken out of the *Estate*.

2. Of the *Estates* that may be barred by Fine.

We have endeavoured already, to shew the Law concerning *Persons*, that have *present* and *future* Rights to *Estates*. We go on and say in general, that the Interest in *Estates* which may be barr'd by Fine, are either Interests by *Common Law*, or by Custom, as *Coppyholds*; whether they are in Fee-simple, Fee-tail, for Life, or Years, Remainders, or Reversions. The Interests also and *Estates* by *Statute-Merchant*, *Statute-Staple*, or *Elegit*, the *Estates* of Executors that hold Lands until Debts or Legacies are paid, may be barred. But more particularly,

^a If I have a *Fee-simple* and am disseised, and the Disseisor doth levy a Fine with Proclamations, and I do not claim within five Years after, I and my Heirs (Allowance being made for Impediments) are barred for ever. If I purchase a ^c bad Title in Fee-simple, a Fine with Proclamations will bar him that hath Right, if he doth not pursue his Right within five Years, as before observed.

^d If Tenant in *Tail* doth levy a Fine with Proclamations, according to 4 *H. 7. ch. 24.* and 32 *H. 8. ch. 36.* this is a Bar to the *Estate-tail*, and the Issue in *Tail*, as aforesaid. And if Tenant in *Tail* is disseised, or hath Right of Action, and the Disseisor doth levy a Fine with Proclamations, and five Years pass, the Right of the *Estate-tail*, or Issue in *Tail*, is barred; and he must suffer for the Negligence of his Ancestor, that was the first that had Right. So the Donor may be barred, if the Tenant in *Tail* dies without Issue. The like of the Laches of him in Remainder or Reversion; for it barreth him and his Heirs. But if Tenant in *Tail* makes a Feoffment, and the Feoffee levieth a Fine with Proclamation, the Issue in *Tail*, after the Death of the Father, shall have five Years; for he is the first, to whom the Right doth accrue after the Fine levied.

^e If Tenant for *Life* by *Covin* levieth a Fine with Proclamations, and five Years pass in his Life, yet the Lessor shall have five Years to make his Claim after the Death of the Tenant or Lessee, notwithstanding the Forfeiture. And if Tenant for *Life* makes a Feoffment in Fee, and the Feoffee levieth a Fine with Proclamations, it shall not bind the Lessor; but he shall have five Years after the Death of the Tenant for *Life*: But upon a *Disseisin* of Tenant for *Life*, and Fine levied, the Lessor and Lessee have but five Years after the Fine. For the Disseisor comes in openly, and without the Consent of the Lessee. But *Quære*, For the Lessor seems to be within the second Saving of the Statute of 4 *H. 7. Saving to all Persons such Actions, &c. as shall come after the Fine levied, &c.* And therefore he shall have five Years after the Action accrueth.

^f Lessee for *Years*, at *Will*, Tenant by *Copy* of Court-Roll, who pretend no Title to the Inheritance, but intend the Disinheritance of their Lessors or Lords, cannot by Fine bar them of their Inheritance; therefore if they make a Feoffment by *Assent* and *Covin*, that a Fine may be levied, it is void. But it is said, that the Lessor must claim within five Years after the Term is expired. [Sed Qu.]

S f f

^a 5 Rep. 124.
^b 9 Rep. 105.
Coke's
Compl. Cop.
^c 55.

^d Plowd. 353.
^e 356.
^f 3 Rep. 79.

^g 3 Rep. 79.
^h 9 Rep. 105.

ⁱ 1 Inst. 372. a.
^j 1 Inst. 298. a.
^k 372. b. 373. a.
^l 3 Rep. 87.
^m 9 Rep. 105.
West, &c.
Sect. 183,
186, 187.

ⁿ 3 Rep. 77.
^o 79.

^p 3 Rep. 79.
^q 1 Ventr. 241.
^r 9 Rep. 105.

^s 3 Rep. 77.
^t 9 Rep. 105.
Coke's Compl.
Cop. 5. 55.
^u Wms. 519.
^v 3 Rep. 78.
^w 1 Ventr. 241.
Contra,
Caf. Temp.
If Talbot 237.

If a Lease is made for Years, and the Lessor, or another, before
 * 5 Rep. 124. Entry of the Lessee, doth levy a Fine with Proclamations, and
 9 Rep. 105. the Lessee does not make his Claim within five Years, the Lessee
 is barred of his Interest for ever; and no Relief is to be had in
 Equity. For tho' the Lessee for Years cannot levy a Fine to a
 Stranger, yet he shall be barred by a Fine with Proclamations by the
 Tenant of the Land, or by one that is in Possession of it. If the
 Lessee be ousted, and by it the Lessor disseised, and the Disseisor
 b 3 Rep. 77. doth levy a Fine, and five Years pass with Proclamations and Non-
 79. claim, the Lessor and Lessee both are barred, and shall have but five
 9 Rep. 105. Years after the Fine levied; because they are within the first Saving
 Coke's of the Statute, and have a present Right.
 Compl. Cop. § 55.

So if one enters upon and puts out a Copyholder, and the Dissei-
 for doth levy a Fine of the Lands, and the Copyholder suffers five
 Years to pass after the Disseisin and Fine, without making any
 Claim, the Interest of the Copyholder, and of his Lord, are hereby
 barred for ever. This is not a Fine levied by Covin, because the
 Levying of the Fine is lawful, and the Disseisee may re-enter, or
 bring his Action within five Years, and the Lord must needs know
 of the Disseisin. So if a Copyholder makes a Feoffment in Fee,
 upon good Consideration, and the Feoffee levieth a Fine with Pro-
 clamations, and five Years pass, the Lord is barr'd. But if a Copy-
 holder levies a Fine, and five Years pass, the Lord is not barr'd,
 as before observed; for, the Copyholder having not a Freehold,
 the Fine is utterly void.

* 1 Infl. 372. a. He that hath Right to a Remainder or Reversion expectant upon
 2 Infl. 518. an Estate of Freehold, hath five Years allowed after the Remainder
 2 Lev. 52. or Reversion accrue. So if Tenant for ninety-nine Years, if he so
 long lives, levies a Fine and dies, they in Remainder, &c. shall have
 five Years after his Death, to avoid the Fine.

But if one hath a Remainder or Reversion depending upon an
 Estate for Years, and the Termor is disseised, and a Fine levied,
 and five Years pass, they are barred. For the Termor might pre-
 sently have entered, and he in Remainder or Reversion might have
 had an Affize for such Disseisin.

* 5 Rep. 124. Estates by Statute-Merchant, Statute-Staple and Elegit may be
 2 Infl. 517. barred, if they are out of Possession, and a Fine is levied, and five
 Years pass without Claim.

A Fine with Proclamations, and five Years pass'd, doth bar the
 Lord in antient Demesne of his Writ of Deceit. And likewise a
 Writ of Error is barred thereby. [But this appears not to be Law
 by subsequent Resolutions;] for the Fine was *Coram non Judice*,
 and the Lord claimeth not the Lands, but his antient Seigniorie.
 But these Fines make a Discontinuance, if they do not bar by the
 Statute of Non-claim.

Note, That no Fine shall bar any Estate in Possession, Remainder
 or Reversion, which is not devested and put to a Right. For he
 who hath the Estate or Interest in him cannot be put to his Action,
 Entry or Claim; because he hath that already, which the Action,
 Entry or Claim would give him. And therefore if one doth levy
 a Fine of my Land, while I am in Possession of it, this Fine will
 not hurt me. And if I make a Lease for Years of my Land,
 rendering Rent, and a Stranger levies a Fine of the Land, and the

the Lessee for Years payeth his Rent to me duly, I am not barr'd of my Reversion; because I was always in Possession, and not put to Right only. So if there is Tenant in Tail, Remainder in Tail, or Tenant for Life, Remainder for Life, and the first Tenant in Tail, or the first Tenant for Life, doth bargain and sell the Land by Deed indented and inrolled, and after doth levy a Fine to the Bargainee; in these Cases the Remainders are not bound, though the five Years pass without Claim. For the Law adjudges them always in Possession.

A Fine levied to deceive Creditors or Purchasers, shall not bar them, but shall be void as to them, as well as any other fraudulent Conveyance. [See 13 El. ch. 3. 27 El. 4.]

By 4 H. 7. ch. 24. The Fine, after the Ingrossing it, and Proclamations made, shall conclude as well Privies as Strangers to the same; except Women Covert, Persons under Age, in Prison, out of the Realm, or not of sound Mind, nor Parties to such Fine. And saving to every Person and their Heirs, other than Parties, such Right, Title, Claim and Interest, as they have at the Time of the Fine ingrossed, so that they pursue their Title or Interest by Way of Action or Entry within five Years after Proclamations made. And also saving to all other Persons such Action, Right or Interest, as shall come to them after the Fine ingrossed, and Proclamations made, by force of any Cause or Matter had before the Fine levied; so that they, (or their Heirs) pursue their Action or Right, within five Years next after the same doth accrue, or within five Years after the before-mentioned Impediments of Infancy, Coverture, &c. are removed. Otherwise they are concluded, as if they had been Parties or Privies to the said Fine. Lastly, Saving to every Person, not Party nor Privy to the said Fine, their Exception to avoid the same, by Reason that those which were Parties had nothing in the Lands comprised in the said Fine. [See 32 H. 8. ch. 36. ante. and see also 1 R. 3. ch. 7.]

All the Savings in this Act relate to Strangers only as to their present or future Right.

Infancy, Coverture, &c. of the Heir in Tail, gives no Claim to him, inasmuch as he is Privy.

The Saving to avoid the Fine, because the Parties had nothing in the Lands, relates also only to Strangers, or to every Person not Party or Privy.

See 5 H. 4. ch. 14. 23 El. ch. 3. and 27 El. ch. 9. For the Inrollment of Fines.

7. A Fine may be avoided, 1. By the Death of all, or some of the Parties, before the King's Silver is enter'd. 2. For Deceit or Covin in procuring it. 3. For some notorious Error in the Proceedings. A small Error will not avoid it. [See 23 El. ch. 3. 10 & 11 W. 3. ch. 14.] 4. By Claim, Entry (which must be an actual Entry) or Action of him that hath Right to the Land, if he claims, &c. in due Time. [See 21 Ja. 1. ch. 16. 4 & 5 Ann. ch. 16.] 5. By Plea, that neither of the Parties had any Thing at the Time of Levying the Fine in the Estate; and then one must shew, in whom the Estate was vested. This is allow'd only to Strangers to the Fine, not to Parties or Privies. [See 27 Ed. 1. St. 1. ch. 1. and the Exposition thereof, 2 Inst. 521, &c. and 4 H. 7. ch. 24. supra.]

3. Of a Common Recovery.

Therefore, 1. *What* is a Common Recovery. 2. *Who* may suffer a Common Recovery. 3. Of *what Things*. 4. *Before whom*. 5. *What is the Force and Effect* of a Recovery. 6. *How falsified, or avoided*.

^a 1 Inst. 154. a.
West. Symb.
Of Recoveries, Sect. 1.

^b 5 Rep. 40.
41.
10 Rep. 39.
42.

^c See p. 122.
ante.

1. A *Common Recovery* (*Recuperatio*) is a feigned and formal Suit and Judgment, upon a real Action brought in the *Common Pleas Court*, by one, against another that is seised of the Freehold, to destroy Estates in Tail, Remainders and Reversions, and to bar the former Owners thereof. ^b It is a *feign'd Suit*, and is now by Usage and Custom become a Common Conveyance and Assurance of Land, which the Judges will not suffer to be impeached or questioned, because so many Mens Titles to their Estates do depend upon it. Feign'd Recoveries, as well as Fines, were contriv'd and allow'd when Estates-tail came to be inconvenient. For an Estate in Tail ^c might possibly last for ever. A *true Recovery* is an actual and real Recovery of any Thing injuriously taken away or detained, or the Value thereof, by Judgment in the ordinary Course.

^d 1 Inst. 101. b.

There must be three *Persons* at least, to make a common or feign'd Recovery, (*viz.*) A *Recoveror*, a *Recoveree*, and a *Vouchee*. The *Recoveror* is the Plaintiff or Demandant, that brings the Writ of *Entry sur Disseisin*. The *Recoveree* is the Defendant or Tenant of the Land, against whom the Writ is brought. He must be perfect Tenant of the Freehold. ^d The *Vouchee* is he, whom the Defendant or Tenant voucheth (*a Vocando*) or calls to Warranty of the Land in Demand, either to defend the Right, or to yield him other Lands in Value, according to the supposed Agreement.

^e Dr. & Stud.
Dial. 1.
ch. 26.

Yelv. 211.

Now to suffer a *Common Recovery*, the Tenant of the Freehold agrees with the Demandant (some Friend) that he shall bring his Action real against him, as tho' he the Demandant had good Right to the Land, and the Tenant no Right of Entry to the same, but after a Disseisin, which a Stranger had unjustly made; whereas indeed the Demandant never had Possession thereof, nor the Stranger. The Tenant appearing to the Writ vouches or calls to Warranty *A. B.* (perhaps the Crier of the Court,) who is called the *Common Vouchee*, and is supposed to warrant the Title. This Vouchee shall appear as tho' he would defend the Title, and enter into the Warranty. But after Imparance shall make default, whereupon the Plaintiff or Demandant shall have Judgment, to recover the Land against the Defendant, or Tenant in Tail, and he to recover in Value against the common Vouchee. But this Recovery in Value is only imaginary; because the common Vouchee hath no Lands to render in Value; yet it is taken for a Bar of the Tail for ever; and is justified to be good in Conscience as well as Law (^f notwithstanding the Statute of *West. 2. ch. 1.* wherein it is provided, that the Will of the Giver shall henceforth be observed)

^g 10 Rep. 37.
38. 39. 40.
^h 1 Inst. 224. a.

ⁱ *Communis error facit jus.* Dr. & Stud. Dial. 1. ch. 26. 4 Inst. 240.
Semper in fictione juris subsistit equitas. 10 Rep. 40. 11 Rep. 51. 1 Inst. 150. a.
Fictio juris inique operatur alicui damnum aut injuriam. 3 Rep. 36.
Necessitas vincit legem. Quod necessarium est licitum est. 5 Rep. 40. 10 Rep. 61.
Necessitas est lex temporis. 8 Rep. 69.

and this, whether the Recovery be upon good Title or not. But it is said, that a common Recovery is not contrary to that Act, nor to the Intent of the Donor. [See 7 H. 8. *ch.* 4.]

A feigned Recovery is either with a *single* Voucher, as before ^{1 Inst. 102. b.} shewn; or with a *double* Voucher, where the Tenant voucheth ^{372. b.} one, who voucheth over the common Vouchee. And this is the most common and safest Way. Yet there may be more Vouchees, or more Vouchers over, where three or more are vouched. But the last is always the common Vouchee, who is worth nothing.

Note, That one may be a Vouchee and Voucher; as he is *call'd* upon, and then as he *calletb* upon another.

The common Recovery with *single* Voucher is to bar the Tenant in Tail, and his Heirs, only of such Estate-tail which is in his *possession* (not where he is put to a Right) with the Remainder dependent upon the same, and the Reversion expectant, which others have; and of all Leases and Incumbrances derived out of such Remainder or Reversion. The common Recovery with *double* Voucher is to bar the first Voucher and his Heirs, of every such Estate as at *any* Time was in him, or any of his Ancestors, whose Heir he is of such Estate; and all others of such Right in Remainder or Reversion, as was at any Time dependent or expectant upon the same; and of all Leases and Incumbrances derived out of them; and it will also be a Bar of such Estate, whereof the Tenant was then seised in Reversion or Remainder, expectant or dependent upon the same.

In a Recovery with *single* Voucher, the *Præcipe* or *Writ* of *Entry* must be brought against the Tenant in Tail in Possession, and he to vouch the common Vouchee. But in a Recovery with *double* Voucher, you must either by Fine, Feoffment, Bargain and Sale enrolled, or Lease or Release, make a Tenant of the Freehold of the Land demanded; and then bring the Writ against that Tenant, as the Conusee, Feoffee, Bargainee, and he to vouch the Tenant in Tail, and he the common Vouchee, who appears, and after makes Default. And then Judgment is given for the Demandant against the Tenant, and for the Tenant to recover in Value against the first Vouchee, and he to recover in Value of the second (or common) Vouchee. In like Manner it is in a *treble* Voucher, &c.

2. *Who may suffer a common Recovery?*

Those may be *Recoverors*, *Recoverees* and *Vouchees*, that may be Cognizors or Cognizees in Fines. [See who may *levy* or *take* by Fine, *supra*. And see 34 & 35 H. 8. *ch.* 20. 14 *El.* *ch.* 8. *infra*.]

An *Infant*, appearing by Guardian, cannot suffer a common Recovery. But if he obtains a Privy Seal for that Purpose, he himself is allowed to suffer a Recovery. [Yet it seems to be in the Discretion of the Court whether they will permit it to pass, and that tho' it is passed, it is voidable by Writ of Error.] A *Feme Covert* with her Husband is bound by a Recovery; but as in a Fine, she ought to be examined, (24.) And a Recovery suffered by *Cestui que trust* is good, and bars the Remainders.

T t t

A Tenant

A Tenant for Years cannot suffer a Recovery, for he is not Tenant of a Freehold. [As to Tenant for Life, see 14 *El. ch. 8. infra.*]

* 5 Rep. 5. A Stranger is not barred by a Recovery, or by Non-claim as in a Fine.

3. Of what Things?

* West, &c. Sect. 2, 3. A common Recovery may be had of such ^b Things (for the most part) as may pass by a Fine. An * Use may be raised upon a Recovery, as well as upon a Fine. [See of *Indentures to lead the Uses of Fines and Recoveries, infra.*] But neither Fine or Recovery can destroy an Estate executory, which depends upon Contingencies; because it is uncertain, whether there will ever be such an Estate in Being, for the Fine to work upon; for that is not like to an Estate in Remainder, because a Remainder is an Estate vested.

4. Before whom?

Common Recoveries must be suffered in the Court of Common Pleas by the Tenants and Vouchets personally in Court, or by their Attornies; or else in the Country upon a *Dedimus Poteſtatem*, or *Commiſſion* out of Chancery.

* Kitch. 176, 177, 178. Recoveries may be had in a Court-Baron by Custom. But others say without Custom, when by Usage Copyhold Lands have been entailed.

1 Cro. 391, 907. By 34 & 35 H. 8. ch. 26. Recoveries may be suffered at the Assizes or Great Sessions in Wales of Lands there.

1 Lev. 136. [See 23 *El. ch. 3. For Reformation of Errors in Fines and Recoveries, and as to the Inrollment thereof. And 27 El. ch. 9. For extending the Provisions for Reformation of Errors in Fines and Recoveries to those levied and suffered in Wales, and the counties Palatine; and for the Exemplification of Fines and Recoveries generally.*]

[See 34 & 35 H. 8. ch. 22. As to Recoveries in Towns corporate.]

5. The Force and Effect of a Recovery is, to cut off Estates-tail, Remainders and Reversions, and ^d all Leases and Incumbrances derived out of Remainders and Reversions, to enable Tenant in Tail to sell, give or devise the Estate in Fee, or in what Manner he pleases. * For the Recompence adjudged over shall go in Succession of the Estate, as the Land lost should have done, and then it would not be reasonable to allow the Heir Liberty to have the Land, and the Recompence in Value. Therefore he loseth the Land, and must trust to the Recompence. This supposed Recompence is the Reason, why a common Recovery is a Bar to all, that are in Remainder or Reversion, as well as to the Issues in Tail. Whereas a Fine bars only the Heirs in Tail, but not those in Remainder or Reversion; except upon Non-claim in due Time.

* 10 Rep. 38, 41. A Tenant in Tail cannot be restrained by Condition from suffering a Recovery. But a Covenant not to suffer a Recovery may be good, and bind him and his Affes.

1 Infl. 224. n. A common Recovery is the best Assurance (except an Act of Parliament) that Purchasers can have for their Money.

By 34 & 35 H. 8. ch. 20. No Recovery had against Tenant in Tail of the King's Gift (the Remainder or Reversion being in the King) shall bind the Heirs in Tail. ¹ Inst. 372. b. ^{373. a.} ² Rep. 15, 16.

6. A Recovery may be falsified (or proved false) and avoided. ¹ Inst. 104. b.
 1. By Writ of Error; when there is some gross Error in the Proceedings in Matter of Substance. As when an Infant, or Feme Covert without her Husband, suffers a Recovery [See 23 El. ch. 3. 16 Car. 2. ch. 9. 16 & 17 Car. 2. ch. 8. But see also 10 & 11 W. 3. ch. 14. That no Writ of Error shall be brought, to reverse a common Recovery, after twenty Years from the Time of the Recovery suffered, unless the Party is under any Impediment, in which Case it may be brought within five Years after the Impediment removed.] 2. By Pleading, that it is by Covin against Tenant for Life, to disinherit him in Reversion, or that he, against whom the Writ is brought, is no Tenant of the Freehold by Right or Wrong; or that he, that hath the Estate, is neither Party nor Privy to the Recovery; or where the Recovery is had against the Husband alone of the Wife's Land, [see 32 H. 8. ch. 28.] or of the Land to which his Wife hath Title of Dower; or because another hath some Estate in the Thing, whereof the Recovery is had, as a Lease for Years, [but see 14 G. 2. ch. 10. *infra*.] 3. By Motion to the Court, and praying a Vacat of the Judgment.

By 11 H. 7. ch. 20. A Recovery by Covin suffered by any Woman, either being sole, or with any after taken Husband, of any Estate in Dower, for Life, or in Tail, which she had jointly with her deceased Husband, or only to herself, of Lands of the Inheritance or Purchase of such first Husband, or given to such first Husband and Wife by such first Husband's Ancestors, shall be void; and he that hath Right may enter after her Decease. [See 32 H. 8. ch. 28.] ¹ Rep. 176. ³ Rep. 50. ^{51, 60, 61, 62.} ⁵ Rep. 79. ⁸ Rep. 71, 72. ¹ Inst. 326. b.

By 21 H. 8. ch. 15. A Termor for Years may falsify a common Recovery, had against him in Reversion, and shall enjoy his Term against the Recoveror according to his Lease. ¹ Inst. 46. a. ^{104. b. 335. a.} ² Inst. 322.

The Recoveror may have the same Remedy by Avowry or Action of Debt, for Rents and Services reserved upon such Lease, and due after such Recovery, and also like Action for Waste, as the Recoveree had. [See 7 H. 8. ch. 4.]

No Statute or Execution by Elegit shall be avoided by such feigned Recovery; but such Tenants shall have like Remedy, to falsify such Recoveries, as Tenant for Years.

By several Statutes Recoveries suffered by spiritual Persons, of Lands held in Right of their Churches, shall not bind their Successors. [See of Leases, *infra*.] ¹ Inst. 43. a. ^{342. a.}

By 14 El. ch. 8. All Recoveries had by Agreement of the Parties, or by Covin, against Tenant by Curtesy, Tenant in Tail after Possibility of Issue extinct, for Term of Life or Lives, or of Estates determinable upon Life or Lives, shall be void against them in Remainder or Reversion, and against their Heirs and Successors.

This Statute extendeth not to any Recovery, unless it be by Agreement or Covin; nor doth it prejudice any one, that shall by ¹ Rep. 75. ³ Rep. 60, 61. ¹⁰ Rep. 45. ¹ Inst. 362. a.

* Consensus tollit errorem. 5 Rep. 36, 40. 1 Inst. 294. a. 2 Inst. 123.

good Title recover Lands, &c. And if there be Tenant for Life, Remainder in Tail, Remainder or Reversion in Fee, if Tenant for Life be impleaded by Agreement, and vouch Tenant in Tail, and he vouch over the common Vouchee, this shall bar the Remainder and Reversion in Fee, tho' he in Remainder or Reversion did never assent to the Recovery. It was never the Intent of the Act, to extend to such a Recovery, in which a Tenant in Tail was vouched. For he hath Power by common Recovery, if he were in Possession, to cut of all Remainders and Reversions. But if Tenant for Life had suffer'd the Recovery without the Assent of him in Remainder, the Recovery had been void. So if Tenant for Life surrender to him in Remainder in Tail, Tenant in tail may by Recovery bar all Remainders and Reversions expectant upon his Estate. And a Surrender of Tenant for Life shall be presumed ^a on a Recovery of forty Years standing. (24.)

Where the *Proviso* of this Act speaketh of an Assent of Record by him in Remainder or Reversion, it must be understood that such Assent must appear upon the same Record.

By 14 G. 2. ch. 20. *Common Recoveries of Lands on which there are outstanding Leases, for one or more Lives, under reserved Rents, shall be valid without the Surrender of such freehold Lease, and without the Concurrence of, or Conveyance from, such Lessee, in order to make a good Tenant to the Writ; provided that the Person intitled to the first Estate for Life, or other greater Estate (in case there be no such Estate for Life in Being) in Remainder next after the Expiration of such Lease, convey, or join in conveying, an Estate for Life at the least, to the Tenant to the Writ. And,*

Purchasers for valuable Consideration, or any claiming under them, where a Recovery was necessary to complete the Title to such Purchase, may, after twenty Years Possession from the Time of such Purchase, produce in Evidence the Deed to make a Tenant to the Writ; and such Deed (the Execution thereof being duly proved) shall be deemed a sufficient Evidence that such Recovery was duly perfected, in case no Record can be found of such Recovery, or the same should appear not to be regularly entred on Record; provided the Person making such Deed had sufficient Estate to make a Tenant to such Writ, and to suffer such Recovery.

And every Common Recovery shall after twenty Years from the Time of Suffering be deemed valid, if it appears upon the Face of the Recovery, that there was a Tenant to the Writ, notwithstanding the Deed for making the Tenant doth not appear^b, or the Deed or Fine for making the Tenant was levied or executed after the Time of the Judgment given in such Recovery, and the Award of the Writ of Seisin; provided the same appear to be levied and executed before the End of the Term, Session, or Assize, in which such Recovery was suffered, and that the Persons joining in such Recovery had a sufficient Estate to suffer the same.

^a See of Felony, B. 3. ch. 1. post.
¹ Rep. 100, 175, 176.
² Rep. 57.
³ Rep. 26.
⁴ Rep. 14, 15.
⁵ Inst. 271. b.
¹ Ld. Ray.
287, &c.

[^c See 21 Ja. 1. ch. 26. Whereby the Suffering a Recovery in the Name of another Person without his Consent is made Felony.]

⁴ Indentures to lead the Uses of Feoffments, Fines and Recoveries, are Writings indented made by the Parties (before or after the Feoffment, Fine or Recovery) to declare the Intent of the Parties, how the Lands are to be settled by the Feoffment, Fine or Recovery. On a Bargain and Sale of Lands no Use may be declared, but

but what the Law doth make, (*viz.*) to the Use of the Bargainee; nor upon a Covenant of Uses, but what is contain'd or averr'd within the Deed. Where no Uses are declared, the Feoffment, Fine or Recovery shall enure to the Use of the Feoffor, Cognizor, &c. But if the Conusee of a Fine levied of Lands doth pay Money to the Conusor at the Time of the Fine levied, and there is no Use declared to lead the Use of the Fine, the Law will construe the Fine to be levied of these Lands to the Use of the Conusee, or of him to whom the Fine is levied. 2 Ld. Ray. 802. contra.

The Husband cannot declare the Use of the Wife's Land against her Will, by reason of the Inconveniences that would follow. [But Coverture cannot be alledged against the Deed of a Feme Covert, to lead the Uses of a Fine, to which she is a Party, so long as the Fine continues in Force; neither can Infancy be alledged against such a Deed, for the Deed is supported by the Fine.] 2 Rep. 57. 58.

By 4 Ann. ch. 16. §. 15. *Declaration of Uses or Trusts of Fines and Recoveries, by Deed made after the Levying or Suffering such Fines or Recoveries, shall be good in Law; notwithstanding* 29 Car. 2. ch. 3. which requires Writing to pass Estates at the very Time of the Conveyance. 1 Ld. Ray. 289.

5. Of Covenants to stand seised to Uses. 1. What is an Use, and a Covenant to stand seised to Uses? 2. How are Uses divided? 3. What Uses require no Execution by the Statute.

1. What is an Use, and a Covenant to stand seised to Uses?

An Use is a Trust or Confidence, reposed in one, that *Cestuy que Use* (he to whose Use) shall take the Profits, and that the Tenant shall make an Estate according to his Direction. This is an Use at Common Law. But Uses may be raised either by *Transmutation* of the Estate and Possession, as by Feoffment, Fine or Recovery, or out of the Estate of the Owner of the Land; as by Bargain and Sale by Deed indented and inrolled, or by Covenant to stand seised to an Use, upon lawful Consideration, without Transmutation of the Estate or Possession. 1 Rep. 121. 1 Inst. 272. b. 1 Ld. Ray. 291. 1 Inst. 271. b. 1 Ld. Ray. 290.

An Use cannot be raised out of an Use.

A Covenant to stand seised to Uses, is when a Man (that hath a Wife, Children, Brother or Kindred,) doth by bare Covenant in Writing under his Hand and Seal agree, in Consideration of natural Love and Affection, Marriage, or other good Consideration, that for their or any of their Provision or Preferment, he and his Heirs will stand seised of Land to their Use, either in Fee-simple, Fee-tail, or for Life. A Man at Common Law could not, during the Coverture, limit an Estate to his Wife, but now by Deed he may covenant to stand seised to her Use, or make other Conveyance to another for the Use of his Wife. 1 Inst. 112. a. 7 Rep. 40. Brañ li. 2. ch. 12.

Also a Covenant to stand seised to Uses may be to the Use of a Stranger, but then it must be for Money; or other valuable Consideration, not for Love and Affection. Consideration of natural Affection only, and Consideration of natural Affection and 20*l.* will raise an Use to a Son. But Consideration of 20*l.* only, without natural Affection, will not raise an Use without Inrollment. 1 Rep. 176. 2 Rep. 85. 1 Lev. 55. 56.

A Covenant to stand seised to Uses is become a Conveyance of the Land since the Statute of 27 H. 8. ch. 10. This needs not be by Deed indented and inrolled, as a Bargain and Sale of a Freehold ought to

be, because that is particularly required by a subsequent Statute, as shall be shewn hereafter.

If the Party, to whose Use one *covenanteth to stand seised* of the Land, is not his Wife, or one that he intends to marry, Child, Uncle, Cousin, or one that his Kinsman intends to marry, no Use will arise, and so no Conveyance. ^a The Law allows in such Cases the Consideration of Blood and Marriage to raise Uses; as well as Money, and other valuable and profitable Consideration, when the Use is to a Stranger. ^b But it does not allow any trifling Consideration, as of Service, or old Acquaintance; yet where a Man conveyeth his Estate to others by ^c Feoffment, Fine, Recovery, or by Feoffment, Fine or Recovery to the Use of his *Last Will*, and afterwards declares the Uses in his last Will, he may appoint an Use without any Consideration. ^d But in a Covenant to stand seised, or in a Bargain and Sale, there must be a Consideration expressed, or specially averred, where the Consideration is general, (as for good Consideration) tho' the Matter so averred is traversable.

^e Many Deceits through Fraud or Fear were invented by Men, by Settling the Possession in one Man, and the Use in another; or by giving the Possession of their Lands to another, and to take the Profits themselves; insomuch, that the Possession and the Use were divided, which opened a Gap for Frauds and many Inconveniences. A Man knew not then against whom to bring his Action; the Wife was defrauded of her Dower; Lords of the Fruit and Benefit of their Lordships; therefore to prevent these and the like Abuses,

By 27 H. 8. *ch. 10.* It is provided, That the Use and Possession shall be always united, by declaring, *That where any are or shall be seised to the Use, Confidence, or Trust, of any other by reason of any Bargain, Sale, Feoffment, Fine, Recovery, Covenant, Contract, Agreement, Will, or otherwise by any Means whatsoever, Cestuy que Use, or be to whose Use the Lands are settled in Fee-simple, Fee-tail, for Life, Years, or otherwise, or in Reversion, or Remainder, shall be esteemed to be in lawful Seisin and Possession of such Lands, Reversion, or Remainder to all Intents and Purposes. And where one is seised of Lands to the Use or Intent, that another shall have an yearly Rent out of the same Lands, Cestuy que Use, (or be to whose Use the Rent is granted) shall be deemed in Possession and Seisin of the same Rent, and of like Estate, as he had in the Use.*

^f He that had the Use before this Statute, had no more than a Trust, or an Equity to have the Lands; and no Remedy for it but by *Subpoena* in Chancery. But now the Statute gives the Possession to the Use. And so in a *Covenant to stand seised to Uses*, the Statute executes the Agreement, as the Chancery would have done before, and gives the Land also to those that have Interest in the Use.

This is the Reason, That in Conveyances you set down in the *Habendum, To whose Use*, in order that they may have the Possession without Livery of Seisin.

But ^g four Things are required to the Execution of a Use within this Statute. 1. That there be a Person seised. For the Words of the Statute are, *Any Person stand or be seised.* ^h But the King, a Corporation, [See 2 & 3 *An. ch. 11.*] Lord by Escheat, [*Qu.*] an Alien, one attainted, Tenant by Curtesy or in Dower, cannot be enfeoffed, or seised to the Use of another, nor Tenant in Tail to the Use of himself and his Heirs, or any other and his Heirs. 2. That there

^a Plowd. 302.
² Roll. Abr. 783.

^b 2 Rep. 58.
⁶ Rep. 18.
¹ Inst. 271. b.
² Roll. Abr. 781.

^c 1 Rep. 176.
² Rep. 15.
¹¹ Rep. 25.
¹ Ld. Raym. 290.

^d 1 Rep. 121.
^{123, 124.}

^e 1 Rep. 87.
^{100, 121.}
^{21 E. 4. 23. a.}

^f 1 Rep. 126.
^{136.}

^g 1 Rep. 122.
^{127, 133.}
¹ Inst. 19. b.
² Cro. 50, 51.
^{401.}

^h But the King, a Corporation, [See 2 & 3 *An. ch. 11.*] Lord by Escheat, [*Qu.*] an Alien, one attainted, Tenant by Curtesy or in Dower, cannot be enfeoffed, or seised to the Use of another, nor Tenant in Tail to the Use of himself and his Heirs, or any other and his Heirs. 2. That there

there be a *Cestuy que Use* in Being; for the Words of the Act are, *Stand and be seised to the Use of any Person or Persons.* [See 10 & 11 W. 3. ch. 16.] 3. That there must be an Use in *Esse*, either in Possession, Remainder, or Reversion. 4. That the Estate of the Feoffees, out of which the Uses arise, be vested or transferred to *Cestuy que Use*; for the Words of the Act are, *And the Estate of such Person seised to the Use, shall be adjudged in Cestuy que Use.* If any of these fail, there is no Execution of the Use within this Statute.

2. *Uses* are thus divided.

There are ^a two Sorts of Uses. 1. In *Being*, either in Possession, ^{a 1 Rep. 121,} Remainder, or Reversion. 2. In *Contingency*, which by Possibility ^{122, 176.} may fall into Possession, Remainder, or Reversion. These remain at the Common Law, till they come in *Esse*. In every of these Uses there must be *Confidence* in the *Person*, and *Privy* in Estate.

Also a Use is *express* or *implied*. 1. *Express*, as when a Feoffment is made of Land to J. S. and his Heirs, to the Use of W. S. and the Heirs of his Body; or when I covenant to stand seised of the Land to the Use of my Wife for Life, and after to the Use of my first Son on her Body begotten, or to be begotten, and the Heirs of his Body. 2. *Implied*, when the Use is not declared betwixt the Parties, but is left to the Construction of the Law. ^b As when ^{a 2 Roll. Abr. 781, 782, 789.} a Man seised of Lands makes a Feoffment in Fee, without any Consideration, and it is not declared to whose Use; by Construction of Law it shall be to the Use of the Feoffor. ^c (24.) [But certainly ^{c 2 Ld. Ray. 802. contra.} where a Man makes a Feoffment without valuable Consideration to divers particular Uses, so much of the Use as he makes no Disposition of remains in him ^d; and that is the *old Use*.] And so where ^{a 1 Inst. 23. a.} a Man seised of Lands as Heir on the Part of his Mother, levies ^{a Comy. 160.} a Fine, and suffers a Recovery, and declares the Use to himself for ^{a Salk. 590.} Life, and then to his Wife for Life, then to the first and other Sons ^{1 Stra. 491.} in Tail, Remainder to his own right Heirs, the last Remainder in ^{a Wms. 139.} Fee is the antient Use, and shall descend to the Heirs of the Part of the Mother. [But where Tenant in Tail, with the Reversion in Fee *ex parte materna*, suffered a Common Recovery, it was held that the *old Use* was gone, and that the Estate descended to the right ^e Heir, *i. e.* the Heir *ex parte paterna*.] If there is such a Consideration, as the Law requires, then the Law will construe it, to be to the Use of the Feoffee. So when one doth bargain and sell his Land for Money to another, and no Use is expressed in the Deed, the Law will construe the Intent of the Parties, to be to the Use of the Bargainee and his Heirs. A Gift in Tail shall be to the Use of the Donee, Lease for Life or Years, to the Use of the Lessee. If Lessee for Life or Years grants over his Estate, without expressing to whose Use, it shall be to the Use of the Grantee; for there is an implied Consideration, as to pay the Rent to him in Reversion, to be subject to Forfeitures, and to be punished for Waste.

3. What *Uses* require no *Execution* by the Statute?

There are Uses, that need no *Execution*, by the Statute of 27 H. 8. ch. 10. As when a Man doth convey Lands to J. S. and his Heirs, to the Use of J. S. and his Heirs. And when Lands are conveyed to others in Trust after this or the like Manner, (*viz.*) ^a That the ^{a Crompr. Jur. 48.} Feoffees shall take the Profits, and deliver them to the Feoffor and ^b his

his Heirs. Such a Trust is not executed by the Statute, but remains as before, and is determinable in a Court of Equity only. * Also *Leases* for *Years* of Lands in Use (which Leases had their Being before, and are granted over in Use or Trust) are not executed by the Statute. And therefore, if a Lessee for Years of Lands assigns over his Estate to *A.* and *B.* and their Assigns, to the Use of the Grantor and his Wife, all the Estate is in *A.* and *B.* and the Grantor hath nothing but a Use or Trust, for which he hath his Remedy in Equity only. And yet if a Feoffment be made to the Use of *A.* and *B.* and his Assigns, for Years, this Use is executed by the Statute; because the Lease had not its Being before; and because the Words of the Statute are, *If any shall stand or be seised of any Lands*; whereas the Lessee for Years of Lands that had their Being before, was *possessed* only of his Term, and not seised of any Freehold. So there still remains an Use of ^b Goods and *Chattels* Personal, which is properly called an equitable Trust and Confidence. For one may still have such Things in Trust and to the Use of another. Here still the Use and Possession are divided, because not united by the Statute. Thus if an *Obligation* or *Statute-Merchant* or *Staple* be made to *A.* to the Use of *B.* this is a Trust of the same Nature. And if *A.* releaseth the Obligation, without the Consent of *B.* or gets the Money into his own Hands, *B.* shall have Relief against *A.* in a Court of Equity. And note also, when there are other Trusts and Confidences of Lands, that are not executed by the Statute, or of Chattels real or personal, and the Trustee proves false, or delays to execute the Trust, the Party grieved must have his Remedy in a Court of Equity; for there is no Remedy at Common Law.

* Dyer 369.
Crompt. Jur.
66.

^b Crompt. 45.
62.

* Coke's
Compl. Cop.
Sect. 54.
Kirch. 176.

* *Copyholds* Lands are not within the Statute of 27 H. 8. ch. 10. because the Transferring of the Possession by the sole Operation of the Statute, without Allowance of the Lord and Agreement of the Tenant, would tend to the Prejudice of the Lord and Tenant.

By 3 H. 7. ch. 4. *All Deeds of Gift of Goods and Chattels made in Trust to the Use of the Grantor, to defraud Creditors, shall be void.* [See 31 El. ch. 5. 27 El. ch. 4.]

By 29 Car. 2. ch. 3. *All Declarations and Creations of Trust of Lands or Hereditaments must be in Writing, signed by the Party, or by his last Will in Writing, or else void; except Trusts arising by Implication of Law, or transferred or extinguished by Operation of Law.* [See 4 An. ch. 16. §. 15. ante.]

² Vent. 361.
¹ Wms. 112.

Also all Grants and Assignments of Trusts shall be in Writing, signed by the Party granting or assigning, or devised by such last Will, or else of no Effect.

⁴ 2 Inst. 672.

6. A ^d *Bargain and Sale* is a real Contract upon valuable Consideration, for passing of Manors, Lands, Tenements or Hereditaments, by Deed indented, and inrolled within six Months after the Date of it, without Livery of Seisin or Attornment of Tenants. It is created by these Words, (*viz.*) *Have bargained and sold.* * Yet these Words are not absolutely necessary; for other Words, as alien, grant, covenant to stand seised, upon valuable Consideration, may amount to a Bargain and Sale, if it be by Deed indented and inrolled. He that sells is the *Bargainer*, and he that buys the *Bargaineer*.

* 7 Rep. 40.
8 Rep. 93.94.
2 Inst. 672.

¹ 1 Rep. 176.
11 Rep. 25.

In this Conveyance there must be some ^d *Valuable Consideration* given,

given, or at least said to be given, for the Land; for a Use cannot be raised by any Covenant, *Proviso*, or Bargain and Sale, upon a general Consideration. And tho' no Money, or other valuable Consideration, was really paid, yet the Bargain and Sale may be good, because no Averment (or Justification of the Exception) will lie against that which is expressly affirmed in the Deed. * A Consideration expressed in the Indenture is not examinable, whether true or false. However, where Money, or other valuable Consideration, is really given, tho' it is not expressed in the Deed, the Bargainee may aver it, and being proved, the Bargain shall be good. The Use must be always to the Bargainee upon a valuable Consideration; for he cannot stand seised^b to the Use of another. And at Common Law the Bargainee had only the Use; and by Force of the Statute of 27 H. 8. *ch. 10. For transferring Uses into Possession*, If a Man by his Deed had bargained and sold for valuable Consideration any Lands or any Estate of Inheritance, or Freehold, (as before explained) the same had been executed by that Act. But

By 27 H. 8. *ch. 16. No Estate of Inheritance or Freehold in any Land, or any Use thereof, shall pass or be made by reason only of any Bargain and Sale thereof, except such Bargain and Sale be made by Deed indented, and inrolled within six Months after the Date thereof in some Court of Record at Westminster, or in the County where the Land lieth, before the Custos Rotulorum, two Justices of the Peace, and the Clerk of the Peace, or two of them, whereof the Clerk of the Peace to be one, who shall inroll them in Parchment, and deliver them to the Custos Rotulorum within one Year after.*

This Act shall not extend to Land in Corporations or Boroughs, where the Corporation Officer hath lawfully used to inroll Deeds or other Writings. [See 5 El. *ch. 26. Concerning Inrollment of Bargains and Sales in the Counties Palatine of Lancaster, Chester and Durham*; 5 An. *ch. 18. For the West-Riding*; 6 An. *ch. 35. For the East-Riding*; and 8 Geo. 2. *ch. 6. For the North-Riding of the County of York.*]

This Statute is confined to the Conveyance of an Estate of Inheritance or Freehold by Bargain and Sale only.

If Lands are bargained and sold for Money only, the Deed ought to be inrolled; * but if for Money and natural Affection, the Estate will pass without Inrollment.

* The Inrollment must be in Parchment only, for the Strength and Continuance thereof, tho' the Indenture may be either in Parchment or Paper.

* If the Deed is inrolled the last Day of the six Months after the Day of the Date, it is a good Inrollment. If the Deed hath no Date, the Day of the Delivery is the Day of Date; and the Deed may be inrolled within six Months after the Delivery.

The six Months are to be computed at twenty-eight Days by the Month. When a Statute accounteth by the Year, Half Year or Quarter of a Year, then you must reckon according to the Kalendar. So a Twelve-month (in the Singular Number) includes the whole Year according to the Kalendar. But twelve Months, six Months, (in the Plural Number) shall be accounted after twenty-eight Days to every Month, (except in a *Quare Impedit*, where the Law reckons by the Kalendar, and by 13 G. 1. *ch. 29.* as Skin. 314.

to the Months limited for taking the Oaths); for the Month by the Common Law is but eight and twenty Days.

^a 1 Inst. 144. a.
² Inst. 673.

^a A Rent may be reserved out of a Bargain and Sale by Deed indented and inrolled; for now the Use and Possession pass together. And so out of any Conveyance of Lands or Tenements, tho' a Remainder or Reversion. [See 27 H. 8. ch. 10. *Ante*.]

Tho' after the Delivery and Acknowledgment, the Bargainor or the Bargainee dies before Inrollment, yet the Land passeth by this Act. For a Release of a Stranger to the Bargainee before Inrollment is good. And so a Recovery suffered against the Bargainee before Inrollment (the Deed indented being after within six Months inrolled) is good; for the Bargainee was Tenant of the Freehold at the Time of the Recovery. So that if two Bargains and Sales are made of the same Lands to two several Persons, and the last Deed is first inrolled, and afterwards the first Deed is also inrolled within six Months, the first Buyer shall have the Land. For when the Deed is inrolled, the Bargainee is seised of the Land from the Delivery of the Deed, and the Inrollment shall relate to it.

^b 2 Inst. 676.

^b Houses and Lands in any Corporation, having Authority to inroll, are exempted out of this Act, and Bargains and Sales of them are not injoined to be inrolled, tho' they have Power to inroll.

There can be no Inrollment of a Deed, unless it be duly and lawfully acknowledged.

Deeds are inrolled either by *Special Custom*, as in *London*; or by *Common Law*; or in pursuance of *Statutes*.

^c 2 Inst. 676.

Every Deed may be inrolled at Common Law for Security; but a Bargain and Sale of Freehold Lands must be inrolled. If a Deed is shewed in Court, or is in Custody of the Court, and by Mischance the Seal is broken off, the Court shall inroll the Deed for the Security of the Party.

^d 1 Inst. 225. b.
³ Inst. 173.
⁵ Rep. 52, 53.

Tho' a Deed is inrolled, yet one cannot ^d plead the Inrollment thereof, tho' it is of Record. And tho' it is exemplified under the Great Seal, one must shew forth the Deed itself under Seal, and not the Exemplification. But by 10 An. ch. 18. §. 3. *Where a Bargain and Sale inrolled is pleaded with a Profert in Curia, a Copy of the Inrollment thereof signed by the proper Officer, and proved to be a true Copy, may be produced, and shall be of the same Effect as the original Indenture would have been, if produced.* [For the Exemplification of the Inrollment of Letters Patent, See 3 & 4 Ed. 6. ch. 4. 13 El. ch. 6.]

[See also 23 El. ch. 3. 27 El. ch. 9. For the Inrollment of Fines and Recoveries; 29 Car. 2. ch. 3. As to the Inrollment of Recognizances; 4 & 5 W. & M. ch. 22. As to Pleading of Charters, or other Conveyances, inrolled, to Inquisitions returned by Coroners; 2 & 3 An. ch. 11. Concerning Lands vested in the Corporation for the Bounty of Queen ANNE by Deed inrolled; 2 & 3 An. ch. 4. 5 An. ch. 18. 6 An. ch. 35. 8 Geo. 2. ch. 6. Concerning Registers of Land in Yorkshire; 7 An. ch. 20. In Middlesex; 10 An. ch. 11. Concerning fifty new Churches to be built in London; 1 Geo. 1. st. 2. ch. 10. For the Inrollment of Deeds whereby Lands are given for the Augmentation of poor Livings; 1 Geo. 1. ch. 55. 3 Geo. 1. ch. 18. For the Inrollment of the Conveyances and Wills of Papists, &c. See also of Evidence, Judgments, B. 4. ch. 4. *post*.]

Note, That a Bargain and Sale of *Leases* for *Years*, or *Goods* and *Chattels* Personal, is not within 27 H. 8. *ch.* 16. or any other Statute. They are good at Law, as between the Parties, though not by Deed indented or inrolled, and though without any Consideration; for *that* in this Case is not examinable, when the Sale is acknowledged by Deed. [But see 29 Car. 2. *ch.* 3. and of *Leases* *infra*. And *how* Property in *Goods* and *Chattels* may be acquired, *ch.* 6. *post*. And of *Actions* on the Case, B. 4. *ch.* 4. *post*.]

7. Of Grants. 1. What is a Grant, and who may grant. 2. What Things may be granted, and therein of Election. 3. Of Attornment.

1. *Grant* (*Concessio*) is properly of an incorporeal Thing by Deed, whereof no Livery of Seisin can be made. It cannot be by Parol, (or Word of Mouth) and therefore Reversions, Advowsons in Gross, Tithes, Services, Rents, Common in Gross, must pass by Deed; and are said to lie in Grant. The Deed of incorporeal Inheritances doth equal the Livery of corporeal. [See 29 Car. 2. *ch.* 3.] A Feoffment is always applied to a corporeal and immoveable Thing. A Gift is of larger Extent, and is applied to Things moveable and immoveable; yet as to Things immoveable, when taken strictly, it is applied only to Lands and Tenements given in Tail. But Gift and Grant are often confounded.

Any natural Person or corporate Body (not prohibited by Law, as Infants, Women Covert, Monks,) may be a Grantor. But an Infant or Woman Covert may be a Grantee.

He that granteth is termed the Grantor, and he to whom the Grant is made, is the Grantee. And the Grant is usually made by these Words, (*viz.*) *Have given, granted and confirmed*, and then by Delivery of the Deed the Freehold doth pass. *Have given* and *granted* may amount to a Grant, Feoffment, Gift, Lease, Release, Confirmation, Surrender, at the Election of the Party, and may be pleaded as a Grant or as a Feoffment, Gift, Lease, as he pleases.

Regularly these Things are requisite in every good Grant.

1. That there be a Person able to grant. 2. That there be a Person capable of the Thing granted. 3. That there be a Thing grantable. 4. That it be done by Deed. 5. That there be an Attornment, where needful. 6. That there be an Acceptance by the Grantee of the Thing granted. [See of Grants by Bishops, &c. Of Leases, *post*.]

2. All incorporeal Things may be granted by Deed, as before said in the Description of a Grant.

All Chattels personal may be granted or given without Deed. [For Chattels real, See 29 Car. 2. *ch.* 3.]

Of every Thing uncertain, which is given or granted, the Grantee has his Election to make it certain.

2 Rep. 37.
1 Inst. 145. a.

RULES Concerning ELECTIONS.

2 Danv. Abr.
759. &c.

WHere nothing passeth to the Feoffee or Grantee before Election made by him, the Election ought to be made in the Life of the Parties.

But when an Interest passeth immediately to the Feoffee, Donee or Grantee, there Election may be made by him, or his Heirs or Executors.

When one and the same Thing passeth to the Donee or Grantee, and the Donee or Grantee hath Election, in what Manner or Degree he will take this, there the Interest passeth immediately; and the Party, his Heirs or Executors, may make Election when they will.

When Election is given to several Persons, the first Election made by any of the Persons, shall stand.

When an Election is given of two several Things, he which is the first Agent, or is to do the first Act, shall have the Election.

When a Grant is of Things annual, and which are to have Continuance, there the Election remaineth to the Grantor, where the Law gives him Election, as well after the Day as before. Otherwise it is, when Things are to be perform'd but once.

He that has Election may by his Act and Wrong lose it, and give it to the other Party.

3. I said that an *Attornment* might be requisite in every good Grant.

1 Inst. 309. a.

Now, An *Attornment* (from turning from one to another) is the Agreement of the Tenant to the Grant of a Seignior, or of a Rent, or of the Donee in Tail or Tenant for Life or Years to the Grant of the Remainder or Reversion made to another. By this the Tenant acknowledges his new Landlord. For otherwise, he that buyeth any Lands or Tenements, which are in the Occupation of a third Person, cannot get the Possession. It

1 Inst. 309. b.
322. a.

1 Inst. 312. a.
Noy's Max.
64.

is not necessary upon a Fine, or where the Estate is transferr'd to the Use by 27 H. 8. ch. 10. nor indeed upon any Grant but such as hath its Operation by the Common Law; nor where a Rent or Reversion is granted by Matter of Record; nor where it passeth by Devise. And it is never necessary, but where there is a Tenure, Attendance, Reversion, or Remainder, or Payment of Rent out of the Land. And therefore if an Annuity, Common, or the like, be granted for Life or Years, the Reversion may be granted without Attornment.

5 Rep. 81.

The End of Attornment is to perfect Grants, and therefore it cannot be made upon Condition, or for a Time.

1 Lit. 551,
&c.

1 Inst. 309. b.
310. a. &c.

Attornment is either *express* or *implied*. *Express* by Words or Writing. By Words only, as by saying, I attorn to you by Force of

* *Alternativa petitio non est audienda.* 4 Rep. 40.

Cujus est divisio, alterius est electio. 1 Inst. 166. b.

Electio semel facta non patitur regressum. 1 Inst. 146. a.

Quod semel placuit in electionibus, amplius displicere non potest. Ibid.

the said Grant; or I acknowledge myself your Tenant. By Writing indorsed on the Deed, or set down in any other Writing, which is the safest Way. And in both Cases, the Tenant may moreover deliver to the Grantee a Penny, or other Thing, by Way of Acknowledgment, that the Witnesses may better remember it. Implied by Law, as if a Reversion be granted to two by Deed, and the Tenant attorns to one of them according to the Grant. This Attornment is good, to vest the Reversion in both the Grantees.

It ought to be made in the ^a Life-time of the Grantor and Grantee. If the Tenant dies, he that has the Estate may attorn. But the Tenant must have Knowledge or ^b Notice of the Grant. When it is made, it shall have ^c Relation to the original Act of the Grantor, for the Law always regards the original Act. ^a 1 Inst. 315. d.
^b 1 Inst. 309. b.
^c 1 Inst. 310. b.
2 Rep. 93.
10 Rep. 49.
1 Inst. 310. d.

^d If a Reversion is granted for Life, the Remainder in Tail, the Remainder in Fee, the Attornment to the Grantee for Life shall enure to them in Remainder, to vest the Remainder in them.

^e The Attornment of an Infant to a Grant is good. The Husband must attorn for his Wife, and it will bind her. A Man that is Deaf and Dumb may attorn by Signs. But Non Compos cannot attorn. ^e 1 Inst. 312. b.
313. a. 315. a.

Attornment is so necessary, that before it be done, the Grantee cannot bring an Action or distrain. [See 32 H. 8. ch. 34.] But no Attornment was ever requisite to Grants to or by the King. ^f 1 Inst. 215. a. & b.

The Title of Attornment was a difficult and great Title, with its Appendixes by the Writ of *Quid juris clamat, Quem redditum reddit, Per quæ servitia*. But since the Statute of Uses, and since new Expedients have been found out by Fines to Uses, by Bargain and Sale, by Lease and Release, and by Deeds enroll'd, on which no Attornment is necessary, that Title is become of little Use. And,

By 4 Ann. ch. 16. All Grants and Conveyances to be made by Fine or otherwise, of any Manors or Rents, or of the Reversion or Remainder of any Messuages or Lands, shall be good without any Attornment of the Tenants, provided, that no Tenant shall be prejudiced by Payment of any Rent to any such Grantor or Conusor, or for Breach of any Condition for Non-payment of Rent, before Notice shall be given him of such Grant by the Conusor or Grantee.

This Act does not extend to Executions on Judgments in Ejectment, &c. but those remain as before, as to the Attornment of the Tenants to him that gains the Possession; for it relates only to Grants and Conveyances. And,

By 11 Geo. 2. ch. 19. which recites, That the Possession of Estates is rendered very precarious by the frequent and fraudulent Practice of Tenants in Attorning to Strangers who claim Title to the Estates of their Landlords, who are by that Means turned out of Possession, It is enacted, That every such Attornment shall be absolutely null and void; and the Possession of the Landlord shall not be construed to be any wise affected by it; but not to extend to vacate or affect any Attornment made in Consequence of any Judgment or Decree; or with the Privity and Consent of the Landlord; or to any Mortgagee after the Mortgage is forfeited.

^a Cuiusque rei potissima pars est principium. 10 Rep. 49.

R U L E S concerning G R A N T S.

^a Perkins, Tit. Grants, 65. **A** Man cannot grant that which he hath not, nor more than he hath.

¹ Inst. 309. b. ^b A Right of Entry, or Thing in Action, or Cause of Suit or Title for Condition broken, cannot be granted over to a Stranger. [See 32 H. 8. cb. 34. *ut supra*.] But see of *Assignments*, *post*.

^{215. a. & b.} ^{266. a.} ⁴ Rep. 66. ⁵ Rep. 24. A bare ^c Possibility of an Interest, which is uncertain, is not grantable.

¹ Inst. 146. b. Grants shall be construed according to the Substance of the Deed, and not according to the ^d strict grammatical Sense.

¹ Inst. 313. a. & b. Construction of Grants shall be made according to the ^e Intention of the Parties.

¹ Inst. 217. b. The Words of a Grant shall be ^f transposed, so as the Grant may take Effect.

¹ Inst. 183. b. ¹ Rep. 46. Where the Grant is ^g impossible according to the Letter, the Law will make such Construction, as the Gift by Possibility may take Effect.

See p. 239. ante. All Grants in the Case of a *Subject* shall be taken most strongly against him that made it, and most beneficial to the Grantee.

¹ Inst. 152. a. The ^h Incident shall pass by the Grant of the Principal; but not the Principal by the Grant of the Incident.

Grants must be certain as to the Person. For if a Grant be made to *A.* or *B.* it is void.

¹ Inst. 56. a. ² Inst. 501. ⁴ Inst. 111. ⁵ Rep. 12. ¹¹ Rep. 52. In the Grant of a Thing, ⁱ all Things necessary for the obtaining of it are included.

[See 13 El. cb. 5. 27 El. cb. 4. *Against fraudulent Grants*.]

8. Of *Leases*; and therefore, 1. *What is a Lease?* 2. *How many Kinds.* 3. *What Persons may make good and sufficient Leases.* 4. *How may they be avoided.*

1. *What is a Lease?*

¹ Inst. 43. b. ^{Lit. 57.} ^k A *Lease* (from *Laisser*, *Dimittere*, to part with) is a Demise or Letting of Lands, Tenements or Hereditaments unto another for

Term of Life or Years, or at Will, upon a reserved Rent. In all Leases there must be a Lessor and Lessee. He that demises or lets to farm is the *Lessor* (vulgarly call'd the *Landlord*) and he, unto whom it is demised, or let, is the *Lessee*, commonly called the *Tenant*.

¹ Inst. 45. b. ^{301. b.} The Words to make a Lease, are, ⁱ *demise, grant* and to *farm let*. Other Words, as *have given, granted*, may amount to a Lease; but *demise, grant* and *to farm let*, are the most usual.

^a *Nemo plus juris ad alium transferre potest quam ipse habet.* ¹ Inst. 309. ⁴ Rep. 24. ⁶ Rep. 57, 68. ⁸ Rep. 63.

^d *Falsa grammatica non vitiat concessionem.* ⁹ Rep. 48.

Falsa orthographia non vitiat concessionem. Ibid.

Ille numerus et sensus abbreviationum accipiendus est, ut concessio non sit iniuri. Ibid.

^e *Quælibet concessio fortissimo contra donatorem interpretanda est.* Inst. 36. a. ^{183. a.} ⁵ Rep. 7. ¹⁰ Rep. 59.

^f *Accessorium non ducit, sed sequitur suum principale.* ¹ Inst. 152. a.

Quod non valet in principali, in accessorio non valebit. ⁸ Rep. 78.

The Use in the Court of *Exchequer* is to make Leases in the King's Name by the Word *Committimus*; ^a which is good by the Custom ^a 1 Roll. Abr. 524. of that Court, though not good at Common Law.

2. How many *Kinds* of Leases?

There are several *Kinds* of Leases; as a Lease is either by *Parol* (*per Parole*, by Word of Mouth only) or by *Writing*. [See 29 Car. 2. ch. 3. *post*.]

Leases also are Leases for *Life*, for *Years*, or at *Will*.

1. A ^b Lease for *Life*, is when one hath Lands or Tenements ^b Lit. 56. let to him for Term of his own Life, or the Life of another, or ¹ Inst. 41. b. for the Term both of his own Life, and the Life of another. There must be *Livery* of ^c *Seisin* upon a Lease for Life, if it is not made ^a Lit. 59. by Covenants to stand seised to Uses, or Bargain and Sale by Virtue ¹ Inst. 50. a. of the Statutes of 27 H. 8. ch. 10 & 16. It cannot be made to ¹ Ld. Ray. 166. commence in ^a *Futuro*. For by the Common Law an Estate of ⁵ Rep. 94. Freehold must take Effect presently, either in Possession, Remainder, or Reversion. It must always be made in Writing; for it is not good by *Parol*. [See 29 Car. 2. ch. 3. *post*.]

By 8 Ann. ch. 1. *An Action of Debt for Rent may be brought on a Lease for Life, as well as for Years.*

2. A ^a Lease for *Years* is when a Man demiseth or letteth any ^a Lit. 58. Lands or Tenements to another, to have and to hold for a certain Number of Years agreed on between them. ¹ By Force and ¹ Lit. 59. 454. Virtue of which Lease the Lessee may enter into the said ^{455. 459.} Tenements. And tho' the Lessor dies before the Lessee enters, yet the ¹ Inst. 46. b. Lessee may enter; for no *Livery* of *Seisin* is to be given upon a ^{51. b. 270. a.} Lease for Years. The Lessee may grant over his Term before ^{& b.} Entry, as hath been said. For before Entry the Lessee hath ^{Noy's Max. 30.} *Interesse Termini*, or an Interest in it, and may take a Release of the Rent. Yet the Lessor cannot pass the Reversion by the Name of the Reversion, before the Lessee enters. If the Lessee dies before Entry, his Executors or Administrators may enter. But the Lessee is not in Possession, to bring an Action of Trespass, or to take a Release to enlarge the Estate, till actual Entry, if the Words of the Lease are *Demise*, *Grant*. If the Words are *Bargain* and sell for Consideration of Money, he is in Possession upon Execution of the Deed, ^{See p. 130. ante.} to bring Trespass, or to take a Release, by the Statute of Uses. Leases for Years must be made of Lands and Tenements, whereunto the Lessor may come to ^a *distrain*; not of incorporeal Inheritances ¹ Inst. 47. a. by common Persons or Subjects. Yet if a Lease is made of them by Deed, it may be good by way of Contract to have an Action of Debt, but one cannot *distrain* by Virtue of it. The King may make a Lease ^{See p. 20. ante.} of incorporeal Inheritances, because he may *distrain* upon all the other Lands of the Lessee.

Leases for Years also may be made of any *Goods* and *Chattels* personal; as a Stock of Cattle, a Sum of Money.

A Lease for Years may be either by *Parol* or *Writing*. [See 29 Car. 2. ch. 3. *post*.] And it may begin at a Time ^b *past*, *present* ^a 5 Rep. 94. or to come. But regularly in every Lease for Years the Term must ¹ Str. 651. have a certain ¹ *Beginning*; tho' whether it shall take Effect or not, ¹ 6 Rep. 35. may depend upon an Uncertainty, as upon a Limitation or Condition ^{36.}

¹ *Id certum est quod certum reddi potest.* 1 Inst. 45. b. 96. a. 142. a.

¹ *Id incertum est, quod certum reddi nullo modo potest.* 5 Rep. 6.

¹ Inst. 45. b.

Noy's Max.

65.

1 Roll. Abr.

850.

precedent. And tho' there is no Certainty of Years in the Lease, yet if by Reference to a Certainty it may be made certain, it is sufficient. As if one seised of Lands in Fee, grants to another, that when he pays him twenty Shillings, from thenceforth he shall have the Land for twenty-one Years; this is a good Lease for twenty-one Years from thenceforth. And in like Manner the Lease also must have a certain *End*. Therefore if the Parson of *A.* makes a Lease of his Glebe for so many Years, as he shall be Parson there, this cannot be made certain. But if he makes a Lease for three Years, and so from three Years to three Years, *so long as he shall be Parson*, this is a good Lease for six Years, if he continues Parson so long; but the Residue is uncertain. And so if one makes a Lease for twenty-one Years, *if he shall so long live*, this is a very good Lease for Years, and yet is a Certainty in an Uncertainty, and tho' a Lease for Years must have a certain *Beginning* and a certain *End*, yet the

^a 1 Inst. 46. a.

^a Continuance thereof may be uncertain; for the same may cease and revive.

^b Noy's Max.

67.

6 Rep. 36.

^b If a Lease be made for Years to *A.* and after the Lessor doth make a Lease for Years to *B.* regularly this Lease to *B.* is a good Lease, for so many Years of the second Lease as shall come after the first Lease is determined. A Lease for a thousand Days, Weeks, Months, or a thousand Years is good. If a Lease is made from Day to Day, or from Week to Week, for four Years, this is a good Lease for four Years. Also a Lease from Year to Year, *so long as both Parties please*, after Entry in any Year, is a Lease for that Year. So if one makes a Lease for a Year, and so from Year to Year, it is a Lease for two Years; and so from three Years to three Years, is a good Lease for six Years as aforesaid. If a Man leaseth Land for Years, it is a good Lease for two Years, to answer the plural Number. If there is Lessee for Years upon Condition, that he shall not alien any Part above three Years during the Term; and if he doth, that the Lease shall be void; now if he lets for three Years, and so from three Years to three Years during the Term, it is a Breach of the Condition.

^c Noy's Max.

65.

6 Rep. 35.

3 Cro. 511.

A Lease for Term of Years, tho' never so long, is but a Chattel; and tho' it be a very long Lease, it cannot be entailed. But the ^d Devise of a Lease for Years to one for Life, and afterwards to another during the Residue of the Term is good; because he hath it not by Way of Remainder, but by executory Devise. If a Lease for Years is made to a Man and his ^e Heirs, it shall go to his Executors. If a Lease for Years is made to a sole Corporation, and his Successors, it shall go to his Executors. [See 29 Car. 2. ch. 3. *post.*]

See p. 130. ante.

^d 8 Rep. 95.

96.

10 Rep. 47.

^e 1 Inst. 46. b.

388. a.

Noy's Max.

49, 99.

^f 1 Inst. 55. a.

See p. 131. ante.

3. A Lease at ^f Will is either at the Will of the Lessor or Lessee, or of both Parties. For it is regularly true, that every Lease at Will must be at the Will of the Lessor and Lessee. It may be made by *Parol* as well as by *Writing*, and of Things corporeal and incorporeal.

Note, That it is not material, whether any *Rent* is reserved upon a Lease for *Life*, *Years*, or at *Will*; except only in the Case of Leases for *Life* or *Years*, made by Tenant in *Tail*, *Husband* and *Wife*, and *Ecclesiastical* Persons, according to the Statute of 32 H. 8. ch. 28. hereafter to be mention'd; and except Leases *parol*, or by Word of Mouth. For,

By

By 29 Car. 2. ch. 3. *All Leases, Estates, Interests of Freehold, or Terms of Years, or any uncertain Interest in or out of Lands, or Tenements, not put in Writings and signed by the Parties making them, or their Agents authorized by Writing, shall have no greater Effect than as Estates at Will; except Leases not exceeding three Years from the making thereof, whereupon the Rent reserved shall be Two Thirds at least of the full improved Value of the Thing demised. And no such Leases, Estates, or uncertain Interests, not being Copyhold or customary Interests, shall be assigned, granted or surrendered, unless by Deed or Note in Writing, signed as aforesaid, or by Act and Operation of Law.* Prec. Chan. 208, 274, 402, 519.

If the Substance of the Lease be put in Writing, and signed by the Parties (tho' not sealed by them) it shall have the Force and Effect of a Lease for Life or Years; otherwise the Effect of a Lease at Will. But no Action of Covenant can be brought on such Writing. Leases that exceed three Years, must be made in Writing; and are usually made by Deed indented. Pr. Ch. 16;

By 11 Geo. 2. ch. 19. *The Landlord, where the Demise is not by Deed, may recover a reasonable Satisfaction for the Lands held by the Defendant, in an Action on the Case, for the Use and Occupation of what was so held or enjoyed. And if in Evidence on the Trial of such Action, any Parol Demise, or any Agreement (not being by Deed) shall appear, on which a certain Rent was reserved, the Plaintiff shall not therefore be nonsuited, but may make Use of it as an Evidence of the Quantum of the Damages to be recovered.*

There is a common Way of conveying by *mutual Leases*, or by Lease on each Side; and this is called a Conveyance by *Demise and Redemise*; and is proper upon the Grant of a Rent-charge.

3. What Persons may make good and sufficient Leases for Lives, Years, or at Will.

Every one that is seised of Lands in *Fee-simple*, may lease out his Lands for Life or Lives, for what Time he pleases, or at Will; except some that are restrained by Statutes, as shall be presently shewn.

Every one that is seised of an *Estate-tail* of any Lands or Tenements, may make any Lease out of it for his own Life, but no longer, unless it be by Fine or Recovery; or such a Lease as is warranted by 32 H. 8. ch. 28. If Tenant in Tail maketh a Lease for Life generally, it shall be construed to be for his own Life, that it may not work a Wrong. a. 1 Inst. 47. a. & b. 183. b. See p. 128. ante.

He that is seised of an Estate for his *own Life*, or the *Life of another*, may make a Lease for his own or the other's Life, accordingly as he is seised. Also he may make a Lease for Years, or at Will, of this Estate; and it shall be good, as long as the Estate for Life does last. If one grants Lands or Tenements, Reversions, Remainders, Rents, Advowsons, Commons, &c. and doth express no Estate, the Lessee or Grantee (due Ceremonies requisite by Law being performed) hath an Estate for his Life. But if Tenant for Life maketh a Lease generally, it is an Estate for his own Life; for if it should be a Lease for Life of the Lessee, it might be a Wrong to him in the Reversion. b. 1 Inst. 183. a. & b. See p. 128. ante.

Every one that is possessed of Lands or Tenements for Years, may make a Lease of all the Years, except one Day, or any other Part of it; or may make an Underlease to commence from his Death.

Z z z

Death. 737.

^a 1 Ld. Ray.
99.
¹ Str. 405.
contra.

Death. It must be granted for a lesser Time, than he hath that makes the Lease; ^a for if all the Estate is granted, it is an *Assignment* of the Lease. And if a Lessee for Years maketh a Lease for Life, the Lessee for Life may enjoy it for the Lessor's Life, provided the Term of Years lasts so long. But if he gives Livery and Seisin upon it, this is a Forfeiture of the Estate for Years.

Jointenants, Tenants in Common, and Coparceners, may make Leases for Life, or Years, or at Will, of their own Parts; and these Leases will bind their Companions.

¹ Ld. Ray.
268.

In some Cases, such Persons as are not seised in Fee-simple, nor able to derive Estates for Life or Years out of their own Estates, may lawfully make Leases for Life or Years, by special *Power* or *Proviso* enabling them to make such Leases. But then the Authority must be strictly pursued.

^b 1 Inst. 44. a.

There are ^b three Kinds of Persons, that at this Day may make absolute Leases for Life, Lives, or Years by several Statutes, who could not do so heretofore, (*viz.*) Tenant in Tail, Husband and Wife, one seised in Right of his Church.

^c 1 Inst. 44. a.
45. b.

1. By ^c 32 H. 8. ch. 28. Any Person seised of an Estate in Tail in his own Right is enabled by his Lease for Lives or Years to bind the Issues in Tail.

But not those in Reversion or Remainder. For if Tenant in Tail makes a Lease warranted by the Statute, and dies without Issue, the Lease, as to him in Reversion, or Remainder, is void. But if the Remainder be in the Tenant in Tail himself, and he makes a Lease for Years according to the Statute, or by Fine, this is good, and shall bind his own Remainder.

2. By the same Statute any Husband and Wife seised of any Estate of Inheritance in Fee-simple, or Fee-tail, in Right of his Wife, or jointly with his Wife, are enabled to make Leases for Life, Lives, or Years, so as to bind themselves and their Issue, or Heirs.

Provided, That all Leases made of Lands, being the Inheritance of the Wife, shall be made by Indenture in the Name of the Husband and Wife, and that she be made a Party to and seal the same; and that the Rent shall be reserved to Husband and Wife, and the Heirs of the Wife, according to her Estate of Inheritance therein; the Husband not to alien or discharge the Rent, or any Part thereof, longer than during the Coverture, unless it be by Fine levied by Husband and Wife.

¹ Inst. 326. a.
² Inst. 681.
⁸ Rep. 72.
See p. 248.
ante.

No Fine, Feoffment, or other Act, done by the Husband only, of the Inheritance or Freehold of the Wife, shall make any Discontinuance, or prejudice the Wife, or any other who is to enjoy it after her Decease; Fines levied by the Husband and Wife only excepted.

This Act shall not give Liberty to the Wife, or her Heirs, to avoid any Lease hereafter to be made of the Wife's Inheritance by the Husband and Wife for twenty-one Years or under, whereupon the accustomed yearly Rent for twenty Years before is reserved according to the Tenor of this Act.

If the Lease is not warranted by the Statute, it is a good Lease against the Husband, tho' not against the Wife. If it be an Estate-tail, the Husband and Wife cannot bind him in ^d Reversion, or Remainder.

3. By the same Statute, *Persons seised in Fee-simple in Right of their Churches, are enabled by their Leases for Life, Lives, or Years to bind their Successors.* [See 1 El. ch. 19. 13 El. ch. 10. post.]

As Bishop, Dean of his sole Possessions, Archdeacon, Prebendary, without Confirmation of the Dean and Chapter.

Ecclesiastical Corporations *Aggregate* of many, are not included here, as Dean and Chapter, but are left to their Liberty to make Leases as before. And *Sole* Corporations (with a proper Confirmation) have still (notwithstanding *this Act*) the like Liberty. [But see 1 El. ch. 19. post.]

[*This Act shall not extend to enable any Parson or Vicar, to make any Lease, otherwise than he might have done before.*]

And therefore if Parson or Vicar makes a Lease for three Lives, ^{1. Inst. 44. b.} or twenty-one Years of Lands accustomedly letten, reserving the ^{45. b.} accustomed Rent, it must be confirmed by Patron and Ordinary. The Common People have a Notion, that a Parson or Vicar may make a Lease for *three* Years, and bind their Successors by it without Confirmation; but it is void by their Deaths. [See 13 El. ch. 10. post.]

But to the making good such Leases by Tenant in *Tail, Husband and Wife*, and of those seised in Fee-simple in Right of their Churches, as *Bishops, &c.* ^{b. Nine Things are to be observed.} 1. The ^{1. Inst. 44. b.} Lease must be made by Deed indented. Therefore this Statute ^{a. & b.} does not extend to *Copyhold* Lands, which in their own Nature are demisable only by Copy. 2. It must be made to commence from the Day of the making thereof. But if a Lease is made for twenty Years to begin at *Michaelmas* next, it is said to be a *good Lease*. 3. If there be an old Lease in Being, it must be absolutely (not conditionally) surrendered or expired within a Year after the making of the New. [See 18 El. ch. 11.] 4. It must be either for Lives (all wearing out together) or Years; either one or the other; and not both, or a double Lease. 5. It must not exceed three Lives, or twenty-one Years, *from the Day of the making of it*; but it may be for fewer Lives, or a shorter Term. If it is for twenty-two Years, it is not only void for the Overplus, but for the whole. And if for ninety-nine Years determinable upon three Lives, it is also void. 6. It must be made of Lands or Tenements corporeal, out of which a Rent may be reserved, and not out of incorporeal Things, or Things that lie in Grant, as Advowsons, Tithes, Fairs, Franchises, whereout a Rent cannot be reserved. 7. It must be of Lands or Tenements which have been most commonly letten (by one that was seised of the Inheritance) to Farm, or occupied by Farmers, by the Space of twenty Years next before the Lease made; so that if it was let for eleven Years, at one or several Times, within those twenty Years, it is sufficient; for then they were *most commonly* letten by the Space of twenty Years. 8. There must be reserved yearly, during the whole Term, to the Lessors, their Heirs or Successors, so much yearly Rent or more, as hath been most accustomedly paid *within* twenty Years next before such Lease made. Fines, Heriots, or other casual Services may be omitted. If the Rent was reserved formerly at four several Days, and by the new Lease is reserved to be paid at one Day, it is good, if the whole Rent be reserved *yearly*. 9. The Lease must not be made without Impeachment of Waste, *i. e.* it must be so made as that the Lessee may

may be punishable for Waste. Therefore a Lease for Life, Remainder for Life, is not good, because it is dispunishable for Waste. [See 32 H. 8. ch. 28. at large.]

The Statute of 32 H. 8. hath enlarged the Power of Bishops, Deans, Archdeacons, Prebendaries. For by that Act they may make a Lease of Lands by Deed indented for twenty-one Years, or three Lives, without the Confirmation of the Dean and Chapter, provided they follow the Limitations in the Statute. This therefore was called the *Enabling Statute*. But because the Statute still suffered Bishops, Deans, Archdeacons, and Prebendaries with Confirmation of Dean and Chapter, Masters and Fellows of any College, Master of an Hospital and his Brethren, Parson and Vicar with the Confirmation of the Patron and Ordinary, to make Leases for Life or Lives, or Years, without any Stint at the Common Law, they are *disabled* or *restrained* by subsequent Statutes, to make any Estate or Conveyance, except Leases for three Lives, or twenty-one Years, with such Provisions and Limitations as in 32 H. 8. are required. For,

By 1 El. ch. 19. *All Conveyances or Estates made by any Archbishop, or Bishop, of any Manors, Lands, Tenements, or Hereditaments, belonging to his Archbishoprick, or Bishoprick, other than for the Term of twenty-one Years, or three Lives, from such Time as any such Grant or Assurance shall begin, whereupon the old accustomed yearly Rent or more shall be reserved, shall be utterly void.*

So that the Confirmation of the Dean and Chapter cannot now make good the Lease of an Archbishop or Bishop for a longer Time, as at Common Law. But it may make good a concurrent Lease for twenty-one Years, from such Time, &c. For the Act is still observed. And if an Archbishop or Bishop observes this Act, his Lease is good to bind * himself; but not to bind his Successors, unless all the Limitations prescribed by 32 H. 8. are pursued; for then the Confirmation of the Dean and Chapter is requisite.

This Act 1 El. is a private Act, whereof the Court will not take Notice without Pleading.

By 13 El. ch. 10. *All Gifts, Grants, Feoffments, Leases, Conveyances, or Estates, made by any Master and Fellows of a College, Dean and Chapter of a Cathedral or Collegiate Church, Master of an Hospital, Parson, Vicar, or any other having any Spiritual or Ecclesiastical Living, (other than for twenty-one Years, or three Lives, from the Time of making thereof, and whereupon the accustomed yearly Rent, or more, shall be reserved, and payable yearly during the Term,) shall be utterly void.* [See 14 El. ch. 11. and 18 El. ch. 11. post.]

These Words, * *or any other*, &c. coming after Parson or Vicar, who are of an inferior Order, will not comprehend Bishops, who are of an Order that is superior.

This Act shall not make good any Lease or Grant made by any College or Collegiate Church, for more Years than are limited by their private Statutes. [See 6 An. ch. 21.]

This Act shall not extend to any Lease to be made upon a Surrender of a former Lease, or by reason of any Covenant or Condition contained in any former Lease, so as the Lease to be made contains

not more Years than the Residue of the Years of the former Lease, nor any less Rent thereby reserved. [But see 18 El. ch. 11. post.]

This is a publick Act, and concerns all the Clergy.

4 Rep. 76.

Note therefore, That all Ecclesiastical Persons whatsoever, (sole or aggregate Corporations) are disabled or restrained by these two last Statutes, to alienate their Lands by any Means whatsoever, or to make Leases for above twenty-one Years, or three Lives, with, or without Confirmation, (*viz.*) Archbishops and Bishops, by 1 El. ch. 19. Masters and Fellows of Colleges, Dean and Chapter of Cathedral or Collegiate Churches, Chapters where there are no Deans, Masters of Hospitals and their Brethren, Dean, Archdeacon, Prebendary, Parson, Vicar, and other Ecclesiastical Persons, by 13 El. ch. 10. which Act hath been always construed beneficially to prevent Evasions against the true Meaning of it. Note, Parsons and Vicars had not their Powers enlarged by 32 H. 8. neither were they restrained till 13 El. but from thenceforth they are restrained from making any Leases or Grants, other than for twenty-one Years, or three Lives, with the Qualifications above-mentioned. And yet even such Leases must be confirmed by the Patron and Ordinary, because excepted in the enabling Act of 32 H. 8. and because they never could bind their Successors without Confirmation.

11 Rep. 76.

But Bishops, Deans, Archdeacons, Prebendaries, may make Grants of ancient Offices, with the ancient Fees and no more, as before at the Common Law; [but whether it be a necessary Office or not is no ways material, if it be an ancient one, that is, before 1 El.] For these Grants are not within the Statute of 32 H. 8. nor restrained by 1 El. or 13 El. because they are no Diminution of their Revenues. Yet to bind their Successors, these Grants must be confirmed by the Dean and Chapter, as before the Statute, because they are Grants at Common Law. They may not grant any new Office, or add any new Fees to old Offices. Neither may they grant their Offices otherwise than they have been granted. And therefore, where the ancient Grants of the Office have been to one, it cannot now be granted to two. And where the ancient Grants have been to two jointly, they may not be granted in Remainder one after another; neither may the Grant of these Offices be longer than for Life or Lives of the Grantees. And in Case any Grant is void, the Confirmation of the Dean and Chapter will not make it good.

1 Inst. 44. a.

10 Rep. 60,

61.

3 Cro. 50,

259. 279. 555.

2 Roll. Abr.

154.

2 Lev. 138.

4 Mod. 16.

1 Trelawney

v. Bishop of

Winchester,

K. B. Hil.

Term 30

Geo. 2.

By 14 El. ch. 11. The 13 El. ch. 10. shall not extend to Grants or Leases of Houses situate in Cities, Boroughs, Corporations, or Market-Towns, or the Suburbs thereof; or the Grounds appertaining to such Houses; so that they be not the Dwelling-Houses of such Grantors or Lessors, nor have above ten Acres of Ground belonging to them.

Provided, That no Lease shall be made by Force of this Act in Reversion, nor without reserving the accustomed yearly Rent at least; nor without Charging the Lessee with Reparations; nor for a longer Term than forty Years. Neither shall such Houses be alienated, unless for Recompence of Lands in Fee-simple, of as good Value, and of as great yearly Value, at the least.

This Statute gives no Power to Archbishops or Bishops to let Houses, otherwise than according to 1 *El. ch. 19*. But tho' they are not included, it is a general Law, extending to all the rest of the Clergy.

These Leases of Houses may commence *in Futuro*. But no Leases in Reversion, or concurring Leases, can be made of them.

And because divers Leases were made long before the Expiration of the former,

By 18 *El. ch. 11*. All Leases hereafter to be made by such Persons, as are mention'd in 13 *El. ch. 10*. of any their Lands or Tenements, whereof a former Lease for Years is in Being, not to be expired, surrendered, or ended within three Years next after the Making of such new Lease, shall be void. And all Bonds and Covenants for renewing or making of any Lease contrary to this Act, or to 13 *El. ch. 10*. shall also be void. But such Leases of Houses as are within 14 *El. ch. 11*. are not made void by this Statute which refers only to 13 *El. ch. 10*.

The 13 *El. ch. 10*. doth not (as hath been said) extend to Bishops; and therefore this Statute of 18 *El. ch. 11*. doth not extend to them. But both extend to all others that have Spiritual or Ecclesiastical Livings. And this is a general Law, whereof the Court ought to take Notice as well as of 13 *El. ch. 10*.

By 43 *El. ch. 9*. All Judgments had to the Intent, that a Lease should be enjoyed contrary to 13 *El. ch. 10*. 14 *El. ch. 11*. 18 *El. ch. 11*. shall be deemed void, as well as Bonds and Covenants.

By 1 *Ja. 1. ch. 3*. All Assurances of Archbishops and Bishops Lands to the King shall be void.

Masters and Fellows of Colleges, and all others having Ecclesiastical Livings, were before restrained by 13 *El. ch. 10*.

Now observe upon all these Statutes in Relation to Ecclesiastical Persons. 1. That neither of the restraining or disabling Statutes of 1 *El.* and 13 *El.* do in any Sort alter or change the enabling Statute of 32 *H. 8*. 2. That Leases made according to the Exception in 1 *El.* or in 13 *El.* and not warranted by 32 *H. 8*. (if they are made by a Bishop, Dean, Archdeacon, or any sole Corporation,) must be confirmed by Dean and Chapter, or in the Case of Parson or Vicar, by Patron and Ordinary.

Aggregate Corporations did never want any Confirmation.

Therefore to explain this Matter;

If a Bishop makes a Lease for one and twenty Years, and all those Years are spent, saving three or more (for the Number of Years to come is not material, the 18 *El.* not extending to Bishops) yet he may make a new Lease to another for twenty-one Years, to begin from the Making, according to the Exception of the Statute; and this concurrent Lease is good, as well upon the Exception in 1 *El.* in the Case of Bishops, as upon 13 *El.* which extends to Spiritual and Ecclesiastical Corporations aggregate of many, as Deans and Chapters, which 32 *H. 8*. did not. But the concurrent Lease of the Bishop must be confirmed by the Dean and Chapter; it not being warranted by 32 *H. 8*. A Bishop cannot make a concurrent Lease for Life or Lives, but only a concurrent Lease for Years upon a Lease for Years.

Not,

[*Note*, the Exception in 1 *El.* is different from 13 *El.* and 32 *H. 8.* for in 1 *El.* the Words are *for the Term of twenty-one Years from such Time as the Grant or Assurance shall begin*, (not be given or made, as it is misprinted in *Co. Lit.* 44. b.) and in 13 *El.* it is from the Time of making, and 32 *H. 8.* from the Day of making.]

Though the Statutes of 1 and 13 *El.* do not appoint the Lease to be made in Writing, or by Deed indented, yet it must therein, and in the other Properties before-mentioned, be made according to the Pattern of 32 *H. 8.* (the concurrent Lease only excepted.)

Tho' the Exception in 1 and 13 *El.* concerning the *accustomed Rent* is more general than that of 32 *H. 8.* and no Provision made for Impeachment of Waste, yet must the Pattern of 32 *H. 8.* be followed.

And tho' by 1 and 13 *El.* all Grants and Leases made (other ; *Rep. 6.* than Leases for three Lives, and twenty-one Years, without saying; or *Under*, according to those Acts) shall be utterly void; yet Grants or Leases, * for a shorter Time are good. And Grants and ; *Rep. 59, 60.* Leases, not warranted by those Acts, are good against the Lessor himself, if he is a sole Corporation; or if an aggregate Corporation, so long as the Dean, or other Head of the Corporation remains. For the Statutes were made and intended for the Benefit of the Successor. Therefore they may be good against the Lessors themselves, so long as the Lessors live; or at least so long as they continue in their Places. But of these Leases we must understand it thus—Leases by Bishops, not according to 32 *H. 8.* are voidable, tho' confirmed by Dean and Chapter. And so of a Dean and Chapter, after the Death of the Dean: But if an Archdeacon, Prebendary, Parson, or Vicar makes a Lease for Years, it is void by Death, if it be not made according to the Statutes. Otherwise it is of a Lease for Life; for that is only voidable, & *sic de similibus*; notwithstanding the Statutes say, that the Leases shall be void.

Where a Bishop, &c. makes a Lease, which may tend to the Diminution of the Revenues of the Bishoprick, &c. which should maintain the Successor, * there the Deprivation, or Translation of the Bishop, ; *1 Inst. 329. a.* &c. is all one with his Death. And the like doth hold in Case of ; *10 Rep. 62.* Resignation.

Upon the whole Matter it appears, 1. That Archbishops and Bishops may make Leases for twenty-one Years, or for one, two, or three Lives, with the Qualifications above-mention'd, without any Confirmation. And they may make concurrent Leases for twenty-one Years upon Leases for twenty-one Years *from the Making*, with Confirmation of Dean and Chapter, and with such Qualifications as aforesaid; tho' there be above three Years in Being of the old Lease at the Time of Making the new. But if they are not confirmed, they must follow the Directions of 32 *H. 8.* 2. Deans, Archdeacons, Prebendaries, Heads and Fellows of Colleges, Masters of Hospitals, Cathedral or Collegiate Churches, Parsons, and

* *Omne majus includit minus. Cui licet quod majus, non debet quod minus est n licere.* 4 *Rep.* 23. 5 *Rep.* 115. 9 *Rep.* 49.

Omne majus trahit ad se minus. 6 *Rep.* 43.

Quod licitum est pro minore, et pro majore licitum est. 8 *Rep.* 41.

Vicars, may make Leases for twenty-one Years, or any lesser Number of Years, or one, two, or three Lives in Possession, according to the Qualifications above-mentioned, and concurrent Leases^a, with Confirmation, if they are made within three Years of the Determination of the former Term; Bishops in this Case having the *Advantage*. When I say *with Confirmation*, Spiritual and Ecclesiastical Corporations Aggregate of many are not to be understood, as before observed.

There are other *Statutes* concerning *Leases* fit to be known. Therefore see 33 *H. 8. ch. 27.* and of *Corporations*, *B. 1. ch. 8. 13 El. ch. 20.* Concerning the Leases of the Benefices of Incumbents that are absent from their Benefices above eighty Days in one Year. 18 *El. ch. 6.* Concerning a third Part of the Rent to be reserved in Wheat and Malt upon College-Leases. 1 *W. & M. Seff. 1. ch. 16.* Concerning Leases made *Bond Fide* and for good and valuable Consideration by Persons simoniacally promoted; and 12 *An. St. 1. ch. 4.* Concerning Leases of Commons inclosed in the *West-Riding* of the County of *York*, for endowing poor Vicarages and Chapelries. And 1 *An. Seff. 1. ch. 7.* As to Leases of Crown Lands.

4. How may Leases be avoided.

^b 1 *Inst. 45. b.* ^b Leases for Lives or Years are of three Natures. Some are good, 214. *b. 215. a.* some voidable, some void.

1. Some are good at the *Common Law*, as those made by Tenant in Fee-simple, notwithstanding they are for longer Time than three Lives, or one and twenty Years; some good by *Act of Parliament*, as Leases made by Tenant in Tail; by a Man seised in Fee-simple or Fee-tail of Land in the Right of his Wife together with his Wife; by a Bishop sole seised in Fee without his Chapter; who now by Deed indented may make Leases for twenty-one Years or three Lives, as by 32 *H. 8. ch. 28.* is limited. All which were voidable at Common Law, tho' now made good by Statute.

2. Some are voidable at *Common Law*, after the Death of Lessor, as after the Death of Tenant in Tail, or Bishop, or after the Death of the Husband, if they are not warranted by 32 *H. 8. ch. 28.* Some voidable by *Statute*, as by a Bishop, tho' confirmed by Dean and Chapter, if not warranted by 32 *H. 8.* And so of a Dean and Chapter after the Death of the Dean. Some voidable at Times by the Lessor himself, or his Heirs, as in the Case of Infancy.

3. Some Leases are void in futuro; as if a Tenant in Tail makes a Lease for Years, and dies without Issue, it is void as to them in Remainder or Reversion, tho' made according to 32 *H. 8.*

^c 1 *Ld. Ray. 166.* If a Prebendary, Parson, or Vicar makes a Lease for Years, it will be void by his Death, if it is not according to the Statutes. Otherwise it is of a Lease for Life; for that is voidable by Entry; and so it is in like Cases. Some Leases are void in Presenti; as if one makes a Lease for so many Years as he shall Live. This is presently void for the Incertainty. So if one makes a Lease for Life without Livery of Seisin, 'unless made by virtue of a Power. [See of Surrenders *Infra*.]

9. Of Lease and Release.

I have shewn before what is a Lease. Therefore now, 1. What is a Release, and how divided. 2. Who may make Releases, or take

take them. 3. What Things may be released. 4. How Releases shall be construed. 5. What is the Conveyance by *Lease and Release*. 6. Of *Acquittances*.

1. A *Release* (*Relaxatio*) is a Deed or Instrument, whereby a Man doth give or discharge the *Right* or *Action*, which he hath or claimeth against another out of or in his Land, &c. It is usually made by the Words, *Remise, release, and for ever quit claim*, or by other Words to the same Purpose. He that releaseth is the *Releasor*, and he, to whom the Release is made, the *Releasee*.

They are of *two* Sorts, (*viz.*) A Release as to *Lands, Goods, and Chattels*; and a Release of *Actions**, whether real, personal, or mixt: For I said, it was a Discharge of a *Right* or *Action*.

Releases also are either *express* or *implied*. An *express* Release is the Act of the Party releasing, and is by Deed. An *implied* Release is that which the Law makes, and is sometimes by *Writing*, and sometimes *without Writing*. When an Obligee or Creditor makes the Obligor or Debtor his Executor, who accepts thereof, this is a Release in Law by *Writing*. But if an Obligor is made Administrator of the Goods and Chattels of the Obligee, this is no Release in Law. And when he is made Executor, tho' 'tis a Release in Law of the Action; yet the Duty remains, and it shall be Assets in his Hands. If a Feme Obligee or Creditor takes the Obligor or Debtor to Husband, this is a Release in Law *without Writing*, [unless it be a Marriage Bond which is to take Effect after the Husband's Decease by way of Provision for the Wife.] But if a Feme Executrix takes the Debtor to Husband, this is no Release in Law; for that would be a Wrong to the Dead. A Release in Law shall be expounded more favourably than a Release in Deed.

* Releases either enure, 1. By way of *inlarging* an Estate; being made by a Reversioner to a Lessee in Privy with enlarging Words. 2. By way of *Mitter le Estate*, or transferring it; as if one Jointenant or Parcener release to another. This must be between Privies. 3. By way of *Mitter le Droit*, which transfers the Right of the Releasor to the Releasee; as when Disseisee releases to Disseisor, and makes his Estate rightful, which was wrongful. Here a Release of a bare Right for an Hour, is as good as if it were made to the other and his Heirs. It is not requisite that there should be any Privy between the Parties to such Release. 4. By way of *Extinguishment* only, against all Persons, when the Releasee cannot have the Thing released. As when the Lord releases his Seignior to his Tenant of the Land, or when the Grantee of a Rent-charge, or of a Common, releases to the Tenant of the Land the Rent-charge or Common. For one Man cannot be Lord and Tenant, he cannot have Land and Rent, nor Land and Common of Pasture out of the same Land.

A Release is of more Force in Law than a Confirmation. But note, That if a Charge or Duty grows by Record, the Release must be upon Record. If by Deed, the Release must be by Deed.

2. Who may make Releases, or take them.

As a Man may release any Debt or Duty due to himself, so a Man may release any Thing or any Wrong due or done to his Wife before or after Marriage. And if the Wife is Executrix to another, the Husband may release any Debt or Duty due to the Testator, but the Feme Executrix cannot to the Prejudice of her Husband. Regularly

regularly the Release of an *Infant* is void; but an *Infant* Executor may release a Debt duly paid to him as Executor: Tho' if he releases that which he doth not receive, the Release is void. An *Executor* before Probate of the Will, may release a Debt or Duty due to the Testator, because he hath an absolute Interest in the Debt in him. And tho' he cannot have an Action before Probate, yet he may release an Action. If one releaseth, and then taketh Administration, this Release shall not bar him: For he had no Right of Action at the Time of the Release. One *Tenant in Common* cannot release to the other, because the Freehold is several.

It is to be observed, that no Right passeth by a Release, but the Right which the Releasor had at the Time of the Release made. If he had no Right, the Release is void.

If he, to whom a Release is made, hath nothing in the Lands, that Release is also void.

It behoveth him, to whom the Release is made, that he hath either the Possession or a Freehold in the Lands in Deed or in Law, or a Reversion, or Remainder in Fee-simple, Fee-tail, or for Life, at the Time of the Release made; or else he cannot take the Release.

3. As to the *Things* that may, or may not, be released.

Supposing a Right in the Releasor, and that the Releasee hath something in them, *Lands, Tenements and Hereditaments* may be given and transferred by way of Release, and all Rights therein may be given and discharged by it. A Release by a Lessor to his Lessee for Years or at Will, having entered by Force of such Lease, is good in respect of the Privy betwixt them; therefore not to a Tenant at Sufferance. A Release to a Lessee for Years in Futuro, or before Entry, (tho' it may extinguish the Rent reserved) yet it cannot enlarge his Estate for want of Possession. If a next Avoidance is granted to two, one may release to the other, before the Church is void, but not afterwards, for it is then (as it were) but a Thing in Action. Rights and Titles to Goods and Chattels, Actions real, personal, and mix'd, may be released. Also

Conditions annexed to Estates, Powers of Revocation of Uses, Warranties, Covenants (even before they are broken by a Release of all Covenants) Services, Rents, Commons, and other Profits to be taken out of Lands may be discharged, extinguished, and determined by a Release to the Tenant of the Land. A Condition cannot be released upon Condition; but the Release will be good, and the Condition void. Possibilities of enjoying Land, (if they are not remote and uncertain, but near and common Possibilities) may be released to him that hath the present Estate of the Land. Mere Possibilities cannot be released. Debts, Legacies by a Release of a Legacy, and other Duties, may be released before or after they become due. A Man cannot release a personal Thing, as an Obligation, upon a Condition subsequent, because a personal Thing once suspended is extinguished for ever. Neither can one release a bare Authority.

4. Of the Construction of Releases.

Where divers Persons join in an Action, to recover any personal Thing, of which they are to have the joint Benefit or Interest (where the Law does not compel them to join) there the Release of one of them shall bar all the Rest. [See 23 H. 8. ch. 3.] And where there

5 Rep. 28.

9 Rep. 39.

1 Inst. 292. b.

1 Inst. 200. b.

Lit. 446.

447. 450. a.

499.

1 Inst. 265.

a. & b. 266. a.

267. a.

1 Inst. 264.

a. & b.

265. a. 270.

a. & b.

Lit. 459.

460. &c.

1 Rep. 112.

2 Rep. 51.

5 Rep. 71.

10 Rep. 48.

49.

1 Inst. 237. a.

265. b. 274. b.

10 Rep. 51.

1 Roll. Abr.

412. 939.

940.

6 Rep. 25.

2 Roll. Abr.

410. 411.

412.

1 Cro. 648.

649.

there are two *Plaintiffs* in Debt, Trespafs, &c. and one of them alone doth release to the Defendant; this is also a Bar to the other Plaintiff. So if an Obligation be made to two, and one does release, this is a Discharge with respect to the other. Where there are two Executors, and one alone doth release a Debt due to the Testator before Judgment, this will bar the other Executor; but not if the Release is after Judgment. A Release of an Action by one Churchwarden is not good, neither can both of them release to the Prejudice of the Church. A Release by the Husband of his Wife's Suit in the Ecclesiastical Court for Defamation, is a good Release as to the Costs; but not as to the Defamation. For the Court may give Sentence that the Defendant shall give a corporal Satisfaction by Penance and Submission; which the Husband cannot release.

On the other Hand for the Benefit of a *Defendant*. A Release made to the Tenant in Tail, or Tenant for Life, of the Right of the Land, shall enure to him that hath the Remainder or Reversion. And so *Converso*. If two are bound jointly and severally in an Obligation or Bond, or other specialty to one, and the Obligee or Creditor releases to one of them, this shall discharge the other. And he shall not be relieved in *Equity* against the other thro' Ignorance of the Law. [See 10 *An. ch.* 15. Concerning *Partners* of a *Bankrupt*, &c.] But a Release from the King to one, shall not enure to the other. And if two commit a *Trespafs*, a Release to one of them shall discharge the other.

A Release of all *Manner* of *Actions* discharges all real, personal, and mix'd Actions, and bars an Appeal. But a Release of all Actions real and personal is no Bar in an Appeal of Death. For such a Release bars only civil Actions. A Release of all Actions real releases mix'd Actions; and so does a Release of all personal Actions. In a Release of all Actions, *Causes* of Action are released. But within a Submission of all Actions to Arbitrament, *Causes* of Action are not contained. He that hath Right of Entry may enter, tho' he hath released all Actions; and if one takes away my Goods, I may take them out of his Possession; tho' I have released all Actions. And if a Man releaseth all Actions, he releaseth all Actions which he hath as *Executor*, as well as others which he hath in his own Right. [2y.] A Release of all Actions will not discharge Executions, or bar one to take out Execution. But a Release of all Suits will be a Bar to an Execution, except in the Case of the King. A Release of all Actions will not discharge any Thing, for which the Releasor had no Cause of Action at the Time of the Release made. But Money on Bond to be paid at a future Day may be released by the Obligee; because the Right of Action was in him before. Yet Rent payable at a future Day cannot be discharged by a Release of all Actions; nor an Annuity. But one may release the Rent for Annuity before the Day, by special Words. It will release the Arrears due before the making of the Release.

A Release of all *Quarrels* amounts only to a Release of all Actions and Causes of Action. So of *Controversies* and *Debates*. And if I am dispossessed of my Goods, and I release all Quarrels, I may take my goods again as aforefaid; for such a Release does not bar my Right.

A Release

^a 1 Inst. 291. a. A Release of all ^a *Dues* (*Debita*) will release personal Actions and Executions; but it will not bar a Writ of *Account*. For there is nothing certainly due, before Account made. But a Release of all Actions will be a good Bar in Account. A Release in full of all *Accounts*, shall be extended only to an Account.

^b 1 Vent. 29. One cannot release a *Duty* or *Debt* by his ^b *Will*.

¹ Wms. 85. A Release of all ^c *Rights* in any Lands or Tenements does release and discharge all Manner of Rights of Action and Entry; but not a Possibility of a Right, that he hath at the Time of the Release; or a Right that shall descend to him afterwards. A Release of all Rights to the Land made to the *Tenue-Tenant* extinguishes the Rent issuing out of the Land. But a Release of all Rights in and to Lands doth not extinguish ^a *Tithes*. A Release of all one's ^c *Title* to Lands and Tenements is a Release of all one's Right.

^a 1 Cro. 216. By a Release of all ^c *Covenants*, A Covenant not broken may be released, as mentioned before.

¹ Lit. 509. A Release of all ^a *Demands* or *Claims* is the best Release of all and the most effectual Word to bar Actions, Appeals, Rights of Entry into Lands, Titles, Conditions, before they are broken, [29.]

⁸ Rep. 153. or after, Covenants broken, Rents even before the Day of Payment, Commons, Debts, Duties, Obligations Contracts, Recognizances, Statutes, Judgments, Executions, Annuities and Arrearages of Annuities and Rents, Estovers. But by a Release of all Demands, a mere ^b *Possibility* is not released, nor a Covenant before it is broken, for there is yet nothing to demand. Neither is a Release of all Demands a Discharge of a ^a *Legacy* due or payable at a future Day, nor if a Parson doth release all Demands to a Parishioner in his Lands doth it release the ^a *Tithes*; for they are not Things issuing out of Lands, but a spiritual Duty. He that hath ^a *Surety* of the Peace cannot release it by any Words, for the Offender is bound to keep the Peace with respect to all the King's Subjects. A Release of all Demands is no Bar in Writ of Error to reverse an Outlawry; for it doth not extend to such Writs, where nothing is demanded either in Fact or in Law. But in such Case a Release of a Writ of Error is a good Plea. If the King releaseth all Demands, a Right of Inheritance shall not be released.

¹ Lit. 508. A Release of an Action or a Right cannot be for a ^c *Time*. It will enure for ever, if it be made but for an Hour.

¹ Inst. 291. b. [Where there are general Words only in a Release, they shall be taken most strongly against the Releasor; but where there is a particular Recital or special Words preceding the general Words, the general Words shall be thereby restrained or qualified.]

¹ Inst. 291. b. Thus Releases shall be construed, and the Words of a Release applied.

¹ Lit. 508. 5. What is a Conveyance by *Lease* and *Release*?

¹ Lit. 508. A Release here is a Conveyance of one's Interest or Right, which he hath in a Thing, to another that hath the Possession thereof. For first you must execute a Lease or a Bargain and Sale for six Months, a Year, &c. to the Intent that by Virtue thereof the Lessee may be in actual Possession of the Lands intended to be released to him. And then the Lessee by Virtue of the Statute of 27 H. 8.

¹ Lit. 508. 235, 664.

¹ Lit. 508. 235, 664.

¹ Lit. 508. 235, 664.

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27 H. 8. ch. 10. For transferring Uses into Possession, is enabled to take a Grant or Release of the Reversion and Inheritance of the said Lands to the Use of himself and his Heirs for ever, which is then accordingly done, reciting the said Lease and declaring the Uses. ^a A ^a 2 Ventr. 35. Reservation of a Pepper-Corn is sufficient to raise an Use, and to make the Lessee capable of a Release.

This is become a very common Conveyance, (*viz.*) To pass Lands by way of Lease and Release. It amounteth to a Feoffment, the Use drawing after it the Possession, and supplying the Place of Livery of Seisin. [The Execution of the Use raised by the Bargain and Sale for a Year, supplies the Want of an actual Entry of the Lessee. See of Confirmation, *infra*.]

6. ^b An Acquittance is a Sort of Release, and is a Discharge in Writing, or by Bill under Seal, of a Sum of Money, or other Duty, which ought to be paid or done. As if one is bound to pay Money upon an Obligation, or Rent reserved upon a Lease, and the Party to whom it is due, upon Receipt thereof gives a Writing under his Hand witnessing that he is paid. This is such a Discharge in Law, that he cannot demand and recover the Sum or Duty again, if the Acquittance is shewed. An Acquittance without Seal is only an Evidence or Proof of Payment, but not pleadable, because no Deed. ^c *Litteræ Acquietantiæ* do signify a Deed of Acquittance. ^b Terms of the Law, v. Acquittance. Dyer 6, 25, 51. ^c Inst. 52. 4

The Obligor is not bound to pay Money upon a single Bond, unless the Obligee will make him an Acquittance. Nor is he bound to pay it before he hath the Acquittance. And in this Case the Obligor may compel the Obligee, to make him an Acquittance. And so it is of a Statute-Merchant. But otherwise it is in Case of an Obligation with a Condition; for there one may aver Payment. And now also,

By 4 An. ch. 16. If an Action of Debt is brought upon a single Bill, if the Defendant hath paid the Money due upon such Bill, such Payment may be pleaded in Bar of such Action.

^a If a Rent is behind twenty Years, and the Landlord makes an Acquittance for the last that is due, all the rest are presumed to be paid; and the Law will admit no Proof against this Presumption. ^a Inst. 373. a. ^b Rep. 65. ^c Noy's Max. 15.

If one hath a Debt upon Bond, and upon Book for Wares from the same Person, the Manner of Tender and of the Payment shall be directed, by him who maketh the Tender or Payment, and not by him who accepteth of it; and the Acquittance ought to be given accordingly. [This is, when the Debtor at the Time of Payment declares, on what Account he makes the Payment; otherwise the Party receiving the Money may apply it to any just Account.] ^a 5 Rep. 117. ^b Cro. 68. ^c See p. 186. ante.

If one acknowledges himself to be satisfied by Deed, it is a good Plea in Bar, without any Thing received. But an Acquittance without a Seal, is only Evidence of Satisfaction, as hath been said.

10. ^a A Deed of Confirmation is a Conveyance of an Estate or Right in Being, by him that hath a larger or better Estate in the Thing granted than the Tenant; whereby a voidable Estate is corroborated, made sure and unavoidable; or whereby a particular Estate is increased. A Confirmation thereof may make a voidable

voidable Estate good, but cannot work upon an Estate, that is void either in Law, or determined by express Condition or Limitation. It is made by these Words, (*viz.*) *ratify, approve, and confirm, &c.* He that confirms must be in Possession of the Estate or Right; and he also must be in Possession, to whom the Confirmation is made.

A Confirmation is almost of the Nature of a Release.

He that makes the Confirmation is the *Confirmer*, and he to whom it is made, the *Confirree*.

^a 1 Inst. 295. b. Confirmations are ^b *express* or *implied*. *Express*, as by the Words *ratify, approve, and confirm*. *Implied*, by Law, as by the Words have given and granted, have demised, which in some Cases shall enure to the same Intent as I have confirmed.

^c 9 Rep. 142. ^e Every Confirmation is *perfecting, increasing, or diminishing*. ¹ 1 Inst. 295. b. *Perfecting*, as when one makes an Estate absolute, that was conditional. *Increasing*, as when an Estate at Will is increased for Years, or an Estate for Years increased for Life. *Diminishing*, as where a Landlord confirmeth the Estate of his Tenant, to hold by less Rent.

^a West's Symb. 1. Pt. §. 457. In a Deed of Confirmation it is proper to ^d recite in the Premises the Estate of the Tenant, which is to be confirmed, and also the Estate of him that is to confirm, and to express the Consideration thereof, if there is any.

^e 1 Inst. 300. b. In some Cases the Confirmation of a ^f *third Person* is needful, to perfect the Grants of others, as the Grants and Leases of a *Bishop* (not warranted by 32 H. 8. *cb.* 28. and other Statutes) must be confirmed by the Dean and Chapter or Chapters; of a ¹ *Dean* of his sole Possessions by the Chapter; and by the ² *Bishop*; of a *donative Dean*, by the King and Chapter; of an *Archdeacon* or *Prebendary*, by the Bishop, Dean and Chapter. If the King is Patron of a *Prebend*, then it must be with the Confirmation of the King, Dean and Chapter; Grants and Leases of a *Parson* or *Vicar*, to bind his Successors, must be with the Confirmation of ^h Patron and Ordinary. But if the Ordinary or Bishop is Patron, the Dean and Chapter also must confirm. The Patron must consent to the Grant of sole Corporations, that have not the absolute Fee in them. But the Patron must have the Fee-simple of the Advowson; otherwise the Confirmation is good only during the Patron's Estate. If the Parsonage is a *Donative*, the Confirmation is to be by the Patron only.

¹ 5 Rep. 81. ¹ 1 Inst. 297. a. If a *Prebendary* or *Parson* makes a Lease for twenty Years, and the *Lease, Demise, or Estate* is confirmed for ten Years, this is a good Confirmation for the whole; and the Addition for *Parcel of the Term* is repugnant when the whole was confirmed before, by confirming the Lease, Demise, or Estate generally. But if the Land had been confirmed to the Lessee for ten Years, or for any other Part of the Term, it had been good for the ten Years, or Part of the Term only; for then there would be no Repugnancy. So may a Confirmation be of *Part* of the Land, or of a less Number of Acres, than were granted. So if Tenant for Life makes a Lease for a hundred Years, the Lessor or Tenant for Life may confirm, either for Part of the Term, or for Part of the Land, if he hath not before confirmed the *Lease*; but an Estate of *Freehold* cannot be confirmed.

firm'd for Part of the Estate; for that the Estate is entire, and not several as Years are.

* *Note*; If a Bishop hath two Chapters, both must confirm his Grants or Leases, or else his Successor may avoid them. And this Confirmation must be made in the Life of the Bishop and of the Grantees. 1 Dyer 282.
1 Inst. 301. x.
See p. 29.
ante.

Also if Tenant for Life grants a Rent-Charge to one and his Heirs, a *third* Person, (*viz.*) he in the Reversion must confirm it; otherwise it is good only for the Life of Tenant for Life. 1 Lit. 529.
1 Inst. 301. x.

* There are *eight* several Diversities betwixt a Confirmation and a Release; and there are *eight* different Cases, wherein a Confirmation and a Release have like Operation in Law. But many of the Curiosities of some kinds of Confirmations and Releases are supplied by Fines to Uses, by Bargain and Sale by Deed inroll'd, and by Lease and Release. 1 Lit. 516,
517, &c.
1 Inst. 296,
297, &c.

11. * An *Assignment* is the appointing or setting over a Right to another by these Words, (*viz.*) *have given, granted, assign'd and set over.* *Have given or granted* may amount to a Grant, a Feoffment, a Gift, a Lease, a Release, a Confirmation, a Surrender, as hath been said; and it is in the Election of the Party, to use them to which of these Purposes he will. But a Release, Confirmation, or Surrender, cannot amount to a Grant; nor a Surrender to a Confirmation, or Release, because these are peculiar Manners of Conveyancing. He that assigns is the *Assignor*, and he to whom the Thing is assign'd is the *Assignee*; who always hath the Thing assign'd in his own Right, not as a Deputy. 1 Inst. 301. b.
Terms of the
Law, v. Assignee.

There may be Assignments in *Deed* and Assignments in *Law*.

There may be Assignment of Lands given in Fee, for Life or Years; of a Mortgage for Years forfeited, the Mortgagor being made a Party, and confirming the Assignment; of an Annuity, Rent-Charge, Judgment, Statute, &c.

If a Lessee does assign over his Term, * The Lessor may charge the Lessee, or Assignee, as he pleases; for a Lessor shall not be forced to take the Assignee for his Tenant; but if he accepts the Rent of the Assignee (knowing of the Assignment) he hath determined his Election, and cannot afterwards sue the Lessee for the Rent due after the Assignment. [But this must be understood of an Action of Debt only; for an Action of Covenant will lie against the Lessee or his Executors, for Rent due after his Assignment, and even after Acceptance of Rent from the Assignee, by the better opinions. But an Assignee of a Term may assign it over, and thereby discharge himself from the Payment of the Rent after such Assignment.] 3 Rep. 24.
1 Cro. 715.
contra.
3 Rep. 24.
1 Saund. 240.
241.
3 Cro. 188,
580.
2 Cro. 521.
3 Lev. 233.
1 Sid. 402.
2 Vent. 209.
234.
2 Str. 1221.
3 Rep. 64.

A Lease for Years rendering Rent with a Condition, that if the Lessee assigneth his Term, the Lessor may re-enter; the Lessee assigneth, and the Lessor receiveth the Rent of the Assignee (not knowing of the Assignment) it shall not exclude the Lessor of his Entry. For the Lessee shall not take Benefit of his own Fraud.

In an Assignment it is necessary, to have Covenants on the Assignor's Part, to save harmless of former Rents, Grants, and Incumbrances; and for the Delivery of Evidences and Deeds; that the Assignor is Owner in Possession, and hath Power to grant and assign; that the Assignee may quietly enjoy; to make further Assurance.

rance. And it is necessary to have Covenants on the Assignee's Part, to pay the Rent, and to perform Covenants.

^a Perkins, Tit. Grants, Sect. 99. ⁴ Inst. 85. ^{Finch} 16, 17. ³¹. ^b 1 Inst. 214. a. ¹⁰ Rep. 48. ^{See} p. 20. ^{ante}. ^c 1 Wms. 497. ⁵⁷⁴. ² Wms. (608). ³ Wms. 199. An ^a Authority or Trust cannot be assigned over, unless it be granted to one and his Assigns. And then it must be in Writing. [See 29 Car. 2. ch. 3.] A ^b Possibility, Right of Entry, or Thing in Action, or Cause of Suit, or Title for Condition broken cannot be granted or assigned over in Law, as hath been said before. [^c But the Assignment for a good Consideration will be valid in Equity, and even ^d without Consideration, as against Volunteers.] [But see 32 H. 8. ch. 34.] A Thing in Action, as a Statute, Bond, a just Debt, is vulgarly said to be assignable over: But then one must sue for the same in the Name of the Assignor. So that in reality, it amounts to little more than a letter of Attorney, to sue in his Name. One may give or assign over his Bond, i. e. the Parchment, Paper, and Wax, and the Assignee may keep or cancel it. [See 7 Ja. 1. ch. 15. What Debts only, may be assign'd to the King.] Matters of Ease and Pleasure granted to a Person cannot be assigned; as to go to Church over my Ground, to dine at my Table; but, generally speaking, Matters of Profit may be granted over.

By 1 Ja. 1. ch. 15. The Estates of Bankrupts may be assigned over by the Commissioners; and the Assignees may bring Actions in their own Names. [See 5 Geo. 1. ch. 21. 5 Geo. 2. ch. 30.]

By 10 & 11 W. 3. ch. 23. The Judges Certificate for taking and prosecuting Felons to Conviction, may be assign'd over once.

By 3 & 4 An. ch. 9. All Notes, whereby any Person shall promise to pay another, or Order, or Bearer, the Money mentioned in such Note, shall be due and payable to such Person to whom the same is made payable. And every such Note payable to any Person, or Order, shall be assignable or indorsible over as Inland Bills of Exchange are. And the Person, to whom such Money is payable, may maintain an Action for the same as they might upon such Bill of Exchange. And the Person, to whom such Note that is payable to any Person, or Order, is assigned, or indorsed, may maintain an Action against the Person who signed, or any who indorsed the same, as in case of Inland Bills, and recover Damages and Costs of Suit.

[See more in the said Statute of drawing, accepting, and protesting Inland Bills.]

¹ Roll. Abr. 6. ¹ Vent. 153. Note, That Inland Bills of Exchange are assignable by the Custom of Merchants.

There is a Difference betwixt an Inland Bill of Exchange and a Foreign Bill of Exchange, which is made to return Money beyond the Seas. For an Inland Bill (without Custom to support it) is but in the Nature of a Letter; whereas if a Foreign or Outland Bill is refused to be accepted, an Action (by the Law-Merchant) would always lie against the Drawer; and if the Merchant to whom it is directed subscribes the Bill, it is an implied Assumpsit to pay it. [But see 9 & 10 W. 3. ch. 17. and 3 & 4 An. ch. 9. at large; and of an Assumpsit, B. 4. ch. 4. post.]

By 4 An. ch. 16. Bail-Bonds may be assigned over by the Sheriff to the Plaintiff in the Action.

By 5 Geo. 2. ch. 30. The Lord Chancellor may assign over the Bond given to him by any Person who has fraudulently or maliciously petitioned

petitioned for a Commission of Bankrupt, to the Party grieved; who may sue such Bond in his own Name.

And by 11 Geo. 2. ch. 19. Replevin Bonds may be assigned over by the Sheriff to the Avowant or Person making Cognisance.

12. An *Exchange* (*Excambium*) is a mutual Grant of equal Interest, the one in Exchange for the other. It is made by these Words, (*viz.*) have given, granted, confirm'd to *A.* and his Heirs and Assigns for ever in *Exchange* for, &c. To this Conveyance the Word *Exchange* is so appropriated by Law, that ^{1 Inst. 50. b.} it cannot be expressed by other Words. Freeholds do pass without Livery of Seisin, if the Word *Exchange* is used; but it must be by Deed.

^b It is necessary to the Perfection of the Estate, 1. That the ^{Lit. 63, 64.} Estate given be equal in Quantity, as Fee-simple for Fee-simple. ^{65.} But it matters not whether the Things be of equal Value, or of ^{1 Inst. 50. a. & b.} the same Nature; so that they concern Lands or Tenements. Neither is the Quality or Manner of the Estate material; for Jointenants may exchange with Tenants in Common. An Exchange with the King is good, though he is seised in his politick Capacity, and a Subject in his natural Capacity. 2. The Word *Exchange* must be used. 3. There must be an Execution by Entry in the Life of the Parties. For if one dies before Entry, the Exchange is void. 4. If it be of Things that lie in Grant, it must be by Deed. 5. If the Lands lie in several Counties, it ought to be by Deed indented. So if the Things lie in Grant, tho' it be in one County. [See 29 Car. 2. ch. 3.]

This was a Conveyance frequent in ^{1 Inst. 50. b.} former Times; but now ^{2 Rep. 74.} seldom used; except that Parsons sometimes exchange their Churches, and resign them into the Bishop's Hands. But this is not a perfect Exchange, 'till both Parties are inducted. Therefore if either dies, before they are both inducted, the Exchange is void, according to the third Requisite necessary to an Exchange just now mentioned.

As an Inheritance for an Inheritance, Freehold for a Freehold, Chattels real for Chattels real, may be exchanged; so Chattels personal or Goods may be exchanged for Chattels personal or Goods. But ^{1 Inst. 50. b.} Annuities, which charge the Person only, and do not concern Lands or Tenements, cannot be exchanged for Lands or Tenements.

13. A *Surrender* (*Sursum Redditio*) is a Deed or Instrument in ^{1 Inst. 337. b.} Writing, testifying with apt Words, that the particular Tenant for Life or Years of Lands or Tenements, doth yield up the Estate, to him that hath the immediate Estate in Remainder or Reversion, that he may have the present Possession; and wherein the Estate for Life or Years may merge or drown by mutual Agreement. For the Lessee cannot surrender to the Lessor against his Will. But if ^{Perk. 607, 608.} he, to whom the Surrender is made, does once agree to the same, he cannot afterwards disagree.

He that doth surrender is the *Surrenderor*, and he to whose Use it is made is the *Surrenderee*. It is made by these Words, (*viz.*) hath *surrendered*, granted, given, yielded up, and confirmed, &c.

^a 1 Inst. 338. a. Surrenders are of ^a three Kinds. A Surrender properly taken at Common Law, which was just now described. A Surrender of Copyhold or customary Estates^b, of which we have spoken before. A Surrender *improperly* taken, as of a Deed, a Patent, a Rent newly created, and of a Fee-simple to the King.

^b See p. 137. ante.

1. A Surrender at Common Law is of two Sorts.

1. A Surrender in Deed, or by express Words in Writing; where the Words of the Lessee to the Lessor prove a sufficient Assent, to give him his Estate back again. This is a Surrender in Deed, if the Lessor agrees to it. There is also a Surrender *by* Deed, and that is of Things that lie in Grant.

To make a good Surrender in Deed of Lands, these Things are requisite. 1. The Surrenderor must be a Person able to grant, and to make a Surrender; and the Surrenderee a Person able to receive, and take it. 2. The Surrenderor must have an Estate in Possession,

^c 1 Inst. 338. a.

^d Perk. 584.

588.

¹ Inst. 337. b.

Noy's Max.

73.

^e Perk. 589.

590.

² Roll. Abr.

494. cont.

¹ Ld. Ray.

402.

^f 1 Inst. 338. b.

^g Perk. 584.

612, 613.

^h Perk. 584.

586, 587.

² Roll. Abr.

494.

ⁱ 1 Inst. 337. b.

^j Perk. 615.

Noy's Max.

73.

^k 1 Inst. 338. a.

^l Perk. 624.

^m Str. 1201.

ⁿ Perk. 588.

^o 1 Inst. 338. b.

^p Perk. 624.

^q Str. 1201.

^r Perk. 588.

^s 1 Inst. 338. b.

^t Perk. 624.

^u Str. 1201.

^v Perk. 588.

^w 1 Inst. 338. b.

^x Perk. 624.

^y Str. 1201.

^z Perk. 588.

^{aa} 1 Inst. 338. b.

^{ab} Perk. 624.

^{ac} Str. 1201.

^{ad} Perk. 588.

^{ae} 1 Inst. 338. b.

^{af} Perk. 624.

^{ag} Str. 1201.

^{ah} Perk. 588.

^{ai} 1 Inst. 338. b.

^{aj} Perk. 624.

^{ak} Str. 1201.

^{al} Perk. 588.

^{am} 1 Inst. 338. b.

^{an} Perk. 624.

^{ao} Str. 1201.

^{ap} Perk. 588.

^{aq} 1 Inst. 338. b.

^{ar} Perk. 624.

Surrenders must not be made of Estates in Fee-simple or Fee-tail, nor of Rights or Titles only to Estates for Life or Years; nor yet of ^k Part of an Estate for Life or Years, as of seven Years out of ten. One may surrender an Estate for Life¹ without Livery of Seisin; because it is but a Restoring the Estate again to him in the immediate Remainder or Reversion. As one may surrender an Estate absolutely for Years, so one may surrender an Estate for Years determinable upon Lives. And Surrenders may be of Messuages, Lands, Commons, Rents, or any Things that are grantable; either absolutely or upon ^m Condition precedent or subsequent. ^a But where Things may not pass by Way of Surrender, it may enure to other Purposes, and take effect by Way of Grant; if there are sufficient Words in the Deed.

If Tenant for Life grants a ^o Rent-Charge, and afterwards doth surrender his Land; the Rent-Charge shall continue notwithstanding the Surrender.

By 29 Car. 2. ch. 3. No Estates of Freehold, or Terms for Years, or any uncertain Interest (not being Copyhold or Customary Estates) shall be assigned, granted, or surrendered, unless by Deed or Note in Writing, signed by the Parties making them, or their Agents authorised by Writing, or unless by Operation of Law.

[By

[By 29 Geo. 2. ch. 31. *Minors, Lunatics, and Females Covert, who shall become intitled to any Lease for Lives or Years, may apply to the Courts of Chancery or Exchequer, or the Courts of Equity of the Counties Palatine, or the Courts of Great Sessions in Wales, in a summary Way; and may by Order of such Court, by Deed only, without levying any Fine, surrender such Lease, and take a new Lease of the same Premises for the like Number of Lives or Term of Years as the old Lease was granted for, or otherwise, as the Court shall direct; which new Lease shall be subject to the same Uses, Trusts, and Incumbrances, as the former Lease would have been in case the same had not been surrendered; and such Surrender and Renewal shall be as valid as if made by a Person of full Age, sane Mind, or not married.*]

* 2. A Surrender in Law is that which is wrought by Operation of Law; as if one makes a Lease for Years to begin at Michaelmas next, and the Lessee before Michaelmas takes a new Lease for Years to begin presently, or at Michaelmas; this is a Surrender in Law of the former Lease. So if one having a Lease, and during the Term takes a new Lease, this is a Surrender in Law of the former Lease. But a future Interest cannot be surrendered by Deed in express Words, because there is no Reversion wherein it may be drowned. So that in some Cases a Surrender in Law is of greater Force than a Surrender in Deed. And this Surrender in Law by taking a new Lease holds, tho' the second Lease is for a shorter Term than the first; and tho' the second Lease is voidable by a Condition, or tho' the second Lease is made to the Lessee and a Stranger, or to the Lessee and his Wife, &c. [*Quere*, If an Officer for Life accepts of another Grant of the same Office to himself and another, whether it is a Surrender of the first Grant:] But the second Lease must be made of the same Thing whereof the first Lease is made; must be good in Law and not void; and must recite the former Lease; or else perhaps it will not be construed a Surrender of the former Lease.

A Master of an Hospital (being a sole Corporation) by the Consent of his Brethren makes a Lease for Years of Part of their Possessions, and the Lessee for Years is afterwards made Master, the Term is drowned. For one cannot have a Term for Years in his own Right, and a Freehold in another's Right together: As if a Lessee for Years takes a Feme Lessor to Wife. But one may have a Freehold in his own Right, and a Term in another's Right. Therefore if a Lessor takes the Lessee to Wife, the Term is not drowned; but he is possessed of the Term in her Right during the Coverture. So if a Lessee makes the Lessor his Executor, the Term is not drowned.

In a Corporation aggregate of many, if a Lessee for Years of Part of their Possessions is made Master, the Term is not extinguished, no more than if the Lessee had been made one of the Members of the Corporation.

14. A *Revocation and new Declaration* is a Deed made pursuant to some *Proviso* contained in a former Deed or Conveyance; giving Power to revoke or call back something granted; and by a new Declaration to create a new Estate of the Lands; after which Revocation and Declaration the Lands shall settle accordingly. These *Provisoes* containing Power of Revocation are crept into

into voluntary Conveyances, and are become very frequent, and pass by raising of Uses according to 27 H. 8. *cb.* 10. For being coupled with an Use they are allowed to be good, and not repugnant to the former Estates. As if one seised in Fee covenants to stand seised to the Use of himself for Life, and after to the Use of his Son in Tail, with divers Remainders over. Provided, that he may revoke any of the said Uses; and afterwards he revokes them, he is seised in Fee again without Entry or Claim. But in case of a Feoffment or other Conveyance, whereby the Feoffee or Grantee is in by the Common Law, such *Proviso* would be merely repugnant and void. [It would be void as to destroying the Feoffment; but it might be good, as to revoking the Uses, to which the Feoffment was made.]

These Revocations are favourably interpreted, because many Men's Inheritances depend upon them. [But see 27 *El.* *cb.* 4. *p.* 225. *ante.*]

^a 8 Rep. 82.

Some Things may be revoked of Course, tho' they are made irrevocable by exprefs Words; as a Letter of Attorney, a Submission to an Award, a Testament or last Will; for these of their own Nature are revocable.

^b 3 Wms. 163.
Gibb. 233.
Sh. P. Caf.
154.
Sparrow, v.
Hardecastle, in
Chan. 3 May
1754.

[A Feoffment, ^b even without Livery, Lease and Release, Fine or Recovery, Bargain and Sale tho' not inrolled, or other Conveyance subsequent to the Will, tho' the Use thereof is declared to the Testator in Fee, is a Revocation of the Will *quoad* the Devise of the Estates comprized in such Feoffment, &c. But if a Tenant in Common makes his Will, and devises his Moiety, and afterwards by Deed and Fine Partition is made, this is no Revocation.] A sub-

^c 3 Wms. 169.

sequent Marriage, and having Children, hath been held *an implied* Revocation ^d of a Will. And by cancelling one of the Duplicates, the whole is revoked ^e: But Cancelling a former Will by Mistake, or on a Presumption that a latter Will is good, which proves void, shall not be a Revocation in Equity, but is properly relievable under the Head of Accident. Neither will a void Will or Codicil be a Revocation, altho' it contains a Clause of revo-

^d 1 Wms. 304.
Salk. 592.
Eq. Ab. 413.
^e 1 Wms. 346.
^f 1 Wms. 345.

king all former Wills ^g.

^g 1 Wms. 344.

^h Pre. Ch. 32.

ⁱ 33, 183.

^j Caf. Eq. Ab.

^k 177.

^l 2 Ld. Ray.

^m 968.

ⁿ 2 Wms. 334.

A Disposition of a particular Interest in the Estate is only a Revocation *pro tanto*, [and so is a Mortgage ¹.]

15. A Statute is a Bond or Obligation of Record. This Word is also used for an Act of Parliament. But here it is called a Statute, because it is made according to the Form provided by Statute or Act of Parliament.

The Debtor, or he that enters into the Statute or Bond, is call'd the *Recognizor* or *Conusor*, and the Debtee, or he to whom it is made, is called the *Recognizee* or *Conusee*.

Statutes are of three Kinds. A Statute-Merchant, a Statute-Staple, a Recognizance.

1. A Statute-Merchant was contrived for the Security of Merchants only; yet at this Day it is used by others, and is become one of the Common Assurances of the Kingdom. [See 31 H. 6. *cb.* 9. 32 H. 8. *cb.* 5. and of Estates by Statute Merchant, *cb.* 1. *ante.*]

2. A Statute-Staple was invented, and is used, only for Merchants and Merchandizes of the same Staple; and is of the same Nature with a Statute-Merchant, and most properly called a Statute-

Statute-

Statute-Staple. [See 23 H. 8. ch. 6. 32 H. 8. ch. 5.] But these are almost out of Use. [See of *Estates by Statute-Staple*, ch. 1. ante.]

By 33 H. 8. ch. 39. *All Obligations and Specialties* (so call'd because they must be specially and particularly pleaded) *due to the King are in the Nature of Statute-Staple.*

By 34 & 35 H. 8. ch. 26. §. 94. *Persons having Lands in Wales are bound by Statutes in England.*

By 27 El. ch. 4. *Every Statute-Merchant or Staple, must be brought to the Clerk of Recognizances, within four Months after the Acknowledgment thereof, and enter'd in his Office, or else shall be void against Purchasers of Lands chargeable therewith, and against their Heirs, Executors, Administrators and Assigns.*

3. But there is a Statute-Staple improperly so call'd, which is a Recognizance or Bond of Record, testifying that the Recognizor doth owe to the Recognizee a Sum of Money.

Recognizances in general are of several Sorts.

2 Inst. 678.

1. One founded upon the Statute of 23 H. 8. ch. 6. By which, *The Chief Justices of the King's Bench and Common Pleas in Term Time, or either of them, or (in their Absence out of the Term) the Mayor of the Staple at Westminster, and the Recorder of London, jointly together, have Power to take Recognizances for the Payment of a Debt in this Form, Noverint Universi, &c. And it shall be sealed with the Seal of the Conusor, and with the Seal of the King appointed for that Purpose, and with the Seal of one of the Chief Justices, or the Seals of the said Mayor and Recorder, and subscribed with their Names, who shall take the Recognizance. The Clerk of the Recognizances shall inroll such Obligation. The Recognizees, their Executors and Administrators, shall have in every Point against such Recognizor, his Heirs, Executors, and Administrators, like Process, Execution, and Advantage, as hath been had or made upon the Statute-Staple.* [See 8 Geo. 1. ch. 25. for supplying some Defects in 23 H. 8.] And by 32 H. 8. ch. 5. *If the Tenant by Execution be evicted, he shall have the Remedy provided for Tenants by Execution upon the Statute-Staple.* See 34 & 35 H. 8. ch. 26. §. 94, 95. Concerning Recognizances taken in England by Persons having Lands in Wales.

1 Inst. 289. b.

2 Inst. 678.

4 Rep. 66.

The Execution upon a Statute or Recognizance pursuant to 23 H. 8. ch. 6. is called an *Extent*. And the Body of the Conusor (if he is Lay) and all his Lands, Tenements, and Hereditaments that where in his Hands at the Time of the Acknowledging the Statute or after, and into whose Hands soever they come, whether corporeal or incorporeal, are liable to the Extent. Lands that are Copyhold are subject to the Extent only during the Life of the Conusor. Goods and Chattels, as Leases for Years, Cattle, &c. that are in his own Hands, and not sold *Bona Fide*, and for valuable Consideration, are liable also to the Extent.

If two or more join in a Recognizance, the Lands of all ought equally to be charged.

3 Rep. 13.

14

This Kind of Recognizance may be used by Merchants or any others, for Payment of Debts, or to strengthen other Assurances.

If a Recognizance is to pay a hundred Pounds at five several Days, (viz. twenty Pounds on each Day) presently after the first Failure of Payment one shall have Execution upon the Recognizance

1 Inst. 292. b.

2 Inst. 395.

471.

10 Rep. 128.

See p. 188.
ante.

for the twenty Pounds, and shall not tarry till the last Day is past, as in some other Cases; for this is in the Nature of several Judgments.

2. There are *other* Recognizances that may be taken before the Lord Chancellor or Keeper, Master of the Rolls, a Master in Chancery, a Judge, a Baron of the Exchequer, a Justice of Peace, &c. These may be to several Ends and Purposes. But the Proceedings on these Sort of Recognizances are different from the Proceedings upon the Statutes and Recognizances first mention'd. The Conusee upon these Recognizances shall have the same Things in Execution, as one may have after a Judgment in the *King's Bench* or *Common Pleas*.

[See 11 Ed. 1. *Action Burnel*, 13 Ed. 1. *De Mercatoribus*. 27 Ed. 3. *ch. 9.* 13 El. *ch. 5.* 27 El. *ch. 4.* 16 & 17 Car. 2. *ch. 5.* 29 Car. 2. *ch. 3.* 8 Geo. 1. *ch. 25.* and of *Action of Debt*, Judgment, Execution, &c. B. 4. *ch. 4. post.* And see 21 Ja. 1. *ch. 26.* and of *Felony*, B. 3. *ch. 1. post.*]

By 5 An. *ch. 18.* 6 An. *ch. 35.* and 8 Geo. 2. *ch. 6.* Judgments, Statutes, Recognizances, shall not affect Lands in the [East, West, and North Ridings of the] County of York, unless they are registred.

By 7 An. *ch. 20.* Statutes, Recognizances, and Judgments shall not bind Lands in Middlesex, unless registred.

[By 4 G. 2. *ch. 26.* All Statutes and Recognizances are to be in the English Language.]

^a 1 Inst. 172. a.
³ Cro. 515.
² Roll. Abr.
146.

16. * An Obligation, according to our Common Law, is a Bond containing a Penalty with a Condition, for Payment of Money, or to do or to suffer some Act or Thing; if it is *without* Condition, it is called a *Bill*; which is sometimes with a Penalty, and then it is called a *penal Bill* or simple Bond. If it is without Seal, it is a single Bill and no Deed. It may be made to an Infant, but if it is made by him the Obligation is voidable. And it may be made to a Feme Covert, but not by her; for then it is void. [See 9 & 10 W. 3. *ch. 17.* For better Payment of Inland Bills of Exchange. 3 & 4 An. *ch. 9.* Concerning Promissory Notes and Bills of Exchange.]

He that enters into the Obligation or Bond is the *Obligor*, and he to whom it is made is the *Obligee*.

Here we may consider, 1. The *Form* of an Obligation, 2. The *Condition* of an Obligation, and 3. What *Obligations* and *Conditions* are void.

^b 1 Inst. 229 b.
230. a.

1. As to the *Form*,^b it may be made in the first or third Person. In the third Person, notwithstanding 38 Ed. 3. *ch. 4.* which doth extend only to Obligations made beyond Sea. But the usual Way is best; as *Know all Men by these Presents, That I, &c.* Yet any Words in Writing on Parchment or Paper, sealed and delivered, whereby one doth acknowledge himself indebted to another, will make a good Obligation. And though a Writing made in the Form of a *Statute* (which the Party seals and delivers, but is not seal'd by the King,) is not a good Statute, yet it may be a good Obligation.

^c 2 Roll. Abr.
149.

A Bond may be made from one to one, from one to two, or more; from two or more, to one, from two or more to two or more. If two or more are bound in an Obligation thus, *We bind ourselves*, without saying more, the Obligation is joint and not several.

veral. But if it be thus, *We bind ourselves and each of us*, this Obligation is both joint and several. If the Obligation is thus, *Memorandum that I shall pay, &c.* it is good. If one binds himself to pay ten Pounds, and does not say *when*, the Obligation is good, and the Money is due presently. If the Obligation is that I own myself indebted to one *to be never paid*, the Obligation is good, and the *Solvendum* void, and the Money is presently due. So if *A.* binds himself to *B.* in twenty Pounds, to be paid to *A.* whereas it should be, to be paid to *B.* the Obligation is good, and the *Solvendum* void. If an Obligation is made without binding the *Executors* by Name, yet they are bound. If an Obligation is made thus, *I bind myself, my Executors and Administrators*, (leaving out *Heirs*) the Executors and Administrators are bound by it, but not the Heir. Debts due to the King are payable by the Heir, tho' he is not named in any Specialty. [See 33 H. 8. ch. 39.] If one binds his Heirs to pay a Sum of Money, it is void; because the Ancestor was not bound. Copyhold of Inheritance shall not be Affests to bind the Heir upon an Obligation. A sole Corporation, as Bishop, Parson, cannot bind their Successors, or take an Obligation to their Successors. For no Chattel shall go in Succession. But in Case of a Corporation aggregate, which never dies, it may go to the Successors.

If a Bond is made to one and his Heirs, the Heir can never have an Action of Debt upon this Bond made to his Ancestor and his Heirs. But the Executor or Administrator must sue, tho' they are not named.

An Obligation may be good, tho' it contains false *Latin*, false *English*, or tho' *Latin* is put for *English*, or *English* for *Latin*, if the Intent of the Parties may sufficiently appear; therefore if *Jobannes* is put for *Jobannem*, *Wiginti* for *Viginti*, *Septuagintis* for *Septuaginta*, *Seventeen* for *Seventeen*, it is good enough. For the Law doth make a reasonable and favourable Construction of Deeds and Conveyances, to support them if possible, according to the Intent of the Parties, but will reject what is uncertain. The principal Things contained in an Obligation are the Parties and the Sum of Money; and when both are sufficiently expressed and understood without straining, it will serve if the Obligation is well executed. The Sum of Money intended may be often found out by comparing the Obligation and Condition; because the Obligation is usually in a double Sum, or thereabout, to the Sum mentioned in the Condition. But if the Obligation is to do a collateral Thing, there will be greater Difficulty.

If an Obligation hath not a *Date*, or a false or impossible *Date*, &c. it is a good Obligation from the Delivery, if sealed and delivered. If it is made beyond Sea and dated at *Bordeaux*, it may be sued here in *England* in what Place the Plaintiff pleases, with a proper Averment, as *at Bordeaux in Iffington in the County of Middlesex*.

By 33 H. 8. ch. 39. *All Obligations and Specialties must be made to the King thus, Domino Regi, and to no other for his Use, Solvendum Domino Regi Hæredibus vel Executoribus suis. And these*

¹ *Mala grammatica non vitiat chartam.* 1 Inst. 146. b. 6 Rep. 39. 9 Rep. 48.

will have the Effect of a Statute-Staple, and if unpaid at the Time of the King's Death, he may dispose of them accordingly, either to his Heirs or Executors.

[By 4 Geo. 2. ch. 26. All Bonds must be in the English Language.]

2. The Condition of an Obligation is either writ under it, or indorsed; and so it becomes a Bond conditional; and if the Condition is performed, the Penalty is saved. A single Obligation is taken most in Favour of the Obligee; but an Obligation with a Condition is taken most in Favour of the Obligor. For the Condition is made for his Benefit.

When the Condition of the Obligation is, to do any lawful or possible Thing, such Condition is good, [and the Condition may be legal and good in Part, and illegal and void in other Part.]

But if the Condition for Payment of Money be made impossible, as to make Payment on the 30th of February, it shall be paid presently. In all Cases where the Condition of a Bond or Recognizance is possible at the Time of making the Condition; and before the same can be performed, the Condition becomes impossible by the Act of God, or of the Law, or of the Obligee, then the Obligation is saved. But if the Condition is impossible at the Time of making the Condition, the Obligation is single. Where the Condition of an Obligation doth consist of two Parts in the Disjunctive, and both are possible at the Time of the Obligation made, and afterwards one of them becometh impossible by the Act of God, the Obligor is not bound to perform the other Part; for the Condition is made for the Benefit of the Obligor, and he has his Election, to perform the one or the other, to save the Penalty of the Bond. [But that this Rule, if Law, is at least laid down too generally, appears by subsequent Resolutions.] Otherwise, if one Part of the Disjunctive was not possible to be performed at the Time of the Obligation made, and the Time when the Condition was to be performed.

If one binds himself to do a transitory Act, not tied to a certain Place, as to pay Money, and no Time is limited, the Money is to be paid presently (i. e.) in convenient Time. If the Act to be done is local, or to be done at a certain Place, and does not in any Manner concern the Obligee or his Benefit, but is to be done by the sole Act or Labour of the Obligor himself, as to go to Rome, and no Time is limited, the Obligor hath Time during his Life to perform it, and cannot be hastened by Request. And where the Condition of the Obligation is local, and no Time limited, if the Concurrence of the Obligor and Obligee is requisite, the Obligor hath Time during his Life to perform it, unless the Obligee hasten it by Request: But if the Obligor may perform it in the Absence of the Obligee, and it is for his Benefit, there the Obligor ought to do it in convenient Time, and hath not Time during his Life.

If the Condition of an Obligation is to pay Money, or to do the like transitory Act, to the Obligee on a certain Day, and no Place is named where it shall be paid, the Obligor must at his Peril seek out the Obligee, if he is within the Kingdom at the Time when the Thing is to be done. But if the Condition of the Bond is to deliver twenty Quarters of Wheat, the Obligor is not bound to carry

carry it about and seek the Obligee, but the Obligor before the Day must go to the Obligee, to know where he will appoint to receive it, and he must deliver it accordingly. ^a And if the *Place* is certain, and the Payment may be at any Time during Life, yet the Obligor cannot tender the Money when he will, but he must first give the Obligee Notice to attend. ^b If a *Place* is named, and the Money is paid at any other *Place*, and even received before the Day, the Condition is performed. For it was a Duty presently, and is to be esteemed Payment at the Day. It is most adviseable to appoint the Money to be paid at a certain Time and *Place*; and then the Obligor is not bound to seek the Obligee in any other *Place*, nor to be there longer than is comprized in the Condition, nor is the Obligee bound to receive it in any other *Place*. If a Man is bound to pay Money at several Days, the Penalty is not forfeited till all the Days are past. But if the Bond is with a Condition, it may be so worded, as to enable the Obligee to sue the Penalty upon the first Default. Where the Obligor is to do any ^a collateral Thing, or which is not Parcel of the Obligation, as, to deliver a Horse, to stand to an Award, if the Obligor does his Part, and the Obligee refuseth, the Condition is perform'd, and the Obligation discharged for ever. When the Condition is for Payment of Money, (to the Party, not to a Stranger) then if the Obligee ^c accepts a Horse, or other Thing, in Satisfaction, it is good. But if the Condition was for the *Delivery* of a Horse, or any other collateral Thing, there tho' the Obligee accepts of Money in lieu of the Horse, it is no Performance of the Condition. And so it is in all other collateral Conditions. Where the Condition is for Payment of twenty Pounds, the Obligor cannot pay a lesser Sum in Satisfaction of the whole, because a lesser Sum cannot be a Satisfaction for a greater. But if the Obligee, after he hath received Part, doth give an Acquittance under his Seal in full Satisfaction of the whole, it is sufficient. ^d If the Obligor is bound by Condition to pay ten Pounds at a certain Day, and at the Day the Parties do account together, and the Obligee did owe five Pounds to the Obligor, and that Sum is allowed, and the Residue paid. This is a good Satisfaction; tho' the five Pounds was not paid, but by Way of Retainer.

If the Condition is to pay twenty Pounds of lawful Money of Great Britain, and the Obligor pays the Money in any foreign Coin made current here by Act of Parliament or Proclamation, this is a good Performance of the Condition. But a Payment in Farthings is no good Payment.

In all Cases when the Condition is not performed, the Obligation is forfeited; and till then it cannot be forfeited. And yet, if the Obligee himself is the Cause of the Breach of the Condition, or if he is to do the first Act, and will not do it; or the Thing to be done by the Condition is now become impossible by the Act of God, or of the Law; the Obligation is not forfeited, but discharged for ever.

In the Condition of a Counter-Bond to save a Surety harmless such general Words, (*viz.*) *To save Harmless* may be sufficient. But it is the best Way (after the Repetition of the Obligation and Condition) to fix a certain Time for the Payment of the principal Money, upon Default of which the Penalty of the Counter-Bond

to be forfeited. Otherwise you will be in continual Danger of being sued by the Neglect of Payment of him for whom you were Surety.

By 4 An. ch. 16. In Debt upon Bond, if the Defendant before Action brought hath paid the Principal and Interest due by the Condition or Defeazance, tho' not strictly according to the Condition, he may plead Payment in Bar. And pending an Action on Bond with a Penalty, the Defendant may bring into Court Principal, Interest, and Costs in Law and Equity; and the Court shall give Judgment to discharge the Defendant.

^a 10 Rep. 101.

¹¹ Rep. 53.

¹ Inst. 206. b.

See p. 235.

ante.

¹⁵ Rep. 119.

3. Obligations and Conditions are void if they are ^a unlawful. Also the Obligation is void by the Performance of the Condition, or by a Release of it. If the Condition is uncertain or unintelligible, it is void, tho' the Bond is good. If an Obligation is made to me, and delivered to J. S. for my Use, and when it is tendered to me I do disagree to it, it is void. If an Obligation is made to my Wife, and I disagree to it, it is void. If an Obligation depends upon, or is necessary to, some other Deed, and the Deed becomes void, the Obligation is also void.

By 23 H. 6. ch. 10. Obligations of any Person in Ward for Appearance at the Day mention'd in the Writ are void, if they are not made to the Sheriff, and in such manner as by that Statute is appointed.

See 33 H. 8. ch. 39. And of Statutes, *supra*.

By 5 & 6 Ed. 6. ch. 16. Bonds that concern the buying and selling of Offices are void.

By 13 El. ch. 5. Bonds made to avoid the Debt or Duty of others, shall (as to the Party whose Debt or Duty is endeavoured to be avoided) be void.

By 14 El. ch. 11. All Bonds with Conditions for enjoying Spiritual Livings contrary to 13 El. ch. 20. are made void.

By 7 & 8 W. 3. ch. 7. All Contracts, Bonds, and Securities given to procure any Return of any Member of Parliament, or any Thing relating thereto, shall be adjudged void.

By 4 An. ch. 14. All Instruments and Agreements for Farming or Purchasing Charity Money upon Briefs are declared void. And the Purchaser is to forfeit 500 l. for the Use of the Sufferers, to be recovered by Action of Debt, Bill, Plaint or Information.

By 12 An. Seff. 2. ch. 16. Bonds upon Usury for Payment of more than five per Cent are void.

The 16 Car 2. ch. 7. and 9 An. ch. 14. make Bonds and all other Securities for Money won by Gaming void.

^a 1 Inst. 236. b.

237. a.

¹ Rep. 113.

17. A ^a Defeazance (from Defaire, to defeat or undo) is a Condition relating to a Deed, which being performed, the Act is defeated or made void. The Difference betwixt a Condition and a Defeazance is, that the Condition is inserted in the Deed, and a Defeazance is usually a Deed by itself, relating to another Deed: Therefore to make a good Defeazance [to defeat another Deed,] it must be, 1. By Deed. 2. It must recite the Deed it relates to, or at least the most material Part of it. 3. It must be made between the same Persons that were Parties to the first Deed. 4. It must be made at the Time or after the first Deed, not before it. 5. It must be made of a Thing defeasible.

Estates of Inheritance, Leases for Years, Rents, Annuities, Conditions, Covenants, by mutual Consent, may be subject to a Defeazance

zance or Discharge. But the Practice is to make Defeazances upon Statutes, Obligations, and Judgments. Inheritances *executory* may be defeated by Defeazances made at the Time or at any Time afterwards. And so of Statutes, Obligations, and Judgments. But Inheritances *executed* by Livery, cannot be defeated by Defeazances made afterwards, but at the Time of the Feoffment they may *.

18. * A *Devise* (from *Deviser*, to speak) is a Bequeathing of Lands or Tenements by last Will in Writing. He that gives away his Lands in this Manner, is the *Deviser*, and he to whom the Lands are given, the *Devisee*. A *Testament* rather concerns Goods and Chattels, of which I shall speak in the 6th Chapter; though these Words, *Devise*, *Testament*, and *last Will* are often confounded.

* A *Devise* in Writing is no Deed, but an Instrument, by which Lands are conveyed. I am speaking of Deeds or Instruments.

A Woman Covert, an Infant, Idiot, or *Non Compos Mentis* cannot make a *Devise* of Lands. A Woman Covert cannot do it without the Consent of her Husband. [See 34 & 35 H. 8. ch. 5.] * If a single Woman doth devise Lands, and afterwards takes a Husband, it is a Countermand of the Will.

Lands and Tenements were deviseable by Custom only: For at Common Law, in Favour of Heirs, no Lands or Tenements in Fee-simple were deviseable by last Will; nor could they be transfer'd from one to another but by solemn Livery of Seisin, Matter of Record, or sufficient Writing. But now,

By 32 H. 8. ch. 1. and 34 & 35 H. 8. ch. 5. * *All Persons* having a sole Estate or Interest in Fee-simple, or in Coparcenary, or in Common, in Fee-simple, of and in any Manors, Lands, Tenements, Rents, or other Hereditaments, in Possession, Reversion, or Remainder, or of Rents or Services incident to any Reversion or Remainder, shall have full and free Liberty to give, dispose, will, or devise to any Person or Persons (except Bodies politick or corporate) by his last Will and Testament in Writing, or otherwise by any Act or Acts lawfully executed in his Life-Time, all his said Manors, &c. at his own free Will and Pleasure; except that Wills and Testaments of Manors, &c. made by Feme Coverts, Infants, Idiots, Persons of non-sane Memory, shall not be good in Law.

These Acts, as to the other Parts of them which relate to the Tenure of the Lands, &c. are altered by 12 Car. 2. ch. 24.

* So that now by these Statutes a Man that hath Lands, Tenements, Rents, or Reversions, in Fee-simple, may devise them either in Fee-simple, Fee-tail, for Life or Years, absolutely or conditionally, at his Pleasure; and this without Livery of Seisin or Attornment of Tenants, or naming an Executor, because the *Devise* is made by Virtue of an Act of Parliament. [But Note, That a Will is an imperfect Conveyance, inchoate only, and ambulatory (as it is termed) till the Death of the Testator, and therefore the Estate devised must continue in the Testator in the same State and Condition till his Death; for any Alteration therein (except under some

* *Quia incontinenti sunt inesse videntur.* 1 Inst. 236. b. 2 Rep. 71.

particular

* See Revocations ante. particular Circumstances *) by any Act of the Testator will be a Revocation of the Devise.]

^b Plowd. 343. ^b Lands purchased after the making of the Will cannot pass without a new Publication by the Devisor. [But this must be understood of Freeholds only, and not *Chattels* real. And if the Testator has entered into Articles for the Purchase, so as to have an equitable Title to the Estate * before the making his Will, the Estate will pass thereby.]

² Wms. (631.) Lands in *Tail* are not devisable by Will, nor *Copyhold* Lands *, unless by Surrender to the Use of one's last Will. [But an Equity of Redemption * of a Copyhold Estate, and therefore also a Trust or equitable Interest in a Copyhold may be devised without any Surrender. And by the later Opinions it will pass by Will not attested by three Witnesses *, as the legal Estate will.] One that hath a Lease for Years of Lands might always devise the same as other Goods and Chattels.

² Vern. 453. A Devise of Land by Tenant in Tail, * to a Charity, is good; though there be no Fine levied, nor Recovery suffered previous thereto. [24.] [But a Devise to a Charity by a nuncupative Will was not good before the Statute of Frauds, nor by a Will not attested * according to that Statute since.] [But see of *Alienations* in *Mortmain*, ch. 4. post.]

¹ Inst. 115. a. The Statutes of Wills do not take away a Custom to devise Lands.

By 29 Car. 2. ch. 3. Any Estate held *pur auter vie*, is devisable by Will, attested by three Witnesses.

¹ Wms. 741. But all Devises of Lands or Tenements, deviseable either by the Statute of Wills, or this Statute, or by force of Custom, must be in Writing, signed by the Devisor, or by some other Person in his Presence and by his express Direction, and attested and subscribed in his Presence by three or four credible [See 25 G. 2. ch. 6.] Witnesses, or else to be utterly void. And

^{Pr. Ch. 459. 514.} No Devise in Writing shall be revocable other than by some other Will or Codicil in Writing, or other Writing declaring the same, and signed in the Presence of three or four Witnesses, or else by burning, tearing, cancelling, or obliterating by the Testator, or in his Presence, and by his Directions and Consent.

¹ Wms. 741. Where there is a Power to appoint an Use of Land by Deed or ^{Comy. 451.} Will; a Will attested only by two Witnesses is not a good Appointment: For, it is to be understood, such a Will as is proper to dispose of Lands. So tho' it be by any Writing in the Nature of a Will.

¹ Pr. Ch. 184. ³ Lev. 1. ³ Wms. 254. A Will published in the Presence of three several Witnesses, at three several Times, and attested by them severally at the respective Times in his Presence, is within the Statute. [And it is not necessary that the Testator should actually sign it in the Presence of the Witnesses, but if he acknowledges it to be his Hand, it is sufficient, for the Statute only requires three Things: 1st, That the Will be in Writing. 2dly, That it be signed by the Testator. 3dly, That it be subscribed by three Witnesses at least, in the Presence of the Testator *.]

¹ 2 Wms. 295. A Will of Lands in England, tho' made beyond Sea, must be attested by three Witnesses.

A Will

A Will being written with the Testator's own Hand; and beginning I A. B. &c. was adjudged to be a good Signing. For the Statute does not direct whether the Signing shall be at the top or bottom of the Will. Sealing is not necessary. But if there is a Sealing, it is a Signing too. [2y.]

* If the second Will cannot be found, and the Contents of it are unknown, it is no Revocation of the former Will.

When a Devise is perfected by the Death of the Testator, it as much alters the Property of Lands, as Acts executed by Deed in his Life-time. Hereby Descents are prevented. And therefore he that takes Lands by Devise is in the Nature of a Purchaser. So that when one seised in Fee deviseth in Tail, for Life, or Years, the Devisee may enter; for the Freehold or Interest in Law is in the Devisee before he doth enter. The Executors have nothing to do in this Case; and therefore their Assent is not to be expected. [If the Devisee dies in the Life-time of the Testator, though the Devise is to him and his Heirs, the Devise lapses for the Benefit of the Testator's Heir at Law; and so it is where the Devise is in Tail; and so it is likewise where the Devise is of Copyhold Lands.]

* There are many Things good by a Devise, which are not good by Deed.

A Man may by Will give Lands to his Wife; because the Devise does not take effect till after the Decease of the Husband. If one doth devise, that after the Decease of his Wife his Son and Heir shall have the House wherein he dwells, she shall have it for her Life, tho' not devised unto her by express Words. And a Feme Covert seised of Lands in Fee to her separate Use, with Power of Appointment by Deed or Will, may devise them to her Husband as well as to any other Person.

* If Lands are devised in Fee, to an Heir, chargeable with an Annuity; he takes by Descent; the Devise not making any Alteration of the Estate, but conveying the same Estate, as the Law would by Descent, tho' charged with an Incumbrance. [And though where a Devise is to one who would otherwise take the same Estate by Descent, (which Rule extends to Copyholds also) the Devise is void, and he shall take by his better Title; yet if the Devise is to one of two Coheirs, the Devisee shall take the whole by Devise, and no Part by Descent.]

* A Codicil signed and published in the Presence of three Witnesses, may amount to a Republication of a Will; and both make but one Will.

The first Grant and the last Will is of greatest Force. For a Will may be countermanded by a later Will, even till the Time of the Death of the Devisor.

A Devise or Testament is to be favourably expounded according to the Meaning of the Devisor or Testator. [And in a Devise there are no technical Words necessary to the Creation or Limitation of the Estate of the Devisee; Words that shew the Devisor's Intention are sufficient, and that Intention shall take Effect if consistent with the Rules of Law; and every Word if possible shall have its Effect.]

And therefore if one doth devise by his Will all his Lands and Tenements, by Virtue of the Word *Tenements* even those Lands shall pass which the Devisor hath in Reversion.

^a Lit. 586.
Terms of the
Law, v. De-
vise.

¹ Inst. 9 b.

³²² b.

^b Terms of
the Law, v.
Devise.

^c 1 Inst. 27. a.

Terms of the
Law, v. De-
vise.

^d 1 Str. 35.

² Vern. 729.

See p. 123.

ante.

^e 1 Inst. 236. b.

^f Plow. 341.

¹ Inst. 112. b.

If Lands are devised to a Man ^a *for ever*, or to him and his Assigns *for ever* (without the Word *Heirs*) the Devisee shall have a Fee-simple. If he devise his Land to another ^b *to do with it as he pleaseth*, this is a Fee-simple.

If one by his last Will and Testament deviseth Lands or Tenements to a Man and his *Heirs Male*, this is an Estate in Tail in a Will, the Law supplying the Words, of his *Body*.

[A Devise to the Heirs Male of the Body of J. S. is good to pass the Estate to him who is Heir Male tho' not Heir General, and he shall take as a Purchaser^c.]

Many Words do make a ^d *Condition* in a Will, which make no Condition in a Deed, as before hath been observed.

In a Will where there are ^e divers Devises of the same Thing, the last Devise taketh Place. [24.]

In these Instances (amongst others) the Construction of a Devise and a Deed do differ.

³ Rep. 36.

^f When you intend to devise your Lands by Will, 1. Make it by good Advice, while you are in perfect Health. 2. If your Will concerns Inheritance, make it indented, and leave one Part with a Friend, lest after your Death it be suppressed. 3. At the Time of the Publication of your Will, call three credible Witnesses at least, to subscribe their Names to it in your Presence. [See 29 Car. 2. ch. 3. ante.] 4. If it may be, let the whole Will be written in one Hand, and in one Parchment or Paper. 5. Let the Hand and Seal of the Devisor be set to it. 6. If it be in several Parts, let the Devisor's Hand and Seal, and the Name of the Witnesses, be subscribed to each Part. 7. If there be any Interlining or Rasure in the Will; let a *Memorandum* be made of it. 8. If you make any Revocation of your Will, make it by Writing with good Advice. [See again 29 Car. 2. ch. 3.]

By 3 & 4 W. & M. ch. 14. *All Wills concerning Lands, Tenements, or Hereditaments, or any Rents, Profits, Term, or Charge out of the same, whereof the Devisors shall be seised in Fee-simple, in Possession, Reversion, or Remainder, shall be deemed to be fraudulent and void as against Creditors upon Bonds or other Specialties, their Heirs, Successors, Executors, Administrators, and Assigns. And such Creditors shall have their Actions of Debt against the Heirs at Law of the Obligees and such Devisees jointly.*

² Danv. Abr.
Tit. Devises.

Devisees shall be chargeable on Action of Debt to the Value of the Land by them sold, though the same be alien'd before Action brought.

See 2 & 3 An. ch. 4. 5 An. ch. 18. 6 An. ch. 35. and 8 Geo. 2. ch. 6. For Registering Wills that concern Lands in the County of York. 7 An. ch. 20. For Registering Wills that concern Lands in the County of Middlesex. 3 Geo. 1. ch. 18. For Inrolling Wills of Papists, relating to real Estates, in one of the Courts of Record at Westminster, or at the Quarter-Sessions where the Estates lie, within six Months after the Testator's Death. And 28 Geo. 2. ch. 10. And other Acts for enlarging the Time; whereby no subsequent Purchase by a Protestant shall be impeached by reason of the Non-inrollment of such Will through which the Title is derived.

These

These are the several Sorts of Conveyances. Yet it is to be observed, that there are divers other Kinds of Deeds. For every Agreement in Writing sealed and delivered is a Deed; as Commissions, Authorities, Licences, and several other Instruments concerning Merchants and other Affairs. I come now to shew,

5. How Deeds are made void.

Tho' a Deed is well made, sealed, and delivered, and well testified by Witnesses, yet it may be made void, when got by corrupt Agreement or Fraud; or when got by Force, or by putting into a just Fear of one's Person, or by Duress of Imprisonment; or it may be made void by Reason of Infancy, or Coverture, or Unsoundness of Mind; For Incertainty; By Disagreement of him for whose Use it is made; By Rasure or Interlining without Consent. A Rasure or Interlining shall be presumed to be made at the Time of making the Deed, if the contrary is not proved. By breaking off the Seal, By Concord, Release, &c. By Judgment of Court.

Having now shewed, how Property in Lands may be gained by Occupancy, Descent, and Purchase, I proceed to set forth how Property in Lands may be gained by Prescription and Escheat.

IV. * Prescription is a Title by Use and Time allowed by Law. It supposes a Descent or Purchase originally. To make such a Title to an Inheritance, the Time by Common Law is Time whereof there is no Memory of Man to the contrary; which is no limited Time. By Statutes Prescription may be within Memory.

* A Prescription properly so called, (as it relates to an Inheritance) is to be Time out of Mind, and is for the most part Personal; being made in the Name of a certain Person and his Ancestors, or those whose Estate he has, or of a Body politick or corporate and their Predecessors; as when J. S. seised of the Manor of D. in Fee, shews that he and his Ancestors, and all those whose Estate he hath in the said Manor, have Time out of Mind of Man had and used to have Common of Pasture, in such a Place (being the Land of another) as appertaining to the said Manor. Tenant in Fee-simple ought to prescribe in his own Name: Tenant for Life, Years, at Will, in the Name of him who hath Fee. Natural Persons cannot gain or be charged by a general Prescription from their Ancestors; tho' Bodies politick may gain or be bound by Prescription only. He that would have a Thing that lies in Grant by Prescription, must prescribe in himself and his Ancestors, whose Heir he is by Descent; not in himself and those whose Estate he has; (unless the *Que Estate* is but a Conveyance to the Thing claim'd by Prescription, as in the former Case) for he cannot have their Estate that lies in Grant without Deed, which ought to be shew'd to the Court. But of Things that are appendant to a Manor, Lands, or Tenements, it is otherwise; because the Manor, &c. might pass without Deed. Nothing can be prescribed for, which cannot be raised by Grant at this Day. One cannot make Title to Land by

* *Prescriptio est titulus ex usu et tempore substantiam copiens ex auctoritate legis.*
1 Inst. 113. a. & b.

Prescription, but only to Rent or Profit out of Land. It relates to a Fee-simple, and is always applied to incorporeal Inheritances. I am speaking of Prescription strictly taken. A Custom is local, and is alledged in no Person; but is within some Manor or other Place: As that there is a Custom Time out of Mind within the Manor of A. that all the Copyholders of the said Manor have had and used to have Common of Pasture in such a Waste of the Lord, Parcel of the said Manor.

Thus it must be, when a Copyholder alledges a Custom against his Lord. For a Copyholder cannot lay a Prescription in himself and his Ancestors, by Reason of the Baseness of his Tenure. Therefore this is allow'd for Necessity. But when he claimeth Common or other Profit in the Soil of a Stranger, he must prescribe in the Name of the Lord of the Manor, (*viz.*) That the Lord of the Manor and all his Ancestors, and all those whose Estate he hath, have had Common in such a Place for themselves and Tenants at Will, &c. Custom (I say) is local, and alledged in no Person; and this serveth for them who cannot prescribe in their own Name, nor in the Name of any certain Person, as Inhabitants of a Town. Also a Custom may be alledged, when it is referred to insensible Things, as that all such Lands are deviseable.

But to speak in general of Customs and Prescriptions without Distinction.

To Customs and Prescriptions, Possession and Time are inseparably incident. Possession must be long, continual, and peaceable. Time (as hath been said) by Common Law must be beyond the Memory of Man. But if there is a sufficient Proof by Record or Writing to the contrary, then it is within the Memory of Man.

A Prescription must not be laid in an Uncertainty, or in the Disjunctive, nor against the Publick Good; as to do a Thing which is a Nuisance; nor against Reason or Religion, nor as to a mere Negative.

Tenants in Common may be by Prescription; but not Jointenants, because there is a Survivorship betwixt them; nor Tenants at Will. In that Case of Tenancy in Common one may make Title to Lands by Prescription. An Attorney at Law may prescribe, that he and all the Attorneys of the Court have used to have Time out of Mind such a Privilege. Such a Prescription may be in General; and it is called here a Prescription, because it is applied to Persons not to a Place. It may be laid in a great many, where it tends but to claim an Easement or Discharge, not Matter of Interest and Profit. A Man may prescribe, that all the Inhabitants of the Parish have used to be buried in the Church-yard, tho' they are not a Corporation.

No one can prescribe against the King, where he hath an Estate permanent, and a certain Interest, nor against an Act of Parliament. None can prescribe directly to Goods and Chattels of Traitors, Felons, Felons of themselves, Fugitives, of those that are put in the Exigent, Deodands, Conusance of Pleas, to make a Corporation, to make a Coroner, &c. But one may make Title by Usage or Prescription only to Treasure-Trove, Waifs, Estrays, Wreck of Sea, to hold Pleas, Court-Leets, Hundreds, to have a Park, Warren, Royal

Royal Fishes, Fairs, Markets, Frank Foldage, the Keeping of a Gaol, Toll, to have a Corporation by Prescription, &c.

The Title being once gained by Custom or Prescription, it cannot be lost by *Interruption* of the *Possession* for ten or twenty Years; but it may be lost by *Interruption* in the *Right*; as if one hath had a Rent or Common by Prescription, Unity of Possession (or a Possession of the Land with the Rent or Common) of as high and durable Estate, is an *Interruption* in the *Right*. A *Modus Decimandi* being alledged by Prescription for Tithes of Lambs; the Payment of Tithe-Lamb in *Specie* for twenty Years last past did not destroy the Prescription. If one that hath Title to a Common by Prescription taketh a Lease of the Land, after the Expiration of the Lease, he may still claim by Prescription: For the Suspension was only of the Possession.

By Unity of Possession, Prescriptions for Matters of Interest and Profit, as Rents or Commons, are extinguished; but Prescriptions for Easements, as for Lights or Air, are not extinguished by Unity of Possession: But after the Unity of Possession is determined, and the Things severed, the Easements will revive. And,

Tho' a House or Mill falleth by Default of the Owner or otherwise, he may rebuild it upon the same Foundation; and all those Things, that were appendant or appurtenant to it, shall continue. A Corporation that hath Privileges by Grant or Prescription, tho' they are incorporated by another Name, yet the new Body shall have all the Privileges that the old one had. If a Court held by Prescription is granted and confirmed by the King's Letters Patent, this does not destroy the Prescription; but the Court may be held by Prescription as before. And if one claims any Thing by Prescription and also by Charter, if the Charter is not contrary to the Prescription, it shall be good by way of Confirmation, as some affirm.

What hath been said concerning *Customs* with Relation to *Acts* of Parliament, the same may be said of *Prescriptions*.

I shall speak of the Time of *Limitation* of *Writs* and *Actions* when I come to treat of *Actions*. I have spoken already of Title by Prescription in Lands by *Fine* and *Non-claim*, and of the Title to Things moveable by buying in Market Overt, by Waif, Stray, Wrecks.

By the Canon Law the utmost limit of Prescription is but forty Years. But this Prescription is not allowed by the Common Law.

Now, upon what hath been said concerning Prescription, you may observe, that a Prescription properly so taken is a Title or Claim of a real Interest or Profit in the Land of another; which must be strictly pleaded according to certain Rules; and that it is not like a Custom, or improper Prescription, that is by way of Discharge, or for Easements, or for Matters of personal Exemption or Privilege.

V. Property in Lands, &c. may be acquired by *Escheat*. Here By Escheat. the Inheritance is cast upon the Lord, otherwise than by *Descent* or *Purchase*. Of which see in the next Chapter.

^a Multiplex interruptio non tollit prescriptionem semel obtentam. 2 Inst. 654.

Thus Lands, Tenements and Hereditaments may be *acquired* by *Occupancy, Descent, Purchase, Prescription, and Escheat*. I proceed to shew, how they may be *forfeited* or *lost*; which may be called a Way of acquiring too, in respect of the Persons that gain by the Loss. But the Method will be more distinct, if I do call it rather a *Losing* than an *Acquiring*.

CHAP. IV.

How *Estates in Lands, &c.* may be *forfeited* or *lost*, (*viz.*) 1. By *Alienation* of a *particular* Tenant. 2. By *Alienation* in *Mortmain*. 3. By *Non-performance* of a *Condition*. 4. By *Waste*. 5. By *Bankruptcy*. 6. By *Escheat*. 7. By *Disseisin, Abatement, and Intrusion*.

How Estates
in Lands, &c.
may be for-
feited or lost.

Touching the *Forfeiture* of Lands, Tenements and Hereditaments in *Criminal* Cases, I shall speak in the 4th Book under the Title *Forfeiture*. Here I intend only to shew how *Estates in Lands, &c.* may be *lost* in *Civil* Cases, as by the *Alienation* of a *particular* Tenant, By *Alienation* in *Mortmain*, By *Non-performance* of a *Condition*, By *Waste*, By *Bankruptcy*, By *Escheat*, By *Disseisin, Abatement, and Intrusion*.

By Alienation
of particular
Tenant.
a 1 Inst. 111. b.
b 1 Inst. 233. b.
251. a. & b.
252. a.
8 Rep. 44.

I. ^a An *Alienation* is a Transferring one's Right and Property to another. But some Alienations are forbidden; as an Alienation by a particular Tenant; as by a Tenant for Life, which infers a Forfeiture of the Estate. This Forfeiture may be either, 1. ^b In *Pair*, or in the Country out of a Court of Record, as where a particular Tenant (not being an Infant or Feme Covert) maketh over a greater Estate, that lieth in Livery, than he may lawfully make, whereby the Remainder or Reversion is divested. (But in Case of the King it is a Forfeiture, though the Remainder or Reversion is not divested out of him.) Therefore, if Lessee for Life by Livery alieneth in Fee, or Lessee for Life maketh a Lease for the Life of another, or a Gift in Tail, it is a Forfeiture of his Estate. Thus it is if Tenant in Tail after Possibility of Issue extinct, Tenant by the Curtesy, Tenant in Dower, Tenant for another's Life, Tenant for Years, Tenant by Statute-Merchant, Staple, or *Elegit*, do make a greater Estate than they lawfully may make. ^c But if a Copyholder for Life surrenders to the Use of another in Fee, this is no Forfeiture; for the Estate passeth by *Surrender* to the Lord, and not by *Livery*. A particular Estate of any Thing that lies in *Grant*, cannot be forfeited by *Grant* in Fee by Deed. For nothing can pass thereby but what may lawfully pass. 2. By *Record*, as by *Alienation* in levying a *Fine*, or suffer-

^c 4 Rep. 23.

^a *Nemo debet rem suam sine facto aut defectu suo amittere.* 1 Inst. 263. a. 8 Rep. 92. ing

ing a Common Recovery of Lands, whether it de vests the Reversion or Remainder, as in case of Things lying in Livery; or doth not de vests them, as in case of Things lying in Grant, or by claiming a greater Estate in a Court of Record; by affirming the Remainder or Reversion to be in a Stranger; as if a Stranger brings a Writ of Entry and supposes the Reversion to be in himself, and Tenant for Life confesseth the Action, this is a Forfeiture.

* Where there is a Forfeiture by Alienation of the particular Tenant, Estates by him made and mean Charges shall not be avoided. ^{1 Inst. 233. b. 234. a. 1 Rep. 67.}
[See Of Fines and Recoveries, ch. 3. ante; and as to Forfeiture of Copyhold Lands, see of an Estate by Copy of Court Roll, ch. 1. ante; as to Forfeiture of Offices, see ch. 2. ante.]

By 11 H. 7. ch. 20. Certain Alienations made by the Wife of the Lands of the deceased Husband shall be void; and he to whom the Land should come after the Death of the Wife may enter as if the Wife were Dead. [See 6 Ed. 1. ch. 7. 32 H. 8. ch. 36.]
[See 14 El. ch. 8. and of Recoveries, ch. 3. ante.]

II. A Forfeiture of Lands may be by Alienation in Mortmain. ^{By Alienation in Mortmain. 1 Inst. 2. b. 2 Inst. 75.}
Mortmain (Mort main a dead Hand) is an Alienation of Lands and Tenements to any Corporation Sole or Aggregate, Ecclesiastical or Temporal. The Name of Mortmain is taken from the Effect; because the Lords (or Landlords) had nothing from the Alience, no more than from a dead Hand. For by Alienation in Mortmain, they lost their Escheats, and many Services, which were heretofore due.

* An Appropriation of an Advowson is a Mortmain, or a Grant of an Advowson in Fee to a sole or aggregate Corporation, and a Rent extinct by a Release to a Corporation. But the Grant of an Annuity cannot be a Mortmain, because it chargeth the Person only; nor an Appropriation of Tithes, because they are Things merely Spiritual; the Cognizance whereof regularly belongs to the Ecclesiastical Court. ^{* F. N. B. 223. 1 Inst. 2. b. 304. a. & b. 5 Rep. 56. 7 Rep. 26. 9 Rep. 96. 2 Inst. 361, 640. Kitch. 280.}

The Foundation of all the Statutes of Mortmain was Magna Charta, (viz.) 9 H. 3. ch. 36. By which,

It shall not be lawful to any, to give his Lands to any Religious House, and to take the same Land again to hold of the same House. If any give his Lands to any Religious House, the Gift shall be void, and the Land shall accrue to the Lord of the Fee.

* This Statute is interpreted to extend to Lands which a Religious House kept in their own Hands, tho' they gave them not back again to hold of the same House. ^{* 2 Inst. 75.}

But Ecclesiastical Persons found Means to creep out of this Statute, (viz.) Religious Men, as Abbots, Priors, and other Ecclesiastical Persons Regular, by purchasing Lands holden of themselves, or by taking Leases for a long Term of Years, and many other Devices. And Bishops, Parsons, and other Ecclesiastical Persons secular, thought that they were out of this Statute. But,

By 7 Ed. 1. St. 2. No Person Religious or other whatsoever (Body Politick or Corporate, Ecclesiastical or Lay, Sole or Aggregate) shall buy or sell, or under the Colour of Gift or Lease, or by reason of any other Title, receive, or by any other Craft or Engine shall presume to appropriate to himself any Lands or Tenements, whereby the same may in any wise come into Mortmain, under Pain of Forfeiture of the same.

And

And within the Year after the Alienation, the immediate Lord of the Fee may enter; and if he do not enter within the Year, then the next immediate Lord may enter within half a Year after such Year; and for Default of all the Mesne Lords, the King shall have the Lands so alienated for ever, and shall infeoff others by certain Services.

This Statute is to be understood of such Inheritances as may be holden; but of such Inheritances as are not holden, as Rent-Charges, Commons, Advowsons, the King shall have them presently by a favourable Interpretation of the Statute.

But Ecclesiastical Persons found out an Evasion also of this Statute; because it extended only to Gifts, Alienations, and Conveyances made between them and others. Therefore pretending a Title to the Land (which they meant to get) they brought a feigned Action against the Tenant of the Land; and he by Consent and Collusion was to make Default, and thereupon they recovered the Land and entered by Judgment of Law. Wherefore,

By West. 2. or 13 Ed. 1. ch. 32. *When Religious Men and other Ecclesiastical Persons do implead any, and the Party impleaded maketh Default, it shall be enquired by the Country, whether the Demandant had Right in the Thing demanded or no; and if it be found he had, then he shall recover Seisin; but if otherwise, the Land shall accrue to the next Lord of the Fee.*

* 2 Inst. 429,
430.

* All Actions brought for any Lands or Tenements, wherein a Freehold, Inheritance, or a long Term is recovered, are within this Statute.

All Recoveries also by Verdict, or otherwise, if they are had by Collusion, are within this Statute, as well as Recoveries by Default.

Notwithstanding all these Statutes, Ecclesiastical Persons (not being able to get Lands by Purchase, Gift, Lease, or Recovery) procured Lands to be conveyed by Feoffment, or in other Manner, to divers Persons and their Heirs, to the Use of them and their Successors, by reason whereof they took the Profits. But,

* 2 Inst. 75.

By 15 R. 2. ch. 5. *No Feoffment, or other Purchase of any Lands and Tenements, Advowsons, or other Possessions to the Use of any Spiritual Person, and whereof such Spiritual Persons take the Profits, shall hereafter be made without Licence of the King and of the Lords, upon pain of Forfeiture.*

The same Law shall likewise be of Lands, Advowsons, and other Possessions purchased by Guilds, Fraternities, perpetual Offices, and Corporations, or to their Use. And,

By 23 H. 8. ch. 10. *Where Feoffments, Fines, Recoveries, Drovers, and other Acts and Assurances of Lands, Tenements and Hereditaments, and of any Trusts thereof, are made to the Use of Parish-Churches, Chapels, Church-wardens, Guilds, Fraternities, Commonalties, Companies, or Brotherhoods, erected and made of Devotion, or by common Assent of the People without any Corporation, or to the Uses and Intents to have perpetual Obits, or a continual Service of a Priest for ever, or for threescore or fourscore Years, or to such like Uses or Intents, to the Prejudice of the King, and to other Lords and Subjects, as in case where Lands are aliened in Mortmain; all such Uses, Intents and Purposes, of whatever Name, Nature, or Quality they shall be called, shall be utterly void.*

Provided,

Provided, That such Uses and Intents may be made and declared to continue twenty Years from the Time of limiting them, and no longer.

This Statute extends only to superstitious Uses. Therefore not-^{11 Rep. 24;} withstanding this or any of the aforesaid Statutes, any Man at this ^{25, 26.} Day may give Lands, Tenements or Hereditaments to any Person ^{11 Rep. 70;} or Persons, and their Heirs for finding a Preacher, Maintenance of a School, Relief of maimed Soldiers and the Poor, Reparation of Churches, Highways, or for any like charitable Uses. And it is good Policy upon every such Feoffment to reserve a small Rent to the Feoffor and his Heirs. For then the Feoffees shall be seised to their own Use, and not to the Use of the Feoffor. Or it may be proper to express some Consideration of a small Sum; and then ^{23 H. 8.} cannot by any Pretence make void the Use. [But see ^{9 Geo. 2. ch. 36. infra.}]

[See 32 H. 8. ch. 1. and 34 & 35 H. 8. ch. 5. Of Wills. And see 39 El. ch. 5. For the Erection of Hospitals and Houses of Correction. 43 El. ch. 4. Concerning Commissioners authorised to enquire of Misemployments of Lands and Goods given to charitable Uses.]

By 17 Car. 2. ch. 3. Owners of Impropriations, Tithes, or Portions of Tithes, may annex the same to the Parsonage or Vicarage where they lie, or settle them in Trust for the Benefit of such Parsonage or Vicarage, or of the Curates thereof, where the Parsonage is impropriate and no Vicar endowed, without any Licence of Mortmain.

And if the settled Maintenance of any Parsonage or Vicarage with Cure shall not amount to one hundred Pounds per Annum clear, the Incumbent may purchase to him and his Successors Lands, Tenements, Rents, Tithes or other Hereditaments, without Licence of Mortmain.

By 7 & 8 W. 3. ch. 37. The King may license any Person or Bodies Politick to alien in Mortmain, and to purchase, take, and hold in Mortmain (in Perpetuity or otherwise) any Lands, Tenements, Rents or Hereditaments, whatsoever, of whomsoever bolden. And Lands so aliened or acquired and licensed, shall not be subject to any Forfeiture by reason of such Alienation or Acquisition. [See 18 Ed. 3. St. 3. ch. 3.]

By 2 An. ch. 11. Any Person may vest Lands, &c. In the Corporation for the Bounty of Queen Anne, by Deed inrolled according to 27 H. 8. ch. 16. or by Will, for Augmentation of Churches, which have not a competent Provision. The said Corporation may take, purchase and hold for the said Purposes without Licence or Writ of Ad Quod Damnum. [See 1 Geo. 1. St. 2. ch. 10.]

See the Statutes for the Dissolution of Monasteries, Chauntries, &c. (viz.) 27 H. 8. ch. 28. 31 H. 8. ch. 13. 1 Ed. 6. ch. 14. &c.

By 9 G. 2. ch. 36. After 24th of June 1736. ^{No} Manors, Lands, Tenements, Rents, Advowsons or other Hereditaments, corporeal or incorporeal, nor any Sum of Money, Goods, Chattels, Stocks in the Funds, Securities for Money to be laid out in the Purchase of Lands, Tenements or Hereditaments, shall be any ways conveyed or settled, to or upon any Person, Body Politick or Corporate, or otherwise for any Estate or Interest, or any ways charged or incumbered by any Person whatsoever, in Trust, or

for the Benefit of any charitable Use; unless such Gift, Conveyance, Appointment, or Settlement (except of Stocks in the Funds) be made by Deed indented, sealed and delivered in the Presence of two or more credible Witnesses, twelve Kalendar Months at least before the Death of such Donor or Grantor, including the Days of the Execution and Death, and be inrolled in Chancery within six Calendar Months next after the Execution thereof; and unless such Stocks be transferred in the publick Books six Calendar Months before such Death as aforesaid, and unless the same be made to take Effect in Possession for the charitable Use immediately, without any Power of Revocation, Reservation, Trust, Condition, Limitation or Agreement, for the Benefit of the Donor or Grantor, or any claiming under him; and all such Gifts, Grants, &c. made in any other Manner or Form shall be absolutely void.

But not to extend to Purchases or Transfers made really and bona fide, for a full and valuable Consideration, or to any Disposition, to or in Trust for either of the two Universities, or any College or House of Learning within them, or the Colleges of Eaton, Winchester, or Westminster, for the better Support and Maintenance of the Scholars only upon the Foundations of Eaton, Winchester, and Westminster, nor to the Disposition of any Estate, real or personal, lying or being in Scotland.

But no such College or House shall be capable of taking, purchasing, or holding more Advowsons than shall be equal in Number to a Moiety of their Fellows, or Students where there are no Fellows, exclusive of the Advowsons annexed to the Headships.

By Non-Performance of a Condition.

III. By Non-Performance of a Condition (whether express or implied by Law,) Lands, &c. may be forfeited or lost. [See of Estates upon Condition, B. 2. ch. 1. Of the Forfeiture of Offices and Franchises, and of Conditions, ch. 3. ante.]

By Waste.

IV. By Waste; therefore, 1. What is Waste. 2. How are Lands forfeited in Waste.

^a 1 Inst. 52. b.
53. a.
^a 1 Inst. 145.
² Cro. 478.
² Roll. Rep.
21.

1. ^a Waste (*Vastum à Vastando*, to Waste) is a Spoil or Destruction in Houses, Gardens or Orchards, Dove-houses, Parks, Warrens, Fish-ponds, Trees, Woods, Land, &c. to the Prejudice of the Heir, or of him in Remainder or Reversion. A Licence or Consent is supposed here to be wanting. [See Stat. of Marlbridg. or 52 H. 3. ch. 23.] The Lessor by Law may enter at seasonable Times, to see whether any Waste is committed. And if the Lessee hinders his entering, the Lessor may bring his Action on the Case.

There are two Kinds of Waste, *voluntary* and *permissive*. *Voluntary*, by *Commission* or by pulling down, &c. *Permissive*, by Negligence or *Omission*, as in not repairing. Both are equally injurious to him that hath the Inheritance.

^b 1 Inst. 53. a.
^a 1 Inst. 145.
¹ 1 Rep. 81.

Waste may be committed in Houses, ^b by pulling them down, or by suffering them to be uncovered, whereby the Timber becomes rotten. But if the House was uncovered when the Tenant entered, it is no Waste in the Tenant to suffer the House to fall down. But the Timber belongs to the Lessor. If he pulls it down, it is Waste, tho' it was ruinous, unless he builds it up again. ^c Also if Glass Windows (tho' glazed by the Tenant himself) be broken down or carried away, it is Waste; for it is Part of the House, the same is of New Chimney-pieces; tho' in some Places they pretend a Custom to

^c 4 Rep. 63.
64.
¹⁰ Rep. 139.
¹ 1 Inst. 53. a.

to take them down within the Term, if they set up the old Chimney-pieces. Thus it is of Wainscot fastened by Nails, Scrues or Irons put thro' Post or Walls, Benches, Doors, Furnances, &c. fix'd to the House, either by him in Remainder or Reversion, or by the Tenant himself. If Wainscot, Benches, Furnances, &c. are not fix'd, they may be taken away at any Time. And a fixed Furnace may be taken away at any Time within the Term, if it is not fixed to the Walls or Posts of the House. [As to the Right of the Tenant to take away Chimney-pieces or other Fixtures, *put up by himself*, the Law is not so strict now as formerly; but he must take them down during his Term, put up the old ones where they were, and leave the House in as good Condition as he found it.] If one pulls down a Malt-Mill, and builds a Corn-Mill, it is Waste, tho' the Corn-Mill is of greater Value. If the Tenant build a new House it is Waste. [But this must mean where the Tenant doth not build it equally good with the old one, or not the same Size;] and then if he suffers that to be wasted, it is a new Waste. If the House fall down by a Tempest, or is burnt by Lightning, or thrown down by Enemies, &c. without the Fault of the Tenant, he shall not be charged with Waste, unless he bound himself by Covenant, that he would leave it in as good a Condition as he found it. But in this Case, or where the House was ruinous at his coming in and falls down, the Tenant may build the same again with such Materials as remain, and with other Timber, which he may take growing on the Premises. Yet he must not make the House lesser or larger than it was before; or sell the Trees, and with the Money build it up; for the Sale is Waste. If the House is uncovered by a Tempest, the Tenant must in convenient Time repair it. And though there is no Timber growing upon the Ground, yet the Tenant at his Peril must keep the House from Wasting. A Tenant for Years is of course bound to sustain or repair the House. If one suffers the Houses to be wasted, and then sells Timber to repair them, this is double Waste. But in many Cases a Tenant for Life or Years may sell Timber to repair, tho' he is not forced to it. As, if a House is ruinous at the Time of the Lease made, he is not bound to repair it; but if he cuts down Timber, and doth repair it, he may justify it. For the Law doth favour the Maintenance of Houses for the Habitation of Mankind. So if the Lessor covenants to repair the House, the Lessee (if the Lessor does not do it) may with Timber growing on the Ground repair it, tho' he cannot be compelled to it. A Tenant may dig for Gravel or Clay, (tho' no Pit was open at the Time of the Lease) for Reparation of the House, by the same Reason that he may cut down Timber to repair it. If the House is burnt by Negligence or Mischance it is Waste. [See 6 An. ch. 3. B. 1 ch. 6 ante.] Thus of Waste in Houses.

If a Tenant cuts down or destroys any Fruit-Trees growing in the Garden or Orchard, it is Waste. But if such Trees grow upon any Part of the Ground out of the Garden or Orchard it is no Waste.

If a Tenant of a Dove-house, Park, Warren, Vivary or Fish-pond, does take so many Pigeons, &c. as that such sufficient Store is not left, as he found there when he first entered, it is Waste.

And

And to suffer the Park-Pales to decay, whereby the Deer are lost or dispersed, is Waste.

^a 4 Rep. 62, 63. ⁵ Rep. 11, 76. ¹¹ Rep. 48, 50, 81. As to Waste in *Trees and Woods*. ^a *Trees* are Parcel of the Inheritance; and the Lessor, after that he hath made a Lease for Life, may by Deed grant the *Trees*, or reasonable Estovers out of them, to another and his Heirs, and the same shall take effect after the Death of the Lessee. But such a Gift to a Stranger is void during the Estate for Life; because of the particular Prejudice it may be to the Lessee. Timber is reserved by Law to the Lessor. Therefore if Timber is cut down by a Lessee, the Lessor may take it away. The Lessee hath only an Interest in *Trees* while standing, as in the Fruit, Shrowd, or Shadow. On this Account if he cuts down Timber-Trees, (*viz.*) Oak, Ash, and Elm, (which are Timber-Trees in all Places, except Elms on some Copyhold Estates) or tops them, or doth any other Act, whereby the Timber may decay, ^b it is Waste. And if the Lessee has covenanted to leave the Wood in as good Plight at the End of the Term as he found it, the Lessor shall presently have an Action of Covenant, for cutting down the Timber; for now it is not possible for him to perform the Covenant, or to leave the Wood in as good Plight as he found it: But it is otherwise as to a Covenant to leave a House in good Repair at the End of the Term, for that may be repaired before the Term expires. Also in Counties where Timber is scarce, and Beech or other Trees serve to build Houses, they are to be accounted Timber, and to cut them down is Waste. It is the Custom of the Country that makes some Trees Timber, which in their Nature, generally speaking, are not so; as Horse-Chestnut and Lime-Trees; so of Birch, Beech, and Asp. ^c If Timber-Trees are thrown down by the Wind, the Landlord or Lessor shall have them. If a Tenant suffers the young ^d *Germins* to be destroy'd by Beasts, or does stub them up, it is Destruction. To cut down Willows, Beech, Birch, Asp, Maple, or other Trees, standing in the Defence of the House, is also Destruction. If there is a Quick-set Hedge of White-Thorn, and the Tenant stubs it up, or suffers it to be destroyed, it is Destruction. And for all these, and the like Destructions an Action of Waste lieth. For *Waste* and *Destruction* in a large Sense are synonymous Terms.

^e 1 Inst. 53. b. To turn Trees into ^f Coals for Fuel, when there is sufficient dead Wood, is Waste.

¹ Inst. 53. b. ^{See p. 204. ante.} The Tenant may take sufficient Wood to repair Walls, Pales, Fences, Hedges, Ditches, as he found them; but not to make these a-new. And he may take sufficient Plow-bote, Fire-bote and other House-bote. He may also cut down ^h Underwood at seasonable Times. ⁱ A Copyholder without Custom may cut down Timber to repair his Copyhold House; tho' by Custom he may be restrained to cut them down without Assignment of the Lord or his Bailiff. A Tenant also may cut down ^j dead Wood.

^k 4 Rep. 63. ¹ 1 Inst. 53. b. As to Waste in *Land*, it is to be observed, ^l That if a Tenant converts Arable Land into Wood, or Wood into Arable Land, or Meadow into Arable, or Arable into Meadow, or Pasture into Arable, it is Waste. For it not only changeth the Course of the Husbandry, but the Proof of the Landlord's Evidence of his Estate. If ancient ^m Meadow-Ground beyond the Memory of Man, or Brook Meadow, is plowed up, it is Waste. But if Meadow-Ground hath been

ⁿ 2 Roll. Abr. 814.

been at any Time Arable, or sometimes Meadow and sometimes Pasture, it is no Waste to plough it up. ^a Therefore such Meadow must be defended from being plow'd up by Covenant, (*viz.*) To pay so much an Acre (as five Pounds an Acre, &c.) if the Tenant doth plow it up. For an absolute Restraint to plow is void; [*2y.*] because Arable is to be preferr'd before Meadow. ^b It is Waste to suffer a Wall of the Sea to be in decay, so that the Meadow or Marsh Ground is surrounded, and rendered unprofitable, by the Sea's flowing and reflowing. But if the Land is surrounded suddenly by the Violence of the Sea, occasioned by a Tempest, without any Default of the Tenant, it is no Waste that is punishable. So it is Waste, if the Tenant does not repair the Walls or Banks against Rivers, or other Waters, whereby the Meadows or Marshes are surrounded, and become rushy and unprofitable.

To dig for Gravel, Lime, Clay, Stone, Brick, Earth, or for Mines of Metal, Coal, or other Things, hidden in the Earth, when the Mines were not open when the Tenant came in, is Waste; except the Gravel, Clay, &c. is for Reparation of the House. ^a If one makes a Lease of his Land for Life or Years, in which there is a Mine, not mentioning any Mines in his Lease, the Tenant may dig and take the Profit of such Mines as were open at the Time of the Lease made. But he cannot dig for any new Mine, that was not open; for that would be Waste. And if there are open Mines, and the Owner makes a Lease of the Land with the Mines therein, this shall extend to the open Mines only. But if there is no open Mine, and the Lease is made of the Land with all Mines, the Tenant may dig for Mines, and have the Profits; otherwise those Words would be void.

If he that hath the Inheritance doth fear Waste in any of the foregoing Instances, he may before any Waste done have a Prohibition directed to the Sheriff, that he shall not permit Waste to be done by the Tenant; and then the Sheriff may take the *Posse Comitatus*, and withstand the doing of it. Or he in Remainder or Reversion may have an Injunction out of the Chancery, to stay the Waste. [And the Court of Chancery will grant Injunctions to restrain Tenants for Life or Years, *scilicet* Waste from pulling down a Mansion House, or the Trees that are a Defence or Ornament to it, or from digging for Bricks.] He in the Reversion, either personally or by another, may enter into the House or Lands, let for Life or Years, to see if Waste is committed. A Patron may have a Prohibition to hinder a Parson from cutting down Trees to his own private Use. [See of *Action of Waste*, B. 4. ch. 4. *post.*]

2. The Forfeiture and Judgment in Waste appears in the following Statute. For,

By the Statute of Gloucester or 5 & 6 Ed. 1. ch. 5. The Party convicted of Waste shall forfeit the Thing wasted, and recompense thrice so much as the Waste is taxed at. [See *West.* 2. or 13 Ed. 1. ch. 14. and 8 & 9 W. 3. ch. 11. For Recovery of Costs; and also 11 & 12 W. 3. ch. 4. Concerning wilful Waste in the Lands of Papists disabled.]

^a *Præstat cautela quam modola.* 2 Inst. 299.

^a 1 Inst. 54. a. ^b 1 Inst. 303. ^c 304. If Waste is done *Sparsim*, or here and there in Woods, so much shall be recovered wherein the Waste was done. And so in Houses, so many Rooms shall be recovered wherein the Waste was done. But if the *Waste* is committed here and there throughout, all shall be recovered.

^b 1 Inst. 233. ^c 234. a. Regularly he that enters or recovers by Force of an implied Condition, shall not avoid precedent Incumbrances. ^b But if a Tenant for Life grants a Lease for Years, and afterwards doth Waste, and the Lessor recovers in an Action of Waste against the Tenant for Life, he shall avoid the Lease made before the Waste done; because the Action of Waste must of necessity be brought against the Lessee for Life, to recover the Place wasted; which must bind the Lessee for Years. But a precedent Rent granted out of the Land shall not be avoided. For if Lessee for Life grants a Rent-charge, and afterwards doth Waste, and the Lessor recovers in an Action of Waste, he shall hold the Land charg'd during the Life of Tenant for Life. But if the Rent was granted after the Waste done, the Lessor shall avoid it.

^c 1 Inst. 54. a. ^d 2 Inst. 306. None shall have Judgment to recover in an Action of Waste, where the Waste is of ^e small Value. Yet the Law will take Notice of Waste in Trees to the Value of three Shillings and four Pence, and suffer Judgment. And many Things together may make Waste to a Value, and amount to a Forfeiture.

^d 3 Inst. 204. ^e 11 Rep. 49. ^f 3 Lutw. 116. ^g 3 Lev. 268. Dilapidation or Waste of Ecclesiastical Palaces, Houses and Buildings, is a good Cause of Deprivation. Some say an Action of the Case will lie for Dilapidations.

By Bankruptcy.

V. Lands and Tenements may be lost by Bankruptcy. Therefore 1. Who may be a Bankrupt, and what Acts make a Bankrupt. 2. How are Lands and Tenements forfeited or lost by Bankruptcy.

^h 4 Inst. 277.

1. A Bankrupt (from ⁱ Banque a Table, and Route the Sign of the Table that was fixed in the Earth) is described by our Statute Law; and is he or she that hath gotten other Men's Goods into his or her hands, and hides in order to deceive his or her Creditors. But more particularly,

By 13 El. ch. 7. If any Person using the Trade of Merchandize, by way of bargaining, bartering, and Chevisance in gross, or in retail, or seeking his living by buying and selling, being a natural born Subject or Denizen, doth depart the Realm, or begin to keep his or her House, or otherwise absent himself or herself, or suffers him or herself willingly to be arrested, outlaw'd or imprison'd without just or lawful Cause, or depart from his or her Dwelling-house, to the Intent to defraud or binder Creditors; Or,

By 1 Ja. 1. ch. 15. Shall willingly and fraudulently procure him or herself to be arrested, or his or her Goods to be attached or sequestered, or make or cause to be made any fraudulent Grant or Conveyance of his or her Lands, Tenements, Goods, or Chattels, to the Intent or whereby his or her Creditors shall or may be defeated or delayed for the Recovery of their just and true Debts, shall be deemed a Bankrupt. And,

ⁱ De minimis non curat lex. 1 Inst. 54. a. 2 Inst. 306.

^j Interest reipublicæ ne quis re sua male utatur. 6 Rep. 37.

By 21 Ja. 1. ch. 19. Every Person using the Trade of Merchandise, &c. (as before) or using the Trade or Profession of a Scrivener, receiving other Men's Monies or Estates into his Trust or Custody, who shall either by himself or others obtain any Protection (except by Privilege of Parliament) [See 7 An. ch. 12.] or shall prefer or exhibit unto the King or any of his Courts any Petition or Bill, thereby to compel his Creditors to take less than their just Debts, or to gain Time for the Payment thereof; or being arrested for Debt, shall after the Arrest lie in Prison two Months or more, or being arrested for a just Debt of a hundred Pounds or more shall escape out of Prison, shall be adjudged a Bankrupt.

[Note, The other Descriptions contained in the former Act, and not mentioned above, are repealed by 10 An. ch. 15. and any single Act is sufficient to make a Bankrupt; and it seems that such Act of Bankruptcy, if it is clear and plain in its Nature, can't be purged by length of Time; or afterwards appearing publickly, or dealing largely; but if it was not an express but doubtful Act of Bankruptcy, then appearing abroad, and dealing after such an Act, will be an Evidence to explain the Intent of it, and to shew that it was not done with Design to keep out of the Way of and defraud his Creditors.]

^a Cases Temp.
Talbot 243.
^b 1 Salk. 110.

By 21 Ja. 1. ch. 19. All Statutes concerning Bankrupts extend to Strangers born, as well Aliens as Denizens, as effectually as to natural born Subjects, both to make them subject to the Laws as Bankrupts, as also to make them capable of the Benefit thereof as Creditors.

It is not Buying or Selling of Land but of personal Things, that will make a Man subject to the Bankrupt Laws; nor is it Buying only, nor Selling only, but Buying and Selling, nor one single Act of buying and selling, but where one gets is Livelihood by it. Such as live on their manual Labour only, as Husbandmen or Labourers, are not Traders within the Statutes: But such as buy Wares and convert them into saleable Commodities, and get their Livelihood by buying and selling, may be Bankrupts within the Statutes; as a Shoemaker, Locksmith, Clothier, &c. But not an Innkeeper; for he doth not properly sell what he buys; but utters it at such reasonable Rates as he thinks fit, with respect to Attendance of Servants, &c.

^c 3 Cro. 31.
^d 3 Cro. 549.
^e 550.
^f 1 Danv. Abr.
686, 687.
^g 1 Salk. 110.
^h 1 Ld. Ray.
287.
ⁱ 1 Ld. Ray.
443.

* It hath been held that a Minor cannot be a Bankrupt.

By 5 Geo. 2. ch. 30. Persons dealing as Bankers, Brokers, and Factors, are liable to the Statutes concerning Bankrupts.

By 14 Car. 2. ch. 24. No Persons Adventurers for putting into the East India or Guinea Company, or the Royal Fishing Trade, shall be taken to be Traders within any of the Statutes of Bankrupts. Provided that Persons trading in any other way than the said Companies, or Fishing Trade, shall be liable to Bankruptcy.

By 7 An. ch. 7. Members of the Bank of England, shall not, as such, be adjudged liable to the Statutes of Bankrupts.

By 9 An. ch. 21. 3 Geo. 1. ch. 9. and 5 Geo. 1. ch. 19. Members of the South Sea Company shall not be liable, as such, to the Statutes of Bankrupts.

By 6 Geo. 1. ch. 4. No Persons concerned about circulating Exchequer-Bills shall, as such, be liable to the Statutes of Bankruptcy.

By

By 5 Geo. 2. ch. 30. No Farmer, Grazier, or Drover of Cattle, or Receiver-General of Taxes granted by Parliament, shall, as such, be deemed within the Statutes concerning Bankrupts.

2. How are Lands, Tenements, and Hereditaments, forfeited and lost by Bankruptcy?

When a Commission hath issued under the Great Seal, upon Petition to the Lord Chancellor, of some one Creditor, whose Debt amounts to the Sum of 100 *l.* at least, or of two Creditors whose Debts amount to 150 *l.* at least, or of three or more Creditors whose Debts amount to 200 *l.* at least, (who must also before the granting the Commission make Affidavit of the Truth of their Debts, and that the Party hath committed an Act of Bankruptcy, and also give Bond in 200 *l.* Penalty for the proving their Debts and the Bankruptcy, and duly proceeding on the Commission) and the Commissioners appointed by such Commission, or the major Part of them, have met and dealt in the said Commission, and found the Party a Bankrupt; all the Lands, Tenements, and Hereditaments, as well Copyhold as Freehold, which such Bankrupt had at the Time of his committing the Act of Bankruptcy, in his own Right, or in Right of his Wife, or jointly with his Wife, Children, or other Person, as to the Bankrupt's Right therein, whether in Possession, Reversion, or Remainder, or whether in Fee-simple, Fee-tail, for Life, or Years; and also all such Estates as shall come to the Bankrupt after the Act of Bankruptcy, and before the Obtaining and Allowance of his Certificate, if all his Debts are not satisfied, may be sold and conveyed by the Commissioners, or the major Part of them, for the Benefit of the Bankrupt's Creditors, by Virtue of and according to the Directions of the said several Statutes of 13 El. ch. 1. and 21 Ja. 1. but more particularly according to 5 Geo. 2. ch. 30. and such Sale shall bind the Bankrupt and his Issue, and all other Persons whom the Bankrupt might have barr'd by Common Recovery or otherwise, (unless the Reversion or Remainder be in the King, and the Estate be of the King's Gift) and also shall be good against all Persons claiming under him by any Act done by him after his committing an Act of Bankruptcy, and also against the Lord of the Manor^a under whom such Copyhold Lands are held.

^a 2 Ld. Ray.
1002.

The Statutes do not extend to any Estate conveyed *Bona Fide* by the Bankrupt before he became a Bankrupt.

And by 21 Ja. 1. ch. 19. No Purchaser for good and valuable Consideration shall be impeached by Virtue of that or any former Statute against Bankrupts, unless the Commission be sued forth within five Years after the Act of Bankruptcy. And if any Bankrupt shall convey, or cause to be conveyed, to his Children, or to any other Person, Lands or Goods (except the same shall be transferred upon Marriage of any Child, [See 5 Geo. 2. ch. 30.] or upon some valuable Consideration) the Commissioners may dispose thereof.

Though it should seem that a voluntary Settlement on a Child will be good,^b if the Party was not then in Trade and in Debt.

³ Wms. 298. If a Bankrupt hath mortgaged any Lands to another, the Commissioners have Power to assign a Person to make a Tender and Payment of the Money. And after such Tender and Payment, they shall have Power to sell the Estate. And any Estate whereof the Bankrupt

Bankrupt is *jointly seised* may be sold, (as to his Share) by the Commissioners: But not such as he hath only as a Trustee for another.^{1 Wms. 314.}

If a Bankrupt hath Land in the Right of his *Wife*, only his Right therein during the Coverture, can be sold by the Commissioners. And notwithstanding the Bankruptcy, the Bankrupt's Wife shall have her Dower in *his* Estate, and the Estate must be sold subject thereto, if the Marriage was had and the Estate came to the Bankrupt before he committed any Act of Bankruptcy. Offices of Trust which are annexed to the Person, cannot be sold; but Offices of Inheritance, as Keeper of a Forest, Warden of the Fleet may. And a Possibility of Right, or a contingent Interest in the Bankrupt, is assignable.^b [See 5 G. 2. ch. 30.]

When the Bankrupt's Lands are sold by the Commissioners, they must be sold by Deed indented and inrolled in one of the Courts of Record at *Westminster*. And,^{b 1 Wms. 358. 3 Wms. 132.}

By 5 Geo. 2. ch. 30. *To enable Purchasers under Commissions of Bankruptcy to make out their Title to the Lands purchased, the Lord Chancellor may, upon the Petition of any Person, order the Commission, and the Depositions and Proceedings thereupon, to be entered of Record. A true Copy of which Record, signed and attested by the proper Officer, may be given in Evidence, to prove the Commission and Bankruptcy of the Person, and other Matters, in case of the Death of the Witnesses proving such Bankruptcy, or the Loss of the original Proceedings.*

The Commissioners also have Power by the *aforesaid Statutes*, to dispose of the Bankrupt's personal Estate, or such Goods, *Chattels*, *Debts*, and personal *Effects*, as he had, and was possessed of, or intitled to, either in his own Right, or in Right of his Wife, or which any other Person had or was possessed of in Trust for him, at the Time of his becoming a Bankrupt, (tho' the Bankrupt hath sold them in Market-Overt; for the Sale of the Commissioners shall have Relation to the first Act of Bankruptcy) and also of all such personal Effects as shall come to him at any Time after such Act of Bankruptcy, and before his obtaining his Certificate or Discharge under the Commission; and if the Bankrupt makes his Debts payable to other Men, they are as liable as if they were payable to himself.

But by 1 Ja. 1. ch. 15. *No Debtor of a Bankrupt shall be in Danger for having truly and Bonâ Fide paid his Debt to the Bankrupt, before he had Notice that he was become a Bankrupt.* [See 19 G. 2. ch. 32. *infra*.]

By 21 Ja. 1. ch. 19. *The Commissioners, or any other Persons appointed by their Warrant under the Hands and Seals of the greater Part of them, may break open the House, Shops, Warehouses, Trunks, or Chests of the said Bankrupt, where the Bankrupt, or any of his Goods, or his Writings, shall be, or be reputed to be, and then seize the Bankrupt, and his Goods and Chattels, &c. and send the Bankrupt to Prison.* [But see 5 G. 2. ch. 30. As to Apprehending the Bankrupt.]

And (after reciting, that many Persons before they become Bankrupts convey their Goods to other Men upon good Consideration, yet still keep the same, and are reputed the Owners thereof, and dispose the same as their own) it is enacted, That if any Person shall, at the Time of his becoming Bankrupt, have, by the Consent of the true Owner,

Owner, in his Possession, Order, and Disposition, any Goods or Chattels whereof he shall be reputed Owner, and take upon him the Sale and Disposition as Owner, the Commissioners may sell and dispose of the same for the Benefit of his Creditors.

The 5 Geo. 2. ch. 30. is the Statute by which the Proceedings upon Commissions of Bankruptcy are now principally regulated; and pursuant to the Directions of that Act, the Person against whom a Commission hath issued, and who hath been found and declared a Bankrupt, must, within forty-two Days after Notice in Writing left at his Place of Abode, or personal Notice if he is in Prison, and Notice given in the *London Gazette*, or within such further Time as the Lord Chancellor shall think fit to allow him, not exceeding fifty Days, to be computed from the End of the said forty-two Days, and to be obtained six Days before the End of the forty-two Days, surrender himself to the Commissioners, and conform to the several Statutes concerning Bankrupts, and make a full and true Discovery of his Estate and Effects; and the Commissioners are forthwith, after they have declared the Person, against whom the Commission hath issued, a Bankrupt, to cause Notice thereof to be given in the *London Gazette*, and appoint a Time and Place for the Creditors to meet for the Choice of Assignees of the Bankrupt's Estate, and assign the Bankrupt's Estate and Effects to such Persons, as the major Part in Value of the Creditors for ten Pounds or upwards, according to the several Debts then proved, shall choose. But the Commissioners may, if they see Cause, for the better preserving and securing the Bankrupt's Estate, immediately (*i. e.* after they have dealt in the Commission, and found the Party a Bankrupt) appoint an Assignee or Assignees of the Estate and Effects, or any Part thereof, who, at the future Meeting of the Creditors for the Choice of Assignees, may be removed if the Creditors think fit, and in such Case, such immediate Assignees must assign over and deliver up the Bankrupt's Effects to the new Assignees chosen by the Creditors; and the Effects delivered up or assigned to such new Assignees are as effectually vested in them, as if the first Assignment had been made to them by the Commissioners.

The Commissioners at their first Meeting, having found the Party a Bankrupt, are to appoint three other Meetings, the last of which is to be on the forty-second Day, and they usually appoint the second of such Meetings for the Choice of Assignees, and seldom make an *immediate* Assignment of the Bankrupt's Effects, unless there is Danger of an Extent coming out against them (which if it does before the Commissioners have actually assigned the Effects, it will bind them): And if there is any real Estate belonging to the Bankrupt, the Commissioners not only make an Assignment of his Effects to the Assignees, but also a Conveyance to them by Bargain and Sale enrolled of such real Estate; and by Virtue of such Assignment, and Bargain and Sale, the Assignees have full Power to sell and dispose of, receive, bring Actions for, and recover in their own Names, any Part of the Bankrupt's Estate, Credits, or Effects; and they or the Commissioners may, by 5 Geo. 2. ch. 30. where there are mutual Debts between the Bankrupt and any other Person before his Bankruptcy, state and adjust the Account; and what shall appear due on the Balance, and no more, shall be claimed or paid on either side respectively. But by the same Statute the Assignees

Assignees shall not commence any Suit in Equity, without the Consent of the major Part of the Creditors present at a Meeting pursuant to Notice given in the *London Gazette* for that purpose; and with the like Consent, the Assignees may also submit any Matter relating to the Bankrupt's Effects to Arbitration, or compound with any Debtor to the Bankrupt's Estate.

It is not now necessary for the Creditors to pay any Contribution Money towards the Expences of the Commission before they prove their Debts; for by 5 Geo. 2. ch. 30. the Petitioning Creditor is to sue forth and prosecute the Commission at his own Costs till the Assignees are chosen; and at the Meeting for the Choice of Assignees, the Commissioners are to ascertain the same, and order the Assignees to reimburse the petitioning Creditor out of the first Effects of the Bankrupt that they shall receive.

The Commissioners may examine, as well by Word of Mouth as on Interrogatories in Writing, the Bankrupt and his Wife, touching his Trade, Dealings, and Effects, and also every other Person (for which Purpose they may summon any one before them) touching the Person, Trade, Dealings, and Effects of the Bankrupt, and any Act of Bankruptcy committed by him.

When the Bankrupt's Estate and Effects have been gotten in by the Assignees, the same are then to be distributed among such of the Bankrupt's Creditors as have proved their Debts under the Commission, which Debts may be proved personally at any Meeting of the Commissioners, or by Affidavit in Case the Creditor lives remote from the Place of Meeting; but before the making of such Dividend, twenty-one Days Notice of the Time and Place of the Commissioners and Assignees meeting for that Purpose must be given in the *London Gazette*; and at such Meeting the Assignees must produce Accounts of all their Receipts and Payments, and of what Effects shall remain outstanding, and, if required by the Creditors present, be examined upon Oath as to the Truth thereof, and shall have all just Allowances for what they have expended on account of the Bankrupt's Estate; and the Commissioners, by Order in Writing under their Hands, shall direct so much, as they shall think fit, of the neat Produce of the Bankrupt's Estate remaining in the Hands of the Assignees, to be divided among the Creditors; and the Assignees must forthwith pay the same to the Creditors in Pursuance of such Order, taking only a Receipt from each Creditor for his Share. The first Dividend ought, by 5 Geo. 2. to be made within twelve Months; and a second Dividend within eighteen Months after the Issuing the Commission; but these Times are not usually observed, though any Creditor who has proved his Debt may petition the Lord Chancellor, and thereby compel the Assignees to make a Dividend.

By 5 Geo. 2. ch. 30. When a Bankrupt has obtained his Certificate of having duly conformed to the Statutes (which Certificate the Commissioners are to sign, and the Lord Chancellor to allow, four Parts in five both in Number and Value of the Creditors who have proved their Debts, not less than twenty Pounds respectively, having first signed their Consent to such Certificate and Allowance, and the Bankrupt's Discharge) he is then free from any future Arrest for Debts contracted before his Bankruptcy; his future Effects are not liable to the Commission (unless he has before been a Bankrupt,

Bankrupt, compounded with his Creditors, or taken the Benefit of an Insolvent Act, and hath not sufficient to pay fifteen Shillings in the Pound; and he is intitled to five *per Cent.* out of the neat Produce of his Estate recovered in, if sufficient to pay his Creditors ten Shillings in the Pound after the Allowance made, so as the said Allowance is not above two hundred Pounds; and in Case his Estate will pay twelve Shillings and Six-pence in the Pound, then seven Pounds and ten Shillings *per Cent.* so as not to exceed two hundred and fifty Pounds; and if it will pay fifteen Shillings in the Pound, then ten Pounds *per Cent.* so as not to exceed three hundred Pounds; but if the neat Produce of the Effects will not pay ten Shillings in the Pound, then the Bankrupt shall be allowed so much as the Commissioners and Assignees shall think fit, not exceeding three Pounds *per Cent.* But,

This Allowance, or any other Privilege or Advantage, shall not extend to any Bankrupt whatsoever, who shall upon Marriage of any of his Children have given (when he was not able to pay his Debts) above the Value of 100 *l.* or who shall have lost in one Day the Sum of 5 *l.* or in the whole the Sum of 100 *l.* within a Year before he became a Bankrupt, in playing at any Game whatsoever. [See 5 Geo. 2. *ch.* 30. At large.]

If an Executor becomes a Bankrupt, a Legatee shall be relieved as a Creditor. A Surety or Bail may come in as Creditor, if he hath paid the Debt. By 7 Geo. 1. *ch.* 31. One that hath a Debt *not yet payable*^a may prove his Debt and receive a Dividend, upon Allowance for Payment before the Time, (and by G. 2. *ch.* 30. may petition for a Commission); but not if it depends upon a Contingency whether it will ever become due or not, unless such Contingency has happened^b. If one trusts a Bankrupt, after he becomes a Bankrupt, he shall not be relieved as a Creditor.

In the Distribution of the Bankrupt's Estate, no more respect shall be had unto Debts upon Judgments, Statutes, Recognizances, or Specialties, than to other Debts; ^d and even tho' such Creditors have sued out Execution before the Issuing of the Commission, they can have no Advantage thereof, but must come in only for a rateable Proportion with the other Creditors, unless such Execution was executed before the Bankrupt committed any Act of Bankruptcy. And every one of the Creditors must have a Share, Rate and Rate like, according to the Quantity of his Debt. [See 21 Ja. 1. *ch.* 19.]

^c If the Bankrupt happens to die after the Commissioners have dealt in the Commission, tho' before Distribution, yet nevertheless the Commissioners may proceed to execute the said Commission concerning the Bankrupt's Lands, Tenements, Hereditaments, Goods and Chattels, in such sort as they might have done if he had been living. But the Commissioners must account to his Heirs or Executors, and pay the Overplus to them, in the same Manner as to the Bankrupt when living. [See 13 El. *ch.* 7. 1 Ja. 1. *ch.* 15. 21 Ja. 1. *ch.* 19. 10 An. *ch.* 15. 3 Geo. 1. *ch.* 12. 7 Geo. 1. *ch.* 31. 5 Geo. 2. *ch.* 30. All which Statutes shall be beneficially construed for the Aid and Relief of Creditors.]

If the Commission is not duly taken out, or if the Commissioners do not pursue their Commission, the Party injured may by Petition apply to the Lord Chancellor to supersede the Commission,

^a 2 Str. 1211.

^b 2 Ld. Ray.

1549.

^c 2 Str. 867.

S. C. 1043,

1160.

^d 2 Wms. 496.

^e Caf. Temp.

Talbot 243.

^f 1 Wms. 92,

739.

^g Caf. Temp.

Talbot 184.

or to compel the Commissioners to proceed to give the Party relief.

Note; The Commission is usually directed to five Commissioners; but three of them are sufficient to do any Act under the Commission; and therefore no more than three are summoned to meet.

By 10 An. ch. 15. *The Discharge of any Bankrupt shall not discharge any Partner in Trade with the Bankrupt at the Time he became a Bankrupt; nor one that was jointly bound, or had made any joint Contract with such Bankrupt.*

By 19 Geo. 2. ch. 32. *No Person, who is bona fide a Creditor of any Bankrupt, in respect of Goods bona fide sold to such Bankrupt, or any Bill of Exchange bona fide drawn, negotiated or accepted by such Bankrupt in the usual and ordinary course of Trade, shall be liable to repay to the Assignee any Money, which before the Suing forth of such Commission was bona fide, and in the usual course of Trade, received by such Person of such Bankrupt, before the Person receiving the same shall have Notice that he is become Bankrupt, or is in insolvent Circumstances.*

The Obligee in any Bottomree or Respondentia Bond, and the Assured in any Policy of Insurance made and entered into, upon a valuable Consideration bona fide, shall be admitted to claim, and after the Loss or Contingency shall have happened, to prove his Debt, and receive a Dividend, in like Manner as if it had happened before the Date of the Commission; and the Bankrupt shall be discharged from such Bond and Policy, and have the Benefit of the several Statutes against Bankrupts, as if the Loss had happened, and the Money had become payable, before the Issuing of the Commission.

VI. Lands may be lost by *Escheat*. *Escheat* (from *Escheair*, *Es-* By *Escheat*:
chier, to fall) is when Lands * fall by Accident to the Lord of whom * 1 Inst. 13.
they are holden; as for want of *Heir* general or special, or for a. & b.
Felony of his Tenant, whether the Judgment is because of Out- 92. b. 268. a.
lawry, or to be hanged. Corruption of Blood makes the *Escheat* & b.
to the Lord upon Attainder of *Felony*; because the Estate cannot descend. But in *Treason* it is a Forfeiture to the King. [See of *Es-*
cheats in *Treason*, *Felony*, &c. under the Title *Forfeitures*, B. 4. ch. 5.
post.]

VII. Lands may be lost by *Disseisin*, *Abatement* and *Intrusion*. By *Disseisin*,
A *Disseisin* is a wrongful putting out of him that is actually sei- Abatement,
sed of a Freehold. [See 32 H. 8. ch. 33.] An *Abatement* is when Intrusion, &c.
a Man dieth seised of an Estate of Inheritance, and between the b 1 Inst. 277.
Death and Entry of the Heir, a Stranger doth enter. An *Intru-* a. & b. 331. b.
sion is when, between the Death of Tenant for Life and the Entry
of the Heir of him who died seised of the Remainder, a Stranger
doth intrude. An Entry also upon the King's Possessions is called
an *Intrusion*.

A *Deforcement* not only comprehends these three before-men- See of Fines
tioned; but also where any one holdeth Land whereunto another ch. 3. ante.
hath Right by Descent or Purchase, he is said to be a *Deforceor*.

A *Discontinuance* taketh away an *Entry* only; but is always by See B. 4. ch. 3.
Wrong. post.

See p. 161.
ante.

An *Usurpation* is when a Stranger presents to a Church, and his Clerk is instituted, as before observed; or it may be when a Subject unjustly uses Royal Franchises.

* 2 Inst. 38,
272.
* See B. 3.
ch. 3. post.

* A *Purpresture* (*Pourprife* an Inclosure) is when any Thing is done to the Nuisance of the King's Demesns, the King's Highways, &c. by Inclosure or Building; endeavouring to make that private, which ought to be publick.

Thus have I shewed how *Estates in Lands, Tenements, or Hereditaments* may be divided, how acquired, and how they may be forfeited or lost.

CHAP. V.

Of *Estates in Goods and Chattels* personal.

Of *Estates in Goods and Chattels* personal.

e 1 Inst. 118.b.
Noy's Max.
49, 50, 99.

C*hattels* (a French Word signifying Goods) are all Goods moveable or immoveable, that are not Freehold; and may be either *real* or *personal*. The Word *Bona* includes them both. *Real*, which concern the Realty, or Lands and Tenements, as Guardianships, Leases, Lands, or Tenements for Years, or at Will, the Interest in an Advowson for one Turn, Interests by *Statute-Merchant, Staple, Elegit*, &c. Of these I have already treated. *Personal*, as Gold, Silver, Plate, Jewels, Implements of Household, and all moveable Goods whatsoever, Cattle of all Sorts, Corn sown upon the Ground, (because it comes not without Industry, and may be given by Will, or forfeited by Outlawry.) These are called Goods and Chattels personal, because they belong immediately to the Person of a Man; and because when they are wrongfully detained, there is no other way to recover them than by a personal Action. But Charters or Evidences concerning Freehold, or Obligations, or Deeds, being Things in Action, are not properly comprehended under the Words *Goods* and *Chattels*. Yet Writings pawned for Money lent are said to be Chattels, and Bonds and Notes, and also Writings that concern personal Effects only, will pass either in a Deed or Will by the Name of Goods and Chattels^f.

* Dyer 5;
8 Rep. 33.
Perk. 115.
* Noy's Max.
50.

f 2 Roll. Abr.
58.

* Noy's Max.
20.

The Ownership of a personal Chattel is called a *Property*; and we are said to be *possessed* of Goods and Chattels, whether real or personal; but to be *seised* of a Freehold. For no Estate of Inheritance or Freehold can be termed Goods and Chattels.

* 7 Rep. 17,

18.

11 Rep. 50.

Finch 176,

177.

Dalt. ch. 156.

p. 371, 372.

H. P. C. 68.

* One may have an *absolute* or a *qualified* Property. *Absolute*, as in Hens, Geese, Ducks, Peacocks, but not in Creatures that are *Fera Natura*, as Wild Beasts, Fowls of the Air, Fishes of the Sea or in the Rivers, Partridges, Deer, Conies, Hares, &c. And one may have an absolute Property in Things of a *base Nature*, as Mastiffs, Hounds, Greyhounds, and Spaniels. But it is not Felony to steal them; tho' an Indictment may be preferred for a Trespass, or an Action brought for Damages for taking them away. A *qualified* and possessory Property is only for a Time, and may be obtained by *Industry*, as by taking Creatures *Fera Natura* and making

king them Tame; and then we have only a Property in them so long as they remain tame, and do not regain their natural Liberty, and have not a Custom of returning. Of these Felony may be committed. Or such a Property may be obtained by Reason of *Impotency* and *Place* in Things wild by Nature; as of young Hawks that are in my Ground, of young Pigeons in the Nest. And of these Felony may be committed. And for these the Owner of the Soil shall have Action of Trespass, if they are taken when they cannot fly. [See 11 H. 7. ch. 17. Concerning the Eggs of Swans and Hawks.] Or a qualified Property may be gained by Reason of *Privilege*, as of a Park or Warren; but one cannot bring an Action for these, and say *his Deer*, *his Conies*, *Hares*, *Pheasants*, *Partridges*; for one hath no *real* Property in them, but they belong to him by reason of Privilege for his Game and Pleasure, so long as they remain in the privileged Place. [But *2y.* for it hath been held that a Man may have a Kind of Property in these while they are in his own Ground, independent of such Privilege^b.] Tho' of these Felony cannot be committed; unless reduced to a Tame-ness, and known to be Tame by the Offender^c. Deer chased out of a Park, and followed by the Keeper with fresh Pursuit, Fishes that are in Trunks or Ponds remain in Possession and such a Property. But if Deer get out of the Park and stray, or Conies out of the Warren, it is lawful for any one to take them^d.

Property is either of Things in *Possession* or *Action*. In *Possession*, either *generally*, when no other can have them from me, or with me, without my Act or Default; or *specially*, when some other hath an Interest with me, or where there is a Property also in another as well as in the Owner; as by Bailment, *i. e.* by *Delivery* of Things to a Carrier, to an Innkeeper to secure Goods in his Inn; in Goods *pledged* or *pawned*; in Goods granted *conditionally*; in Things *distrained*; in Goods *demised* or leased out for a Term, or in *Action*, as an Interest to sue at Law either for the Things themselves, or Damages for them, as for Debts or Wrongs. All these Things in *Possession* or *Action* one may have in his *own* Right, or in the Right of *another*, as an Executor in Right of his Testator. [See the Difference betwixt a *Possession*, a *Charge*, and a *special Use* in Title *Felony* against the Goods of a Subject, B. 3. ch. 1. *post*.]

Godb. 174.

Vide Comy.

34.

Salk. 556.

and 1 Ld. Ray.

250. contra.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

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Ibid.

Ibid.

Ibid.

Ibid.

C H A P. VI.

How *Estates* in *Goods* and *Chattels* may be acquired, (viz.) 1. By the King's *Prerogative*. 2. By *Gift*. 3. By *Sale*. 4. By *Theft*. 5. By *Testament*. 6. By *Administration*.

How *Estates* in *Goods* and *Chattels* may be acquired, &c.

Bac. Elem. 72. By the King's *Prerogative*. See p. 215. ante, & B. 4. ch. 5. at the End, post.

E States in *Goods* and *Chattels* may be acquired, 1. By the King's *Prerogative*. 2. By *Gift*. 3. By *Sale*. 4. By *Theft*. 5. By *Testament*. 6. By *Administration*.

I. By the King's *Prerogative*. As by *Deodands*, *Treasure-Trove*, *Waiving*, *Straying*, *Wreck of the Sea*; and by *Forfeiture*.

II. By *Gift*.

By *Gift*.

See of *Grants*, p. 263. ante.

^a 3 Rep. 26, 27.

^b See p. 61. ante.

^c Perk. 57. Hob. 230.

^d 3 Rep. 80, &c.

^e See p. 224. ante.

Here by *Gift*, the Transferring of Things *immoveable*, (as *Leases for Years*) and of Things *moveable*, to one another, may be understood. Such a *Gift* is sometimes by the Act of the *Party*; as when one doth give a Thing to another, and even tho' the Donee be absent, for the Property vests in him, till he disagrees. Sometimes by Act of the *Law*; as when a Woman is married, all her Goods and Chattels are given to the Husband by the *Marriage*; or when one is made *Executor*, the *Law* gives all the Goods and Chattels of the *Testator* to the *Executor*.

^c All Chattels real [But see 29 *Car.* 2. *ch.* 3.] or personal may be granted or given without *Deed*, except in some special Cases; and a free *Gift* is good without a *Consideration*. But if there is a ^d general *Gift* of all one's Goods without Exception of *Apparel*, or other Things of *Necessity*, as *Bedding*, though it is by *Deed*, this may reasonably be suspected to be fraudulent to deceive *Creditors*. And though there may be a true *Debt* owing, a *Gift* of all one's Goods in Satisfaction of the *Debt*, is void against other *Creditors*, tho' good against the *Giver*, his *Executors* or *Administrators*. For tho' it may be a *Gift* upon valuable *Consideration*, yet it may not be done *Bona Fide*, as the Statute of 13 *El.* *ch.* 5.^e does require. By giving all one's Goods, there seems to be a secret *Trust* and *Confidence*, that the Donee shall deal favourably with the *Donor* in respect of his *Poverty*, or permit him, or some other for his *Benefit* or *Use*, to be in Possession, and such a sweeping *Deed* will amount to an Act of *Bankruptcy*. And therefore when any *Gift* shall be made in Satisfaction of a *Debt*, let it be made, 1. In a ^e publick Manner before Neighbours, and not in private. 2. Let the Goods and Chattels be appraised to the full Value, and the *Gift* made of specifick Goods in Satisfaction of the *Debt*. 3. After the

^a *Dolus versatur in generalibus.* 3 Rep. 80.

^b *Dona clandestina sunt semper suspiciosa.* 3 Rep. 80. *Clausula inconsuetas semper inducunt suspicionem.* Ibid.

Gift let the Donee take Possession of them; for the Continuance of the Possession in the Donor is a Sign of a Trust.

See 3 H. 7. ch. 4. Concerning Deeds of Gift, of Goods and Chattels made in Trust to the Use of the Grantor; and see the 13 El. ch. 5. p. 224 ante.

* A Gift may be upon Condition.

[See of Election under Title Grants, ch. 3. ante.]

III. By Sale.

A Sale or Selling is a Transferring of the Property of Goods and Chattels from one to another upon valuable Consideration. A Gift may be without a Consideration; but a Sale can never be without a valuable Consideration. A Man may sell his Goods at any Time, tho' he fears an Execution for Debt; except there is a Trust betwixt the Parties, as that by paying the Money he may have the Goods again; and except the Writ of Execution is delivered to the Sheriff, for then by 29 Car. 1. ch. 3. The Property of the Goods is bound from the Time of the Delivery.

One became indebted to the King by Bond, and sold a Lease for Years for a valuable Consideration: The Sale binds the King, because it was but a Chattel. The King's Debtor shall not be in a worse Condition than a Felon or Traytor, who may sell his Goods and Chattels after the Felony or Treason committed, and before Conviction, for his Maintenance.

If one agrees for Wares, he must not carry them away, before he hath paid for them, unless a Day of Payment is allowed him. If the Bargain is, that you shall give me five Pounds for my Horse, and you give me a Penny in Earnest, which I accept, this is a perfect Sale. If I say I will sell my Horse for five Pounds, and you say you will give me five Pounds, and presently go to tell out the Money to pay for him, I cannot sell my Horse to any other. But if you do not pay me presently, it is no Contract. If I sell my Horse for Money, I may keep him till I am paid. And if a Horse dies in my Stable after I have sold him, and before I have delivered him to the Buyer, I may notwithstanding have an Action for my Money because the Property was in the Buyer.

By 29 Car. 2. ch. 3. No Contract for the Sale of Goods, for ten Pounds or upwards, shall be good, except the Buyer actually receives Part of the Goods sold, or gives something in Earnest to bind the Bargain, or in Part of Payment, or some Note thereof in Writing be made and signed by the Parties to be charged with the Contract, or by their Agents thereunto lawfully authorized.

And no Action shall be brought upon any Agreement that is not to be performed within the Space of a Year from the making thereof, unless the same, or some Memorandum thereof, be put in Writing, and signed by the Party to be charged therewith, or some other by him thereunto lawfully authorized.

So that if any Agreement is for Wares under ten Pounds, and they are not to be delivered within the Year, it is void, unless put in Writing, though Earnest be given, by the last Part of the Statute. As to Agreements that are not to be performed within

* Cujus est dare, ejus est disponere. 2 Rep. 71. 7 Rep. 6.

a Year, if no Day is set, or the Time is uncertain, (as to pay a Sum at the Day of Death,) they are good notwithstanding the Statute. For it doth not appear to the contrary, but that the Payment may be within the Year. [See 7 Geo. 2. ch. 9. against Stockjobbing.]

By Theft.

IV. By Theft.

See p. 213.
ante.

As when one steals Goods, and sells them in Fairs and Markets Overt. But the Owner may seize his Goods stolen at any Time, till they are sold in the Fair or Market.

By Testament.

V. By Testament.

Here it will be necessary to shew, 1. *What is a Testament*, and its several *Kinds*; 2. *Who may make a Testament*; 3. *What is an Executor*; 4. *What is a Legacy*; 5. *How a Testament may be made void*.

^a Terms of the Law, v. Testament. Finch 167, 168. 1 Inst. 111. a. 322. b. West's Symb. Part 1. § 633.

1. ^a A *Testament* (*Testatio Mentis*) is a voluntary Disposition of what one would have to be done concerning his Goods and Chattels, real and personal, after his Decease, with the Appointment of an Executor. If he appoints no Executor, the Ordinary must commit Administration *Cum Testamento Annexo*, (with the Will annexed) and such Administrator is to perform the Will instead of an Executor.

^b 2 Ld. Ray. 1282.

A Testament is either *written* or *nuncupative*. A *written* Testament is not only such as I have before spoken of in the 3d Chapter (more properly called a Devise of Lands and Tenements,) but it is that Testament concerning Goods and Chattels, which at the Time of making thereof is committed to *Writing*. Signing and Sealing is not necessary to this Sort of Testament, for it may be made good by Proof^b, without it. A *nuncupative* Testament, or Will, is when the Testator doth by *Word* of Mouth only declare his Will concerning his Goods and Chattels (for Lands cannot pass by Words) before a sufficient Number of Witnesses, who after his Death put into Writing what the Testator ordered in his Life-time. [See 29 Car. 2. ch. 3. *infra*.]

^c Lit. 168. 1 Inst. 112. b.

^c No Testament is of any Effect till after the Death of the Testator. For one may alter and make void his Will at his Pleasure; and he may make as many new Testaments as he pleases; but the last Testament only shall stand, the rest being revoked by the last. Yet a new ^d Publication of the first Will does revoke the last that was made. When the last Testament is known, it shall be favourably expounded according to the Meaning of the Testator.

^e West. Symb. Part 1. § 636.

A ^e *Codicil* (*Codicillus* from *Codex* a Book, a Writing) is a Supplement to a Will, adding what is omitted, or altering, retracting, or explaining something in it. It is the same with a Testament, ex-

^a *Omne Testamentum morte consummatum est.* 1 Inst. 322. b. 4 Rep. 61.
Voluntas testatoris ambulatoria est usque ad mortem. 1 Inst. 112. b. 4 Rep. 61.
In contractibus benigna, in testamentis benignior, in restitutionibus benignissima interpretatio facienda est. Ibid. and 3 Inst. 241.
De bonis defuncti trina debet esse dispositio; necessitatis, utilitatis, voluntatis. 8 Rep. 136.

cept that it is without the Appointment of an Executor; and except that one may leave behind him only one Testament, but as many Codicils as he pleases.

If the Testament or Codicils are kept from the Executor, he may force the Party detaining them to deliver them up by the Ecclesiastical Law, and recover them in the Spiritual Court.

By 29 Car. 2. ch. 3. No Will in Writing concerning personal Estate, nor any Clause thereof, shall be repealed or altered by any Words or Will by Word of Mouth only, except the same be in the Life of the Testator committed to Writing; and after the Writing thereof, read unto the Testator, and allowed by him, and proved to be so done by three Witnesses at least.

And no Nuncupative Will shall be good, where the Estate thereby bequeathed exceeds thirty Pounds, that is not proved by the Oaths of three Witnesses at least, that were present at the making thereof; nor unless it be proved that the Persons present or some of them were bidden to bear Witness by the Testator; nor unless made in his last Sickness, and in his own House, or where he had been resident for ten Days before the making; except surprised by Sickness from home, and dying before he returned.

A Nuncupative Will shall not be proved by the Witnesses after six Months, except the Substance thereof was committed to Writing within six Days after the Making of the said Will. Neither shall any Probate of a Nuncupative Will pass the Seals of any Court, till fourteen Days after the Decease of the Testator; nor be proved till Process hath first issued to call in the Widow, or next of Kin, to contest the same if they please.

Soldiers in actual Military Service, and Mariners at Sea, may dispose of their personal Estates, as before the making of this Act.

By 4 An. ch. 16. Such Witnesses as are good Witnesses upon Trials at Law, shall be deemed good Witnesses, to prove a Nuncupative Will, or any Thing relating thereunto.

2. Who may make a Testament?

All Persons (the King and all his Subjects) may make their Testaments, except as followeth. An Infant Male under fourteen Years of Age, an Infant Female under twelve Years, (or as others say) under seventeen Years of Age, cannot make their Wills of Goods and Chattels. But an Infant of the Age of seventeen certainly may make a Testament of his Goods and Chattels, and constitute Executors. Yet sometimes Wills are made by Infants of fourteen Years of Age, and the Common Law will not intermeddle.

A Woman Covert cannot make a Testament of Goods and Chattels, without her Husband's Consent and Licence first obtained. Yet if she then disposeth of any Thing, the Legatee hath it rather of the Gift of the Husband. But of Goods that she hath as Executrix she may make an Executor without the Husband's Consent, or she may make her Husband Executor.

If a Woman maketh her Will before Marriage, Taking Husband and Coverture at the Time of her Death, is a Countermand of it.

Idiots, Lunatics (except in the Time of their lucid Intervals, where no Commission of Lunacy hath issued out of Chancery) Non Compos Mentis, or those that have not a sound, perfect, and disposing

^a 4 Inst. 335.

^b 1 Inst. 89. b.

^c 2 Danv. Abr.

^d Tit. Devis.

^e 512, 513.

^f Pr. Ch. 316,

^g 537.

^h See p. 12.

ⁱ ante.

^j Perk. 501.

^k 4 Rep. 51.

^l 3 Cro. 219.

^m 597.

ⁿ Perk. 502.

^o West. Symb.

^p Part 1. § 634.

^q 1 Roll. Abr.

^r 912, 913, 915.

^s 4 Rep. 61.

^t 6 Rep. 23.

disposing Memory, (for it is not sufficient that the Testator hath a Memory) an *Alien Enemy*, Persons convicted and attainted, *Re-cusants* Convict, *Corporations* cannot make a Testament. An *Out-law* in a personal Action may make a Testament of his Goods, and devise his Lands. He who is himself an *Executor*, cannot give away by Will the Goods, Chattels, and Credits, which he hath as Executor, if the Property is not altered by him by Payment of his own Money. Yet if he hath proved the Will, he may make a Continuation of the Executorship; and his Executor shall have the Goods, Chattels, and Credits, as Executor to the first Testator. But he may give them by Word or Deed in his Life-time. An Administrator of a Term cannot devise it, tho' he may sell it in his Life-time. For the Devise doth not take Effect 'till his Death; and immediately upon his Death the Law vests it in the Administrator *de Bonis non*, of the Intestate [See of the Interest of an Executor *Infra*.]

By 4 & 5 W. & M. ch. 2. Persons inhabiting, or having any Goods, within the Province of York may by their last Wills dispose of all their personal Estate, notwithstanding any Custom to the contrary. [See 2 An. ch. 5. As to Citizens of York City.]

By 7 & 8 W. 3. ch. 38. Any Person residing, or having Goods, in the Principality of Wales may make his Will thereof, and dispose of them to his Executors or others, as he shall think fit, notwithstanding the Custom by which Widows and Children claim a Reasonable Part.

By 11 Geo. 1. ch. 18. Freemen of London, become such since the first Day of June 1725, or old Freemen unmarried and without Children, are enabled to dispose of their Effects by Will, notwithstanding the Custom.

But if any Person who shall be Free of the City, hath agreed or shall agree by Writing, in Consideration of Marriage or otherwise, that his personal Estate shall be distributed according to the Custom, or in case any Person so free shall die intestate, his personal Estate shall be subject to the Custom.

3. What is an Executor?

^a Terms of the Law, v. Executor.
Noy's Max. 102.
^c Finch 167, 168.
West's Symb. Part 1. § 633, 637.

An *Executor* is he to whom the Execution or Performance of another's Man's will is committed after his Death. He may be appointed by express Words, or by Words of Circumlocution that amount to a direct Appointment. Where there is no Executor, there is no Testament properly speaking. Land was not originally Testamentary. Therefore that still may be devised in Writing, without making an Executor. He that appoints the Executor is call'd the *Testator*. If an Executor is only named by the Testator; and nothing given away in the Will to any other, yet it is a Testament.

^a West's Symb. 1 Part, § 635.
³ Cro. 9.
⁴ Inst 335.
¹ Roll. Abr. 915.

All that are capable of making a Testament are capable of being Executors. When the King is made Executor, he appoints others to take the Execution of the Will upon them, and others to take Account. But some that cannot make a Testament are capable of being Executors. A Mayor and Commonalty may be Executors.

(2.) An Infant *in ventre sa mere*, or in his Mother's Womb, may be an Executor. But when he is born he cannot act as such till Seventeen Years of Age. And therefore the Ordinary must grant Administration *durante minore etate* till that Age. A Woman Covert may

⁵ Rep. 29.
⁶ Rep. 67.

may be Executor. ¹⁰ So may an excommunicate or outlaw'd Person, ¹ Cro. 683. or attainted or Alien. But Popish Recusants Convict cannot be ³ Cro. 8. 9. Executors. [See 3 *Ja.* 21. *ch.* 5.] Nor those that have been convicted of executing an Office without taking the Oaths to the Government. [See 13 & 14 *W.* 3. *ch.* 6. and 1 *Geo.* 1. *ch.* 13.] Nor ¹ See p. 102. Antc. Artificers exercising or teaching their Trades in foreign Parts, and not returning within six Months after Warning. [See 5 *Geo.* 1. *ch.* 1. ¹ See of Forfeiture, B. 4. *ch.* 5. post. ¹ Well. ¹ Symb. 1 Part 637. ¹ Roll. Abr. 924.

He that may make one Executor may make two, three, or more; but all of them in the Eye of the Law are but one Executor. In which respect most Acts done by or to any one of them, are Acts done by or to all.

An Executor may be made to a fixt Time, upon Condition, (as if the Executor will find Sureties to perform the Will) or to some certain Part of the Estate, or to some certain Act.

Every ¹ Intermeddling with the Goods of the Deceased is not an Acceptance of the Executorship, to make one chargeable as Executor, or as Executor of his own Wrong. As if one does an Act of Charity or Humanity, by locking up the Goods of the Deceased, that they be not wasted; or if he does bury the Deceased, and sell his Goods to do it; or if one does take away his own Goods, that were in the House of the Deceased; or use some of the Goods of the Deceased in the necessary Occasions of the Family; or take the Goods by Letters *ad Colligendum*. These Acts will not amount to an Acceptance of the Executorship, if the special Matter is pleaded. ¹ Dyer 166. ¹ 167. ¹ Noy's Max. 102, 103.

When an Executor hath accepted the Executorship, he cannot assign it over. He may accept or refuse the Executorship. But as an Executor, after he hath once refused the Executorship, can never afterwards intermeddle; so after he hath once legally accepted it, he can never after refuse it. For he cannot accept and refuse too. So if an Executor is cited by the Ordinary to prove the Will, [See 21 *H.* 8. *ch.* 5.] and he appears, and refuses to prove the Will, he cannot afterwards accept and intermeddle with the Estate. Thus it is where there is but one Executor. But where there are many Executors named, and all are cited, and some of them only appear and refuse the Executorship, and afterwards one of the Executors proves the Will, and takes upon him the Executorship, or where one only appears and proves the Will, this sufficeth for them all; and they that did refuse, or did not come in and prove, may at any Time join with him, and intermeddle with the Estate, and come in and take out Probate of the Will. And if the acting Executor dies, and makes an Executor, the surviving Executors may act; for their Refusal before the Ordinary is void in this Case. But where all refuse, no one can ever after come in and prove the Will. For the Testator now dies Intestate, and without an Executor, so that the Ordinary may grant Administration *cum Testamento annexo*, [to the residuary Legatee, if there be such, or if none, then to the next of Kin] or sequester the Goods in the mean Time, till the Administration is granted. ¹ 9 Rep. 37. ¹ Inf. 113. a. ¹ Dyer 372. ¹ Salk. 311. ¹ Noy's Max. 102. ¹ Shower 26. ¹ Vern. 300. ¹ 9 Rep. 32. 39.

In Case where one accepts, and all the rest refuse, he must bring Actions in all their Names, and one may release the Action; for the Possession of the one is the Possession of all of them. But an Action

^a Perk. 485.
^b Noy's Max.
 102, 103.
 Finch 264,
 295.
 See p. 146.
 ante.
^c Office of Ex-
 ecutor, ch. 9.
^d Terms of
 the Law, v.
 Administrator.
 5 Rep. 31,
 32, 33.
 8 Rep. 135.
 9 Rep. 39.
 Noy's Max.
 102,

^e 5 Rep. 33,
 82, 83.

^f See Office of
 Executors,
 ch. 14.
 Swinb. Part 4.
 S. 23.

^g Ibid.

^h 5 Rep. 30.

Action may be brought against him or them only that act or administer. [See 9 Ed. 3. St. 1. ch. 3. 21 H. 8. ch. 4.]

Regularly one Executor cannot sue the other at Law, but he may have Relief in Equity.

An Executor of his own Wrong is he that is neither Executor nor Administrator, and yet acts as an Executor; as when he takes into his Hands the Goods of the Deceased, and converts them to his own Use, and also if he alters the Property by Gift or Sale, tho' he had Letters *Ad Colligendum Bona Defuncti*; for the Ordinary himself has no Power to give or sell them; or if he delivers the Goods of the Deceased to Creditors or Legatees in Satisfaction of their Debts or Legacies; or receives any Debt due to the Deceased; or releases any Debt due to the Deceased, before it is paid; or pays any Debt due from the Deceased, except it be with his own Money. So that if a man dieth Intestate, and a Stranger taketh the Intestate's Goods and useth them; he is an Executor of his own Wrong, and must be sued as Executor. For no one can be an Administrator of his own Wrong. [See 31 Ed. 3. ch. 11.] [It is the taking Possession

of the Goods of the Deceased that makes him liable as Executor in his own Wrong, to answer the Value of them to the Creditors, even without any selling, using, or converting of them.] If there is a legal Executor that hath proved the Will, or if a legal Administration is granted, before the Stranger intermeddled, a Stranger cannot be an Executor of his own Wrong, but is a Trespasser against the Executor, &c. and Creditors may have their Remedy against the lawful Executor, &c. [But this must be understood, where he takes them out of the Possession of the legal Executor or Administrator; for if the legal Representative of the Deceased was never possessed of them, they never were Assets in his Hands; and the Person who took them, tho' after a legal Administration granted, is liable as Executor of his own Wrong to the Creditors, or may be sued for them by the legal Representative.] And tho' there be an Executor or Administrator, if the Stranger takes the Goods, and claims to be Executor, by paying and receiving Debts, there he may be charged as Executor of his own Wrong by such express Administration. But all lawful Acts, which he doth as Executor of his own Wrong, are good; and he must answer only as far as he acts. An Executor of his own Wrong cannot retain for his own Debt against another Creditor, because then the Creditors would strive amongst themselves, to seize the Goods of the Testator.

By 43 El. ch. 8. If any Person shall obtain any Release of a Debt, or any Goods or Debts of an Intestate, by Fraud, and not upon valuable Consideration, he shall be charged as Executor of his own Wrong, so far as the Value of the Goods or Debts so obtained shall amount. However, he shall be allowed such reasonable Deductions, as other Executors or Administrators ought to have.

See 30 Car. 2. ch. 7. To enable Creditors to recover their Debts of Executors or Administrators of Executors in their own Wrong; and 4 & 5 W. & M. ch. 24. As to Executors or Administrators of Executors or Administrators, who shall waste the Goods of the Testator or Intestate. See also 25 Ed. 3. St. 5. ch. 5.

This is the Description of an Executor. Let us see what is his Interest; and what are Assets; his Power; his Office and Duty.

1. The *Interest* of an Executor arises at Common Law, by Virtue of the Testament, which gives him all the Chattels real and personal of the Testator; and the Probate of the Ordinary is only a Confirmation. The Law gives him not only those in Possession, as *Leases for Years*, and Charters and Evidences concerning them, *Arrears of Rent due at the Death of the Testator*, Grants of next Advowsons and Presentations of the Testator's Inheritance becoming void in his Life-time; Corn cut or growing, where the Testator had an Estate for Life; Gold, Silver, Jewels, Plate, Household-Stuff, Cattle, Implements of Husbandry, but also those Things that lie in *Action*, as Rights and Interests upon Judgments, Statutes, Recognizances, Obligations and Bonds, and all other Debts due to the Testator; because on the other Hand the Law subjects the Executor to every Man's Claim and Action, which he had against the Testator for the same. For this Reason the Executor is said to be the Testator's Assignee, and to represent the Person of the Testator. But for personal Wrongs done by the Testator to the Person, Goods or Land of another, he does not represent him; because personal Actions die with the Person. [But see 13 *El. ch. 10.* where Grants of Goods shall be liable to the Successors Suit in the Ecclesiastical Court for Dilapidations, as if they were Executors or Administrators.] But after all that hath been said concerning the *Interest* of an Executor; if one makes his Will, and appoints an Executor, and gives him ever so small a Legacy, and makes no Disposition of the *Residue* of his personal Estate after Debts and Legacies paid; This Residue shall not go to the Executor for his own Benefit, but shall be distributed amongst the next of Kin to the Testator, according to the Statute of Distribution of 22 & 23 *Car. 2. ch. 10.* [which see *infra.*] For the Testator is esteem'd to die intestate as to that Residue. [But an Executor is not compellable by the Spiritual Court to make Distribution, but only in a Court of Equity, which considers him as a Trustee for the next of Kin.]

The *Wife* of the Testator must have her wearing Apparel, which is necessary and convenient for one of her Station and Character. See p. 63. ante.

2. Of *Assets*. [See of *Ancestor and Heir*, B. 1. *ch. 6. ante.* As to real Assets.]

All those Goods and Chattels which belonged to the Testator at the Time of his Death in any Part of the World, and which do come to the Hands of the Executor, shall be *Assets* (from the *French Assets*, enough) or *sufficient* Goods and Chattels to make the Executor chargeable (as far as the said Goods and Chattels extend) to a Creditor or Legatee. If a Stranger takes Goods out of his Possession, yet they are *Assets* in his Hands. *Assets* in the Hands of one Executor are *Assets* in the Hands of all the Executors; [but each Executor is chargeable for no more than he actually receives, (or joins in giving a Receipt for, as to Creditors, *Qu. in Equity*) either to Creditors or Legatees.] Such Things as are not valuable, or not to be sold, (as *Presentation to a Church* actually void,) shall not be accounted *Assets*. If the Cattle of the Testator do breed after his Death, the Young shall be *Assets*. So Wool growing on the Sheeps Backs, Goods and Chattels mortgaged to the Testator, and not redeem'd, or the Money wherewith they are redeemed, shall

Plowd. 280.
9 Rep. 37. 38.
Noy's Max. 103.

Noy's Max. 103, 104.
1 Inst. 209 a.
388. a.
3 Cro. 515.

1 Inst. 209. b.
210. a.
9 Rep. 89.
Noy's Max. 104.

1 Wms. 7.
544. &c.
Pr. Ch. 169.
1 Str. 568.
2 Wms. 158.
S. C.
3 Wms. 43.
194.

2 Str. 865.

6 Rep. 47.

Terms of the Law, v. Assets.
1 Inst. 374. b.
Noy's Max. 104.

2 Vern. 504.
570.

1 Wms. 241.
1 Salk. 318.
S. C.

Westby v. Clarke, in Chan. Trin. Term, 32 & 33 G. 2.
1 Inst. 338. a.

Office of Executor, ch. 9. p. 119.

^a 5 Rep. 34. shall be Assets. ^a But if the Lands are only devised to be sold, the Money and Profits of the said Lands shall not be accounted any of the Testator's Goods. [The Law seems to be otherwise now ^b.] ^b 1 Lev. 224. Also all Goods and Chattels, and Debts that are received or recovered by the Executor by *Action*, after the Death of the Testator, shall be accounted Assets; but not before they are received or recovered. For if the Executor do never recover, or get a Debt into his Possession, he shall never be charged; ^c provided he has used his utmost Endeavour to recover it, and cannot do it. ^d Damages also recovered for Goods taken away in the Life of the Testator shall be Assets. [See 4 Ed. 3. ch. 7.] ^e If an Obligee or Creditor is made Executor, he may pay himself before any other in equal or inferior Degree. If the Obligee or Creditor makes the Obligor or Debtor Executor, it is a Release of the Debt in Law, even in the Case of an Infant. ^f But his Debt shall be Assets for so much to other Creditors, [and to Legatees, or even to a Residuary Legatee in Equity ^g.] ^h if there is not Assets besides. ⁱ If an Executor of his own *Wrong*, to whom twenty Pounds is owing, doth seize Goods to the Value of twenty Pounds, intending to pay himself a Debt of that Value, this shall be Assets in his Hands, to make him chargeable to any Creditor or Legatee, as hath been hinted before. If an Executor alters the Property of any Thing belonging to the Testator, as by laying down his own Money in lieu of it, it belongs to him. If one recovers against an Executor a just Debt of an hundred Pounds, and the Executor ^k compounds for sixty Pounds, he shall not be allowed an hundred Pounds, to defraud other Creditors.

^l 2 Vent. 358. ^l Tho' a Plantation be an Inheritance, yet, being in a Foreign Country, it is a Chattel to pay Debts, and a Thing that is Testamentary.

By 29 Car. 2. ch. 3. *An Estate for the Life of another, shall be Assets in the Hands of the Executor or Administrator, if there be no special Occupant, nor Devise made thereof, and by 14 G. 2. ch. 20. s. 9. is distributable among the next of Kin as personal Estate.*

^m 9 Rep. 90. ^m Assets shall be always intended, till the Executor alleges the Want of them in Excuse.

After all the Debts and Legacies are paid, that which remains belongs to the Executor by Virtue of his Executorship. [But see of the Interest of an Executor above.] ⁿ Tho' the Interest which the Executor hath as Executor in the Goods of the Testator before such Payments, is different from the Interest which every one hath in his own proper Goods. For an Executor cannot by Will give away the Goods which he hath as Executor. But his Executor shall be Executor to the first Testator. Neither are the Goods, which a Man hath as Executor, liable to pay his own Debts. But if an Executor ^o alters the Property from the Testator to himself, by paying a Debt to the Value of such particular Goods named by him, or ^p by paying the Rent, and receiving the Profits of a Lease, or Part of the Profits equal to the Rent, the Goods and Profits received are his own.

^q Plowd. 277. 3. The ^q Power which an Executor hath is wholly by the Will. And therefore he may release an Action, Debts or Duties, assent to a Legacy, receive Debts, and take Possession of the Testator's Goods, or do any Thing as Executor before the Probate of the Will, if he afterwards proves it. But before Probate he cannot bring Actions for

^a 5 Rep. 34.
^b 1 Lev. 224.
See p. 146.
ante.

^c 1 Rep. 98.
Office of Executor, ch. 6.

p. 92.

^d Lit. 192.

^e 1 Inst. 124. a

^f 1 Inst. 264. b.

Office of Executor, ch. 2.

p. 43.

^g See p. 277.

ante.

^h 1 Chanc.

Rep. 292.

Cal. Temp.

Talb. 242.

ⁱ 1 Roll. Abr.

920, 921.

^j 5 Rep. 30.

^k 8 Rep. 132.

133.

^l 2 Vent. 358.

^m 9 Rep. 90.

94.

ⁿ Plowd. 525.

526.

Dyer 160.

Noy's Max.

107.

^o 9 Rep. 88.

^p 1 Roll. Abr.

907.

^q Dyer 185.

187.

^r 5 Rep. 31.

^s Plowd. 277.

278, 280.

^t 5 Rep. 28.

^u 9 Rep. 38.

^v 1 Inst. 292. b.

^w 1 Roll. Abr.

917.

Noy's Max.

103.

for Debts, &c. due to the Testator, for he must shew the Testament proved under the Seal of the Ordinary. [But if there is but one Executor, and he dies before Probate, his Executor or Administrator cannot prove the Will; but Administration must be granted with the Will annexed, to the residuary Legatee, if there is any such, or if not, then to the next of Kin.]

An *Infant* Executor, after seventeen Years of Age, hath as much Power as another Executor of full Age. But he is disabled to do any Thing to his own Hurt; and therefore, if he releases a Debt before he receives it, the Release is void; tho' it might have been good upon Payment. And if an Infant above seventeen Years of Age assents to a Legacy before the Debts are paid, the Assent is void; or if he do any Act that will be a *Devastavit*, or a Wasting of the Goods, in another Executor of full Age, it shall not bind him. He cannot sell a Lease for Years, which he hath as Executor, before he is twenty-one Years of Age. If he does, such Sale shall be void.

A *Feme Covert* Executrix may do any lawful Act, which another Executor may do. But she cannot prejudice her Husband by releasing a Debt before it is paid; by assenting to a Legacy before the Debts are paid. Yet the Husband may do it.

If the Goods of the Deceased are kept from the Executor, he may sue for them at Common Law. If one seised of a Messuage in Fee-simple, Fee-tail, or for Life, hath Goods in the House, and makes his Executors and dies; his Executors shall have free Entry, Egress and Regress to carry the Goods out of the House (to whomsoever it does belong) in a reasonable Time.

One Executor may sell a Lease for Years, and the Sale shall bind the other.

4. The *Office* and *Duty* of an Executor is, 1. To bury the Testator in a decent Manner according to his Rank and Character, but with regard to his Estate left after Debts paid. For funeral Expenses that are unreasonable ought not to be allowed out of the Testator's Estate. Whatever the Executor lays out extravagantly, if there is not enough to pay the Debts, he must bear it at his own Expence. If they are reasonable and necessary, Funeral Charges must be allowed before Debts and Legacies. 2. The Executor ought to make an *Inventory*, i. e. a Schedule containing a true and perfect Description of all the Goods and Chattels of the deceased at the Time of his Death, with their Value, and of all Debts due to him. And this Inventory ought to be made and appraised in the Presence of the Executor by two or more of the Creditors, or two of the next of Kin, or in their Default by two or more of the Neighbours or Friends to the Deceased; [See 21 H. 8. ch. 5.] and then the Executor must deliver the same upon Oath to the Ordinary; unless the Ordinary gives him Time to bring in the Inventory, or upon good Cause dispenses with it. 3. The Executor must prove the Will before the Ordinary, either in *common Form* by his own Oath, or by *Witnesses* besides his own Oath, if any that have Interest call him to do it. And tho' a Will is proved in *common Form*, yet the Executor may afterwards be forced to prove it again *per Testes*, by those that have a Right to Question it. A *Caveat* is frequently entered into the Register's Office against the Probate in common Form. When the Will is proved, either in *common Form*,

or *per Testes*, it must be exhibited in the Office belonging to the Ecclesiastical Court, to be kept by the Register; and a Copy thereof in Parchment is to be delivered to the Executor under the Ordinary's Seal; which Copy in Parchment so sealed is called the *Probate*. But it is rather the Certificate of the Probate. [See 21 H. 8. ch. 5.] One may prove a Will before the Ordinary which relates both to Goods and Lands; tho' formerly a Prohibition used to be granted as to the Lands. If there is a Devise of Lands and Tenements of Freehold in the Testament, it is proper also to prove the Will by Witnesses in the Court of *Chancery*. The Probate of the Will with respect to Goods and Chattels is necessary; for tho' as to Freehold Lands devised, it is not at all material to prove the Will before the Ordinary, yet as to Goods and Chattels it is necessary to give the Executor Power to bring Actions, and to confirm the Acts which he did as Executor before Probate. If all the Goods and Chattels of the Deceased (under which I comprehend 'Specialties, as Bonds, Statutes, &c.) be within the same Diocese wherein the Testator lived and died, the Executor must prove it before the Bishop of the Diocese, or his Commissary, or before the Archdeacon, or his Official, according as the *Composition* has been made with the Bishop, or as *Prescription* directs. [But it hath been lately expressly held^a, that it is not the Death of the Party; but his having Goods or Chattels at his Death within the Diocese, that gives the Jurisdiction to the Ordinary; and if the Party has no Goods or Chattels within the Diocese where he lived and died, or not to the Value of Five Pounds, but hath Goods or Chattels in another Diocese to that Value, the Probate must be granted by the Ordinary of that other Diocese.] Sometimes the Executor hath been driven to shew, how an Archdeacon hath Power to prove a Will; whereas the Power of the Bishop or his Commissary will be allowed of Course. Debts without Specialty are to be accounted Goods in that Diocese where the Debtor lives. If all the Goods and Chattels lie in a *peculiar* Jurisdiction, then the Will ought to be proved before him that is Judge of the Peculiar. If some Part of the Goods, to the Value of five Pounds, is in a Diocese, and Part to the same Value in a Peculiar of the same Diocese, [or in one Diocese in one Province, and in another Diocese in another Province] there must be two several Probates. But if the Goods are within two Peculiars within the same Diocese, then the Will must be proved before the Archbishop of the Province. And so before the Archbishop, if there are *Bona Notabilia*, i. e. If the Testator had Goods and Chattels at the Time of his Death of the Value of five Pounds, or more, lying in different Diocesses within the same Province [or if there are *Bona Notabilia* in different Diocesses in one Province, and also in different Diocesses in another Province^b, it must be proved before the Archbishop of each Province. But if there are *Bona Notabilia*, only in one Diocese in one of the Provinces, in that Case it is sufficient to prove it before the Ordinary of that Diocese, and the Archbishop of the other Province, without any regard to the Place of the Testator's Death, as before observed.]

But by 4. An. ch. 16. *Wages due to Persons for Work done in the King's Yard or Docks, shall not be deemed Bona Notabilia*. In some Places^c Lords of Manors have the Probate of all the Wills of their Tenants within the Manor, by Custom Time out of Mind. Therefore

^a 1 Ventr. 207.
^b 6 Rep. 23.

^c 1 Roll. Abr.
917.
Noy's Max.
103.
^d Dyer 305.
^e 1 Roll. Abr.
908, 909.

^f Griffiths v.
Griffiths, K.
B. East. T.
26 G. 2.
^g 1 Salk. 37. to
the contrary
not Law.

^h Perk. 491.
492.
Can. 92. & 93.

ⁱ 1 Cro. 718,
719.

^j 1 Lev. 78.

^k 2 Lev. 86.
^l 1 Salk. 39.
Dalison 77.
^m 1 Roll. Abr.
908, &c.

See of Prero-
gative Court,
B. 4. ch. 1.
post.
ⁿ 5 Rep. 73.
^o 9 Rep. 37.

Therefore it is to be observed, that if Probates of Wills or Letters of Administration are ^a denied in the King's Courts, and thereof an ^a 9 Rep. 31. Issue joined, it shall be tried by a Jury, and not by Certificate of ⁴⁰ 41. the Ordinary; because not *originally* of Ecclesiastical Cognizance. ² Inst. 231. ¹ Str. 666. [But the Probate is Evidence uncontrovertible ^b of the Will, and of ^b 1 Ld. Ray. its Contents, as to personal Effects.] ²⁶².

By 31 Ed. 3. ch. 4. *Bishops shall restrain their Officers from taking excessive Fees for Probate of Testaments; in pain to have them indicted before the Justices for Extortion.* ¹ Str. 481. ¹ Wms. 389. ⁵²⁶.

By 21 H. 8. ch. 5. *The Fees for Probate of Testaments are limited.* ³ Inst. 149. ⁴ Inst. 336. *And the Ordinary may convene Executors to prove the Testator's Will, and to bring in an Inventory.*

By 23 H. 8. ch. 9. *A Man is not to be cited out of his Diocese, or peculiar Jurisdiction, to prove a Will, or to take Letters of Administration, unless there are Bona Notabilia.*

4. It is the Executor's Office and Duty to pay Debts and Legacies. ^a Hob. 250. A Bond or other Security for Payment is to be accounted Payment. ² Vent. 358. All Debts must be paid before Legacies. In Payment of Debts this Order must be observed. After the Charge of the Funeral, Inventory, Opposition by a *Caveat* and the Probate, the King is to be preferred for his Debts due upon ^a Record and Specialty. Then ^a Office of the Forfeitures for not *Burying* in Woollen are to be allowed out of ^{ch. 12. p. 179.} the Estate of the Deceased before any Statute, Judgment, or other ¹ Roll. Abr. Debt or Duty whatsoever. [See 30 Car. 2. ch. 3.] All Money due ^{927.} for Letters to the Post-Office shall be paid before any Debt due ^{Bacon's} to a private Person. [See 9 An. ch. 10.] Afterwards Debts due ^{Elem. 81.} upon ^a Judgments recovered against the Testator in any Court of ⁴ Rep. 60. Record, without any Consideration of first or last. [But see 4 & 5 ⁵ Rep. 28. W. & M. ch. 20.] Yet then amongst Judgments, he that first sueth Execution shall be preferred. But before Execution it is at the Election of the Executor, to pay which Judgment he will first. [A Duty decreed in a Court of Equity stands in an equal Degree with ³ Lev. 355. a Judgment at Law.] Then ^a Statutes or Recognizances forfeited, ¹ Vern. 143. but those that are for Performance of Covenants, or with Condi- ^{Caf. Temp.} tions, are not to be paid before they are broken or forfeited; ^{Talb. 217.} and amongst Statutes and Recognizances forfeited, the Executor ³ Wms. 402. may give Precedency, as he pleases, before Execution. Then Debts ⁴ Rep. 60. due for ^a Arrearages of Rent, whether due upon *Leases* in Writing, ⁵ Rep. 28, 29. or upon *Parol Leases*, because it favours of the Realty in regard of ^{Office of Exe-} the Profits received. For the Lessor may distrain and pay himself ^{ch. 12,} whether the Executor will or no. Then Debts due upon ^{201, &c.} *Special-* ^{Contra,} *ties*, as Obligations, Bills penal, or single Bills seal'd without Pe- ¹ Cro. 734. nalty. Lastly, Debts due upon Bills or *Notes* unsealed, or verbal ^{822.} *Contracts*; for there is no Difference betwixt these which are called ^a Office of simple contract Debts. ^{Executors,} ^{ch. 12. p. 209,} ^{210, 211.} ² Vent. 184. ^{Bacon's} ^{Elem. 81.}

Note; That amongst Debts that are of equal Degree, the Executor may always pay ^a himself first; but an Executor of his own Wrong cannot ³ Lev. 267. retain, as before-mention'd. ^a An Executor of an Executor may retain, because he is Executor to the first Testator: ^{Office of} But if the Testator, being indebted by Bond to A. makes A. and ^{Executors,} B. his Executors, and dies; and then A. makes C. his Executor, and ^{204, &c.} dies; C. cannot retain, because he is not Executor of the first Tes- ¹ Plowd. 543. tator; but B. is now sole Executor by Survivorship; and the only ^{Office of Exe-} Reason for allowing Retainer, is because the Executor cannot sue ^{ch. 12. p. 204,} himself. ¹ 5 Rep. 30. ² Vent. 180. ³ Wms. 183. ^{Pr. Ch. 79.} ² Wms. 298.

himself. And of Creditors in equal Degree, he that commences his

^a Dr. & Stud. ^a Suit is to be paid before those who do not sue; but of those who
Dial 2 ch. 10. commence Suit, he who first gets Judgment is to be first paid. Those
Noy's Max. Debts that are due are to be paid before those that are not due, or
104. whose Day of Payment is to come.

¹ Roll Abr. Yet (notwithstanding what hath been said concerning the Com-
926, 927. mencement of Suit first, and those whose Day of Payment is to
Bacon's come) an Executor will sometimes confess Judgment presently to a
Elem. 81. Friend for his Debt (for he is not bound to stand Suit) and plead
that Judgment to a Stranger's Debt, that his Friend may be first
paid. In Equity, as well as at Law, ^b Executors may prefer any
^b 1 Wms 295. Creditor in equal Degree, or after an Action at Law or Bill in
Pr. Ch. 188. Equity brought by one Creditor, may confess Judgment to another.
Caf. Temp. But if on a Judgment for a hundred Pounds the Plaintiff ^c com-
Talbot 217. pounds for sixty, the Judgment for the whole Sum will not be al-
³ Wms. 402. low'd to keep off other Creditors, as before-mentioned. If no Suit
⁴ 8 Rep. 133. is begun, the Executor may make a voluntary Payment of the
⁹ Rep. 110. whole Debt to any one Debtor in *equal Degree*, tho' he hath no
Assets left to pay unto another any Part of his Debt. Debts due
to the ^d King, otherwise than by Matter of Record, as for Sale of
Timber, Amerciaments in his Courts-Baron, are like Debts due to
a Subject. [But see 33 H. 8. ch. 39.] The same Order throughout
is to be observed by Executors of Executors. If the Executor pays
in any other Order, he must pay the Debts of a higher Degree out
of his own Estate, if he hath not Assets to pay all the Creditors.
After all the Debts are paid in such Order as directed, the Executor
must pay ^e Legacies. And herein the Executor may prefer ^f him-
self if any Legacy is given to him, tho' there is nothing left to dis-
charge the other Legacies. [^g But this is not Law at this Day,
and even tho' the Legacy be given to him for his Care and
Trouble, and not generally, it hath been held, that he shall abate
in Proportion with the other Legatees.] If there is not enough to
satisfy all the Legatees, he must pay to each of the Legatees a Part
of their Legacies in Proportion. ^h For it is not here as in the Case
of Debts due from the Testator. The Executor may not know the
Number of the Debts; and therefore shall be allowed to pay those
which come to his Knowledge first. But here the Legacies are all
known, as soon as the Will is opened. But if there is a ⁱ *specifick*
Legacy, or any particular Thing given *in Specie*, as a *Lease*, a
Horse, a Silver Cup; this must be delivered accordingly before any
other Legacy, if there are Assets sufficient to pay Debts. If there
is enough to pay all the Legacies, they must be all paid. If one
binds himself and his Executors in an Obligation, to perform a
certain Thing, and in his Will gives divers Legacies and dies,
leaving Goods only sufficient to pay this Obligation when it is
forfeited, this Obligation shall be no Bar to the Legacies; ^k because
it is uncertain whether it may ever be forfeited. But the Execu-
tor may make a Delivery or Payment of the Legacy upon Condition,
(viz.) ^l to return the Legacy if the Obligation is ever forfeited,
and the Penalty recovered. If there is not enough to pay Debts,
or more above Debts, the Legatees must lose their Legacies. ^m If
there be only a Deficiency in Part, *specifick Legacies* are to be first
paid, and not to abate in Proportion with the other Legacies;
but pecuniary Legacies are to abate in Proportion; and ⁿ so shall
charity

⁴ Office of
Executor,
ch. 12. p. 179.
¹ Roll. Abr.
927.

^a Dr & Stud.
Dial. 2. ch. 11.
⁸ Rep. 136.
⁹ Rep. 88.
Bacon 83.
^f Plowd. 545.
Office of Exe-
cutor, ch.
12. p. 204, &c.
⁸ 2 Vern. 434.
² Wms. 25.
² 2 Ventr.
358, 360.

¹ Office of
Executor,
ch. 19. p. 317.

² Roll. Abr.
928.

¹ 2 Ventr.
358.

¹ 1 Wms 422,
539.

² 1 Wms. 265,
675.
² Wms. 25.

charity Legacies, which are pecuniary, though preferred by the Civil Law. * If an Executor pays one Legatee his whole Legacy, upon a Supposition that there are Assets to pay all the others, and there happens a Deficiency, a Court of Equity will oblige the Legatee to refund in Proportion; but it is otherwise if the Deficiency arises by the Wasting of the Executor. [See of a Legacy, *infra*.]

By 29 Car. 2. ch. 3. No Executor or Administrator shall be charged on a special Promise, to answer Damages out of his own Estate, unless some Note thereof be in Writing, and signed by the Party to be charged, or some other by him authorized.

5. The Executor must pass his ^b Account before the Ordinary ^b 9 Rep 39/ concerning the Goods and Chattels of the Testator. The Inventory ⁴⁰ shews what is his Charge, and the Account must be his Discharge for so much as he can prove to be laid out in Payments for Funeral Charges, making the Inventory, Probate of the Will, Debts and Legacies. This Account will discharge him of all Suits in the Spiritual Court, but will not discharge him of Suits at Common Law. For there each Particular must again be proved: [And the Executor is accountable for what he has actually received by Sale of the Testator's Goods and Chattels, and not according to the Appraisement.] [See 31 Ed. 3. ch. 11.]

By 4 Ann. ch. 16. An Action of Account lies against the Executor, or Administrator of a Guardian, Bailiff, or Receiver. And the Auditors shall examine the Parties upon Oath; and shall be allowed, as the Court shall judge reasonable, by the Party on whose Side the Balance shall be.

If one maketh ^c Overseers in his Will, they have no Power to ^c Office of execute the Will, or to intermeddle with the Goods. They may give ^c Executor, Counsel and Advice; and if Executors will not be prevailed on to do their Duty, the Overseers may complain of them in the Spiritual Court, or in a Court of Equity. ^{ch. 1. p. 13, 14.}

Lastly, ^d If an Executor does Waste, or misemploys the Estate ^d 8 Rep. 133. of the Deceased, or sells the Goods of the Testator at an Under- ^d Terms of the value, tho' upon a Submission to Arbitrators, or does not observe ^d Law, v. Devastavit. the Law which directs him in the Management thereof, by paying ^d Noy's Max. what ought not to be paid, or by not observing the right Order of ^d 104. Payment, or doth any Thing by Negligence or Fraud against his ^d Office of Ex- Trust, it is a Devastavit, or Waste; and he shall be charged for ^d Executor, ch. 13. so much, upon the Devastavit returned by the Sheriff, *De Bonis* ^d p. 226, &c. *Propriis*, upon his own Goods, as if it were for his own proper Debt. ^e Where there are many Executors, the Fraud or Negli- ^e Office of gence of one shall not be chargeable upon the Rest: But it is not ^e Executor, ch. 13. p. 231, &c. so with Administrators, for they have but one Authority, which ^e Roll. Abr. must be executed by all joined together. If the wasting Executor ^e 929, 930. dies, ^f his Executors or Administrators are chargeable. [By 4 & 5 ^f Bacon's Elem. 81, 82. ^f Office of ^f Executor, ch. 13. p. 232. *W. & M. ch. 24.*]

4. Of Legacies.

* A Legacy is a particular Bequest or Gift of Money, Goods, or ^g Terms of Chattels, to one or more by Testament. In some Cases a Bequest ^g the Law, v. of Lands or Tenements may be called a Legacy. Some are inca- ^g Legacy. pable of Taking by Legacy. [See 3 Ja. 1. ch. 5. 13 W. 3. ch. 6. ^g Inst. 81. 1 Geo. 1. St. 2. ch. 13. 5 Geo. 1. ch. 27.] He to whom the Le- ^g gacy

^a Noy's Max. 31, 99, 100. gacy is given is called the *Legatee* or *Legatary*. ^{*} There is a Difference where the *Property* of the Thing is given, and when the Use of it only is given. For a Man may give the Use of his Plate to one for Life, Remainder to another. But if the Plate was given for Life, or for an Hour, a Remainder to another would be void, and the Legatee may dispose of it. But if he does not dispose of it, he in Remainder shall have it. [But now a Bequest of a Chattel personal for Life is construed to mean the same Thing as a Bequest of the Use of it.]

¹ Ver. 35.

See p. 153. ante.

^b Perk. 570.
¹⁰ Rep. 49.
¹ Inst. 111. a.
¹ Roll. Abr. 618.
Bacon's Elem. 83.

^c 8 Rep. 95, 96.
¹⁰ Rep. 47.
¹ Inst. 111. a.
Bacon's Elem. 83.
³ Wms. 12.
⁴ 10 Rep. 47.

^e Perk. 572.

^f 5 Rep. 29.
¹ Cro. 719.

¹ Wms. 287.

² 2 Str. 847.

^b Plowd. 543.
544.
⁴ Rep. 28.

Legacies are not recoverable at Common Law, but in *Chancery* or the *Spiritual Court*. But if an Executor promises, that in Consideration of Forbearance to sue for his Legacy, he will pay the Legacy at such a Time, by Virtue of that Promise it becomes a Debt, and may be recovered at Common Law. [24.] The Common Law taketh Notice of the *Assent* of the Executor to the Legacy, and doth give him Time, to consider of the Value of the Goods, and State of the Debts; that he may safely pay a Legacy without Danger to his own Goods as a Waster. Therefore the ^b Assent or Agreement of the Executor is first to be obtained, before any Legacy can be taken. Until then the Legatee may not meddle with the Legacy, because (I say) the Executor is to pay Debts before Legacies. And this is the Reason why no Property can be transferred to the Legatee without the Consent of the Executor. Nay, a *specifick* Legacy, or a particular Thing given in *Specie*, as a Piece of Plate, cannot be taken without his Assent. For else by such Legacies the Testator might give all his Goods away, to defraud his Creditors. ^c Where a Lease for Years is devised, his Assent is necessary. And where a Lease for Years is bequeathed to one for Life, or so many Years as one shall live, the Remainder over, the Assent to the first Estate shall be effectual to him in Remainder. If the Legacy is given to the ^d Executor himself, it shall come to him as Executor, except he chuse to take it as Legatee. For the Law gives him his Election. When there are many Executors, the Assent of one is sufficient, to transfer the Property to the Legatee; and ^e one Executor may take his Legacy without the Assent of his Co-Executors; for one may release. And if there is not sufficient to pay Debts, he only that assented shall answer of his own proper Goods. An Executor may assent before and after Probate. An ^f *Infant* Executor before seventeen Years of Age, or *Feme-Covert*, cannot bind themselves by their Assent. But the Husband's Assent is sufficient, where his Wife is Executrix. An Administrator *Durante minori etate* of an Executor cannot assent to a Legacy. (24. If there be Assets sufficient to pay Debts.)

If an Executor will not assent, he may be compelled in a Court of Equity or the Court Christian, to pay the Legacy; [And may be sued in the Court ^a where he proves the Will, though he does not live in that Diocese, notwithstanding 23 H. 8. *cb.* 9.]

There may be an Assent ^b *implied*, as well as *express*. For if a Horse is bequeathed, and one offers to buy him of the Executor himself, and he directs him to go to the Legatee to buy him, or

^a *Quando duo jura concurrant in una persona, idem est ac si essent in diversis.*
7 Rep. 2. 14.

if the Executor himself offers the Legatee Money for him. This is an implied Assent, and sufficient. And if the Executor doth once declare his Assent to the Legacy, the Legatee may take it, tho' the Executor revokes his Assent afterwards. For by the Assent the Property was vested in the Legatee. The Assent of the Executor is not needful in a Devise of Lands by one seised in Fee-simple, if he deviseth the same in Fee, in Tail, for Life, or Years, as hath been said.

If a Legatee dies before the Testator, the Legacy is lost. But if the Testator dies, and there is a Time limited for Payment of the Legacy, and the Legatee dies before that Day, his Executor shall have the Legacy; for the Legatee had a present Interest, tho' the Time of the Payment was *in futuro*. Otherwise, if a Legacy is bequeathed to one at such a Time, and he dies before that Time; for then the Legacy is lost. [But if a Legacy be given out of a real Estate payable at a future Day, and the Legatee dies before that Time, the Legacy shall not be raised. Tho' this Rule seems to be subject to these Distinctions: That where the Time of Payment respects the Legatee or his Capacity to take, if he dies before the Time of his being in such Circumstances, his Representative shall not have the Benefit of the Legacy: But if the Time respects the Circumstances of the Estate itself, or the Conveniency or Propriety of raising the Money, there it shall be raised at the Time appointed, for the Benefit of the Representative of the Legatee: So if the Time limited be the ultimate Time, within which it is to be paid: So also where it is annexed by Way of Condition to the Enjoyment or Possession of the Estate, out of which it is to be paid, or where it is given upon such a Contingency so remote, as that the Testator could not suppose it would happen in the Life of the Legatee.]

[Where the residuary Legatee dies before the Testator, the Testator is considered as having died intestate as to such Residue, and it shall go to the next of Kin, and so if the Residue is bequeathed to two or more equally between them, or in certain Shares, so as to make them *separately* interested therein, and any of them die in the Life-time of the Testator, his Share belongs to the next of Kin, as if the Testator had died intestate, the Executor being in such Case only a Trustee for the next of Kin, and bound to make Distribution according to 22 & 23 Car. 2. ch. 10. [which see *infra*.] But if the Residue is bequeathed to two or more by such Words as give them a joint Interest, if one of them dies in the Life of the Testator, the Survivors take the whole Residue.]

[If a Man bequeath his personal Estate among his Relations, it shall go among such only as are capable of taking within the Statute of Distributions of 22 & 23 Car. 2. which see *infra*.]

When a Wife is made Executrix, with Legacies to the Children, and she marries again; at the Instigation of the Husband, she frequently will endeavour, to discount Maintenance and Education. But this was not suffered in the Chancery, so as to diminish the principal Sum. For the Mother ought to maintain her Children. Yet a Sum of Money paid for the Binding out a Child, to be an Apprentice, was allow'd to be discounted.

5. A Testament is void, 1. Where the Person was incapable to make a Testament for want of Discretion; for want of Liberty, as Woman Covert; for that one is a Criminal, as Traitor or Felon;

- or by Reason of some legal *Impediments*, as an Alien Enemy, &c.
2. By making of a *later* Testament; though the first was made irrevocable; * for a Testament is of its own Nature revocable.
3. By *Cancelling* that which was made. [See 29 Car. 2. ch. 3.]
- By 9 & 10 W. 3. ch. 41. *No Seaman's Will contained in the same Instrument with a Letter of Attorney shall be good in Law.*



It remains that I shew how Goods and Chattels may be acquired by *Administration*.

^b Terms of the Law, v. Administration.
^a Inst. 397. By Administration.

VI. ^b *Administration* is the Management (committed by the Ordinary in Writing under Seal, for it cannot be granted by Word of Mouth) of the Goods and Chattels of one that dieth Intestate, by making no Will at all, or by not appointing an Executor in his Will, or where the Executor refuseth to prove the Will. It relates to the Time of the Intestate's Death. He or she to whom the Management is committed, is called the *Administrator* or *Administrix*. They have but an ^a Authority, because they have nothing to their own Use. [But see 31 Ed. 3. ch. 11. *infra*.]

* 8 Rep. 135.

Concerning Administrations it may be enquired, 1. *By whom* Administration is to be granted. 2. *To whom* it ought to be granted. 3. *What is the Interest* of an Administrator. 4. *His Power*. 5. *His Duty*. 6. *How an Administration may be revoked*.

1. An *Administration* is to be granted by the Bishop of the Diocese, or Archdeacon, or Judge of the peculiar Jurisdiction, where the Goods which are to be administered, are at the Time of the Death of the Intestate. But a Judge of a Peculiar ought to ^d shew in his Grant, how he hath Power to grant it. Regularly he that shall have the Probate of a Will, shall have the Grant of the Administration, when the Party dieth Intestate, or without Will. And if there are *Bona Notabilia*, the Administration must be granted there where the Probate of a Will in such Case is to be granted, (*viz.*) By the Archbishop of the Province. So that what hath been said before concerning the Right of granting *Probates* of Testaments or Wills, the same may be said concerning the Right of granting *Administrations*.

The Law is the same in both Cases as to *Bona Notabilia*. In the Time of the Vacation of a Bishoprick, the Guardian of the Spiritualities may grant the Administration. [See 43 El. ch. 8. An Act against fraudulent Administrations of Intestates Goods.]

* See Prerogative Court, B. 4. ch. 1. post.

2. An Administration must be granted to such a Person as the Law directs; so that the Ordinary cannot refuse to grant Administration, where a proper Person applies to him; nor can he ^f revoke it where it is *legally* granted. But it may be granted upon ^e Condition. It may be granted to an Alien, and he may have Administration of Leases as well as of meer personal Things, because he hath them in another's Right, and not to his own Use.

^f 9 Rep. 40.
^e Lev. 157.
^d 6 Rep. 19.
^c Cro. 683.

By 31 Ed. 3. ch. 11. *Where one dieth Intestate, the Ordinaries shall depute the next and most lawful Friends of the Intestate, to administer his Goods; which Deputies shall have an Action, to demand and recover the Debts due to the Intestate in the King's Courts, to enable them to administer, and shall answer also in the King's Courts to others, to whom the said Intestate was bounden, in the same Manner as Executors*

Executors shall answer; and shall be accountable to the Ordinaries as Executors are in Case of a Testament.

This Act gave Power to Ordinaries to grant Administrations, which they could not do before. For originally the King used by his Officers to seize the Goods of Intestates to pay their Debts, and for Advancement of their Wives and Children, or next of Blood, where there was no Wife or Child. And afterwards this Trust was committed to the Ordinaries. But no Power was given to the Ordinary to sell or dispose of the Goods either to his own Use, or the Use of any other, tho' the Goods were in Danger of Perishing; but only to the Use of the Deceased, as to pay his Debts, &c. Neither could the Ordinaries bring Actions for Recovery of the Debts of the Intestate, tho' an Action lay against them at Common Law, or their Committees, by the Name of Executors, if they intermeddled with the Goods, and would not pay the Debts. After Possession of the Goods they might have an Action of Trespass, for carrying them away; or before Possession sue for them in the Spiritual Court. But now by this Statute of 31 Ed. 3. there are six Alterations made; three as to the Ordinary, and three as to the Administrators. As to the Ordinary. 1. The Ordinary is compelled to grant Administration. 2. He must grant it to the next of Kin, not attainted of Treason or Felony, or under other legal Disability, for they must be the next lawful Friends. 3. The Ordinary may appoint the Administrators. Under the Word Ordinary, Commissaries, Archdeacons, Officials, and other Ecclesiastical Judges are comprehended for this Purpose within the Meaning of the Act. As to Administrators. 1. The Administrators have by this Act a greater Interest in the Goods than the Ordinary ever had, nay, as absolute Property in the Goods and Chattels as Executors have. 2. Administrators shall recover the Debts, and have all Actions as Executors may have. 3. Administrators shall answer to Actions in the same Manner as Executors, and be accountable to the Ordinary.

By 21 H. 8. ch. 5. In case any Person dies Intestate, or the Executor refuses to prove the Testament, the Ordinary shall grant Administration of the Goods of the Person deceased to his Widow, or to his next of Kin, or to both, as the Ordinary shall think fit; taking Surety for the true Administration thereof. And in Case where divers Persons claim the Administration as next of Kin, which be in equal Degree of kindred to the Person deceased, the Ordinary hath Election to accept any one or more making Request; or where but one or more of them, and not all, being in equal Degree, make Request, the Ordinary may admit the Widow, and him or them only making Request, or any one of them, at his Pleasure.

As to the Wife or Widow, this Act hath altered 31 Ed. 3. ch. 11. And as to the next of Kin, where an Executor refuses to prove the Testament, the Statute supposes, that such an Intestate's Intent was to prefer the Kin. But if he makes a residuary Legatee, that Presumption is taken away. In that Case the residuary Legatee shall have the Administration, who is to have what remains after Debts and Legacies are paid. An Administration *Durante Minore Estate* of an Executor is not within the Statute, or of Necessity to be granted to the Widow of the Testator, nor Administration *Pendente lite*. [See *infra*.] So that now the Law is settled thus as to Administration

tion upon the Goods of Intestates. It must be granted, 1. To the *Husband* of the Wife's Goods and Chattels, as of a Lease for Years. 2. To the *Wife* of the Husband's Goods and Chattels. But an Administration may be granted to the Father, or other next of Kin, before the Widow; and a residuary Legatee ought to be preferred before the Widow in an Administration *cum Testamento annexo*. If there is no Husband or Wife living, then, 3. To the *Children*, Sons or Daughters. 4. If Children die first, to the *Father*, or *Mother* if the Father is dead. And if no Father or Mother, then 5. To a *Brother* or *Sister* of the whole Blood. 6. To Brother or Sister of the *half Blood*; for they are all next of Kin in equal Degree. And if none of the half Blood, then 7. To the next of Kin, Uncle, Aunt, or Cousin. A Grandmother is nearer of Kin than an Aunt, and is intitled to Administration in Preference to her; neither is the latter to come in for a distributory Share. If none of these desire the Administration, then, 8. To a *Creditor*. For want of all these, 9. To any other Person or Persons, at the Discretion of the Ordinary. Or the Ordinary may *ex Officio* grant to a Stranger Letters *Ad Colligendum Bona Defuncti*, or to gather up the Goods of the Deceased. Or the Ordinary may take them into his own Hands, to pay the Debts of the Deceased, in such Order as an Executor or Administrator ought to pay them. But he, or the Stranger who has Letters *ad Colligendum*, cannot sell them, without making themselves Executors of their own Wrong. The Ordinary hath only an Authority, and no such Power himself; and therefore he cannot give that Power to any other. Administrators (as hath been shewn) derive their Power only from the Statutes.

If one hath made a Will, and after the Death of the Testator the Executor does prove it, and then dies Intestate, the Ordinary must grant Administration of the Goods of the Testator (Not administered by the Executor) to some other Person. This is called an Administration *De Bonis non, &c.* (viz.) *Non Administratis*.

By 17 Car. 2. ch. 8. An Administrator De Bonis non may sue out a Scire facias on a Judgment after a Verdict recovered by the Executor or Administrator.

Where an Executor refuses to prove a Testament, Administration must be granted *cum Testamento annexo*, or with the Will annexed to the Administration, to the residuary Legatee, or if none, to the next of Kin.

Where an Infant is made Executor, Administration must be granted *cum Testamento annexo* to his Guardian, or next Friend, *Durante Minore Aetate*, but the Administration ceases, when the Infant is ¹⁷ seventeen Years of Age. And if an Infant Executrix before seventeen Years of Age taketh Husband of full Age, the Administration presently ceaseth: [24.]

If an Infant is entituled to an Administration of the Goods of an Intestate, Administration shall be granted to another *Durante Minore Aetate*, till he is of full Age^m, i. e. one and twenty. And so it is of an Administration during the Minority of a residuary Legatee: Because an Administrator is in by the Statute, and not by the Act and Judgment of the Party, as an Executor is, and in Judgment

^a 4 Rep. 51.

^b Raym. 91.
Shower's Rep. 351.

^c Sid. 179.

^d Salk. 36.

^e 1 Vent. 217.

^f 218, 219.

^g 3 Rep. 40.

^h Style 74.

ⁱ 75, 102.

^j 1 Salk. 38.

^k 1 Wms. 41.

^l Pr. Ch. 527.

^m Bacon's
Elem. Bo.

ⁿ Dyer 256.

^o 8 Rep. 135.

^p 9 Rep. 39.

^q 1 Roll. Abr.

^r 918.

^s 1 Vent. 350.

^t 1 Roll. Abr.
907.

^u 5 Rep. 29.

^v 6 Rep. 67.

^w 2 Inst. 398.

^x 1 Ld. Ray.

^y 338.

^z Comy. 159.

^{aa} 3 Wms. 88.

^{ab} contra.

^{ac} 1 Salk. 39.

^{ad} 1 Ld. Ray.

^{ae} 338, 667.

^{af} Comy. 110,

^{ag} 159.

ment of Law, no one is capable to act as Trustee for another till twenty-one; and a Minor cannot enter into a Bond with Sureties to administer faithfully, as required by 22 & 23 Car. 2. *cb.* 10. An Administrator *Durante Minore Estate* may bring Actions; but he cannot sell any of the Goods of the Deceased; unless it be upon Necessity, as for the Payment of Debts, or for fear the Goods should perish. He cannot let a Lease, if the Grant of the Administration is special, *ad opus, commodum & utilitatem Executoris Durante Minore Estate, & non aliter, &c.* But if the Grant of the Administration is general without such Restraint, such an Administrator may let Leases: But methinks this is a nice Distinction; and surely in the first Case he might let Leases during the Time that he is Administrator. [*Quare.*]

An Administration may be granted by the Ordinary *Durante Absentia extra Regnum, or Pendente Lite*; and it is as good as an Administration *Durante Minore Estate*. And such an Administrator may maintain Actions for Debts due to the Deceased.

If Administration is granted to two, and one of them dies, the Administration survives.

By 21 H. 8. ch. 5. * *The Fees for Letters of Administration are settled, with a Penalty for Extortion.* (But there is no Provision in the Act, in case the Goods of an Intestate amount to more than forty Pounds.) *Nothing is to be taken, if the Goods are not above the Value of five Pounds.*

By 9 & 10 W. 3. ch. 41. *For Administration granted to the Wife or Children of any Seamen dying in Pay of his Majesty's Navy, no more shall be taken than one Shilling for the Seal, Writing, or suing forth of the same (unless the Seaman's Goods and Chattels amount to twenty Pounds) upon Penalty of ten Pounds to the Party grieved.*

3. An Administrator by Virtue of his Administration hath Interest in all the Chattels, real and personal, of the Intestate, and in all the Goods and Chattels, either in Possession or Action, in like manner as an Executor in the Goods of the Testator deceased. And all those Goods and Chattels which belonged to the Intestate at the Time of his Death, and which come to the Hands of the Administrator, shall be Assets, or sufficient Goods and Chattels, to make him chargeable to the Creditors, as Executors are to Creditors and Legatees. Before they come to his Hands he is not chargeable.

But tho' an Executor shall have all the Residue or Surplusage of the Goods and Chattels after Debts and Legacies paid, by Virtue of his Executorship; it is otherwise in Case of an Administration. For an Administrator can take no Advantage by his Administration, (unless by paying his own Debt first, if it is equal in Degree with others, or by taking the Goods and Chattels, as they are appraised) because the Surplusage must be distributed amongst the next of Kin, if there are any Kin, according to 22 & 23 Car. 2. *cb.* 10. hereafter to be mentioned. If a Debtor takes Administration of the Goods and Chattels of his Creditor, this shall not discharge the Debtor; but his Debt shall be Assets; because the Intestate did no Act to free him from the Debt. Whereas by making a Debtor Executor, the Testator doth thereby release the Debt; tho' the Duty remains, and is Assets. When an Administrator (as well as an Executor) hath paid Funeral Charges, Debts, &c. with his own Money, he may retain

^a Noy's Max.

106.

¹ Roll. Abr.

910.

¹ Cro. 718.

719.

⁴ Mod. 14.

¹ Lut. 342.

⁶ Mod. 304.

¹ Salk. 42.

S. C.

² Wms. 576.

² Ld. Ray.

1071.

² Sir. 917.

² Vern. 514.

Caf. Temp.

Talbot 127.

³ Inst. 148.

&c.

² Inst. 398.

¹ Roll. Abr.

919.

¹ Roll. Abr.

922.

² Rep. 136.

¹ Roll. Abr.

920.

¹ Inst. 264 b.

retain so much of the Goods of the Intestate in kind according to the Value, and shall have Property in them. For by such Payment the Property is altered from the Intestate to the Administrator.

Roll. Abr.
997.

5 Rep. 9.

If an Executor hath not proved the Will of the Testator and dies, his Executor is not Executor of the first Testament. But Administration must be granted with the Will annexed to the residuary Legatee, or if none, to the next of Kin of the Testator. But where an Executor has proved the Will and dies, making an Executor, the second Executor is Executor to the first Testator also. Yet if an Administrator dies Intestate, or makes an Executor, his Administrator or Executor shall not be Administrator or Executor to the first Intestate; neither shall the Administrator of an Executor be Administrator to the Testator; but the Ordinary is to grant a new Administration or an Administration *De Bonis non*, of the Goods of the first Intestate, or Testator, to his residuary Legatee, or next of Kin. Therefore where an Administrator hath Judgment and dieth, his Executor cannot sue Execution of that Judgment. For none shall have Execution of the Judgment, but he who shall be subject to the Payment of the Debts of the first Intestate, to which the Executors of the Administrator are not subject.

4. As to the Power of an Administrator.

Noy's Max.
106.
Bacon's Elem.
82.

An Administrator can do nothing till an Administration is granted to him; whereas an Executor hath his Power from the Will, and may act in many Cases before Probate. After the Administration is granted, the Power of an Administrator is almost equal with that of an Executor. Yet if there are many Administrators, one of them cannot sell Goods, or release Debts, without the other, but they must all join, because they have but one Authority. [See 30 Car. 2. ch. 7. 4 & 5 W. & M. ch. 24.]

5. The Office and Duty of an Administrator is the same with that of an Executor, as to the Burial of the Deceased and Payment of Funeral Charges, the making of an Inventory of his Goods and Chattels, the Payment of Debts and the passing of an Account. And as an Executor is to take a Probate of the Will, so the Administrator must apply to the Ordinary for Letters of Administration, and must take them out from the Ordinary, as an Executor ought to do for the Probate of the Will, and with regard to *Bona Notabilia*. But there is something more to be done by an Administrator. For,

By 22 & 23 Car. 2. ch. 10. All Ordinaries and Ecclesiastical Judges, (upon granting Administrations) must take Bond of the Administrator with two or more able Sureties, [2. Of an Administrator *Cum Testamento Annexo*, and see 21 H. 8. ch. 5.] with Condition, that the Administrator shall make a true and perfect Inventory of all the Goods and Chattels of the Deceased, and exhibit it into the Registry of the Ordinary's Court by such a Day; and to administer according to Law, and to make a true and just Account thereof, and to deliver and pay the same to such Person as the Court shall decree the same to, pursuant to the Act; and the Court shall order Distribution of the Surplus after Payment of Debts, Funerals, and just Expences, as follows, viz. One third to the Wife of the Intestate; the Residue amongst his Children, and such as legally represent them, if any of them are dead; except such Children (not Heirs at Law) who had any Estate by

by Settlement or Advancement by Portion from the Intestate in his Lifetime, equal to the other Shares. If their Shares by such Advancement are not equal to the other Shares, those Children shall have so much of the Surplus, as shall make the Shares of all to be equal. But the Heir at Law shall have an equal Share in the Distribution with the other Children, without any Consideration of the Value of the Land which he hath by Descent, or otherwise, from the Intestate.

* A Descent of Lands in the Nature of Borough English to the youngest Son will not prevent his having a full distributive Share of his Father's personal Estate. ¹ Caf. Temp. Talbot 276.

Note; ¹ The Right to the distributive Share vests immediately on the Intestate's Death: But not so as to exclude a posthumous Child. ² Wms. 442. 446.

If there are no Children, nor legal Representatives of them, one half of the Intestate's Goods and Chattels shall go to the Wife; the Residue equally to the next of kindred to the Intestate in equal Degree, and those that represent them. If there is no Wife, all shall be distributed amongst the Children; if no Child, all shall be distributed amongst the next of Kin to the Intestate in equal Degree and their Representatives. [But see 1 Ja. 2. ch. 17. post.] ³ Wms. 50.

No Representation shall be admitted amongst Collaterals after Brothers and Sisters Children. [That is after the Children of the Intestate's ¹ Brothers and Sisters.] ¹ Wms. 25.

Such Distribution is not to be made till one Year after the Death of the Intestate; and Bond with sufficient Sureties must be given by those, to whom such Distribution shall be made, to refund to the Administrator, in Case Debts afterwards appear. ¹ Ld. Ray. 571.

Where the Intestate's Brothers and Sisters all die before him, leaving Children, these take *per Capita* ¹; but if there is one or more Brothers or Sisters, and the Children of deceased Brothers or Sisters, they then take *per Stirpes*. ² Pr. Ch. 54. ³ Wms. 50.

Note, That it is agreed for Law, that the ¹ half Blood shall have a Share upon a Distribution equally with the whole Blood. ¹ Ventr. 307. ² Ventr. 317. Shower's P. Cases 108.

And the next of Kin on the Mother's Side take equally with those of the same Degree of Kindred on the Father's Side ¹. ¹ Show. Rep. 1. ² Lev. 173. ³ Wms. 53.

Where the next of Kin are an Uncle, and the Son of a deceased Aunt, the latter can have no Share under the Statute ¹. But Uncles and Nephews are in equal Degree of Kindred, and the Uncles shall take under the Statute with the Nephews, if the Intestate left no Brothers ¹ or Sisters. ¹ Wms. 53. ² Wms. 594. ³ Pr. Ch. 28.

By 29 Car. 2. ch. 3. The Act of 22 & 23 Car. 2. ch. 10. shall not extend to the Estates of Feme Coverts that die Intestate, but their Husbands shall have Administration of their personal Estates, as before the making of that Act. ¹ Morgue v. Boiffiere, in Chan. 12 March 1756.

And the Husbands are not compellable to make Distribution of their personal Estates. But a ¹ Husband shall be liable, as Administrator to his Wife, to her Creditors, by Reason of such Part only of her Estate as he did not reduce into Possession during the Coverture; unless he made a Jointure upon her, in which Case he is deemed ¹ a Purchaser of all her Fortune ¹. ¹ Caf. Temp. Talb. 173. See p. 63. ² Wms. 199.

By 1 Ja. 2. ch. 17. No Administrator shall be cited to render an Account of the personal Estate of the Intestate (otherwise than by Inventory) unless it be at the Instance of some Person in Behalf of a Minor, or of one having a Demand out of such Personal Estate as Creditor or next of Kin.

If, after the Death of a Father, any of his Children shall die Intestate without Wife or Children in the Life of the Mother, every Brother and Sister, and the Representatives of them, shall have an equal Share with the Mother.

^a 1 Wms. 48.
Pr. Ch. 260.

^a But if a Child dies Intestate and unmarried, the Father surviving has the Child's whole Estate at this Day. And this without taking Administration to him.

^b 2 Wms. 344.
1 Str. 710.

^b If after the Death of the Father the Son dieth Intestate, without Issue, but leaving a Wife, a Mother, and Brothers, and Sisters, the Intestate's Wife shall have one Moiety, and as to the other Moiety, the Intestate's Brothers and Sisters shall come in for an equal Share thereof with the Mother, being a Case within the Statute.

Danv. Ab.
311, &c.

Such Part of any Intestate's Estate within the City of London or Province of York, as any Administrator hath by Virtue only of being Administrator, shall be subject to Distribution as in other Cases, and the Custom shall not extend to such Part.

^c 2 Salk. 426.
1 Wms. 341.

[If a Freeman of London leaves a Wife and no Children: By the Custom of London^c, the Half of his personal Estate belongs to his Wife, and the other Half is subject to his Disposition by Will: So if he leaves a Child or Children, and no Wife, the Half belongs to such Child or Children. But if he leaves a Wife, and a Child, or Children, one Third belongs to the Wife, another Third to the Child or Children, and the other Third he may dispose of by Will: But if a Freeman dies without making any Will, his Testamentary Share (or such Part as he might have disposed of by Will) is subject to the Statute of Distributions. [But see 11 G. 1. ch. 18. To empower Freemen to dispose of their whole Estate by Will. *Ante.*]

^d Ibid.

^e 2 Wms. 527.

[^e Such Child of a Freeman, as hath been advanced in his Lifetime, must (if there are other Children) bring such Advancement into Hotch Pott, *i. e.*, into the Orphanage or Children's Part of the personal Estate.]

² Str. 911.

6. An Administration may be *revoked* by the Ordinary upon good Cause; and then if the Administrator afterwards intermeddles with the Estate, he may be charged as Executor of his own Wrong. But the Ordinary cannot revoke an Administration legally granted, at his Pleasure. If a ^c Citation is granted to the next of Kin against an Administrator (a Stranger) to shew Cause, why his Administration should not be revoked, and it is revoked accordingly by Sentence, yet all Acts of the Administrator done lawfully and *Bona Fide*, as Administrator, during his Administration, (as Selling Goods, Paying Debts, Receiving Debts, and Giving Releases, even depending the Suit for Revocation of his Administration) are good till the Administration is revoked; and shall bind the succeeding Administrator. For the Administration was only voidable, not void. But if there is any Fraud, a Creditor may have Relief upon the Statute of 13 El. ch. 5. tho' it remains good against the second Administrator. Otherwise it is when there is an *Appeal* from the Grant of the Administration to one: For the Appeal doth suspend the former Decree; which is different from the Case of a *Citation* to shew Cause why the Administration should not be revoked. ^f So it is when the first Administration is merely void; as when an Administration is granted by the Bishop of the Diocese, &c. where there is an Administration already granted by the Prerogative Court, whether by right or

⁶ 6 Rep. 18.
19.
8 Rep. 135.
143.
1 Cro. 459.
460.
1 Ventr. 219.
1 Ld. Ray.
685.
1 Wms. 41.

^f 5 Rep. 30.
8 Rep. 135.

or wrong. For tho' the prerogative Administration is afterwards revoked, it shall not make the other Administration of more Effect, than it was at the Time it was granted. So that after it is revoked, a new Administration must be granted by the inferior Ordinary. But if the Inferior Ordinary had first of all granted Administration, and the Metropolitan in his Prerogative Court afterwards grants Administration where he ought not, and it is revoked; all Acts by the first Administrator are valid from the beginning. [A Prerogative Administration, where there are not *Bona Notabilia*, is only voidable; * but a Diocesan Administration, in Case there are *Bona Notabilia*, is merely void.] ^{1 Wms. 767.}

If an Administration is granted, and afterwards a Will is produced and proved, the Administration is to be revoked. and all the Acts, which the Administrator hath done, are void. ^b But if the Executor ^{1 Roll. Abr. 907.} was cited to prove the Will, and he did not appear, or if he conceals the Will, and thereupon the Ordinary grants Administration to another; and then the Executor comes in afterwards and proves the Will; all Acts done by the Administrator are good, and shall bind the Executor. Letters of Administration obtained by ^c Fraud are ^{3 Rep. 78.} void; and shall not repeal a former Administration. [See 43 *El. ch. 8.* and of the *Prerogative Court*, *B. 4. ch. 1. post.*] [See 29 *Car. 2. ch. 3.* 30 *Car. 2. ch. 7.* 4 & 5 *W. & M. ch. 24.* which are mentioned under *Executor*.]

CHAP. VII.

How *Estates* in *Goods* and *Chattels* personal may be forfeited or lost.

GOODS and Chattels personal may be forfeited or lost by ^{How Estates in Goods and Chattels personal may be forfeited or lost. ^d Bacon's Elem. 77, 78.} *Treason, Felony, Flight for Felony*, tho' one is not Guilty; By being put in the *Exigent*, tho' he is not Guilty; By *Sale in Market Overt*; By *Deodand, Treasure-Trove, Waif, Stray and Wreck*. Of these I have spoken particularly in another Place. [See of *Forfeiture*, *B. 4. ch. 5. post*; and of *Franchises*, *B. 2. ch. 2. ante.*] By *Bankruptcy*, [See *ch. 4. ante.*] By *Assaulting* or *Challenging* another to fight For Money won at *Play*, &c. [See 9 *An. ch. 14.*]

Thus far of *Estates* in *Lands*, *Tenements*, and *Hereditaments*; and of *Estates* in *Goods* and *Chattels* personal; being the second Object, and the most difficult Part, of the *Laws of England*.

The End of the Second Book.

BOOK

BOOK III.

Of Crimes and Misdemeanors; or of the Pleas of the Crown.

CHAP. I.

Of Capital Crimes or Offences, (*viz.*) High Treason, Petit Treason, and Felony. And therein of Private Felonies, which are committed against the Life, Body, Goods, or Habitation, of the Subject, &c.

THE *third* Object of the Laws of England are Crimes and Misdemeanors, or the Pleas of the Crown.

Some Offences are by the *Common Law*; but most of them are made so by *Acts* of Parliament. These are necessary to be known, because they concern the Safety of the King; the Quiet of the Commonwealth; the Life, Liberty, and Estate of the Subject.

The Order that I shall observe in Treating of Crimes and Misdemeanors shall be this. I shall speak 1. Of *capital* Crimes. 2. Of *Principals* and *Accessories*, and of the *Benefit* of the *Clergy*. 3. Of Crimes *not capital*. These shall be the Subjects of the ensuing Chapters concerning the *third* Object of our Laws.

* *Well's*
Symb. Cf
Indictm. and
Offences, § 2.

* A Crime or Offence is an Act committed against a Law, or omitted where the Law requires it, and punishable by it. This general Definition comprehends capital Offences, and Misdemeanors or Offences not capital.

But those that are to be esteemed Guilty of any Offences must have the Use of their *Reason*, and be at their own Disposal or Liberty. For 1. * Those that want *Reason*, to distinguish betwixt Good and Evil (as *Infants* under the Age of Discretion, *viz.* under the Age of fourteen Years, *Idiots*, and *Lunatics*) ought not to be prosecuted for any Crime; no, not for Treason for killing the King; tho' the Law was antiently otherwise. But as to *Infants* under fourteen, their Understanding and Discretion ought to be examin'd. For if they appear to have Knowledge equal to those that are of Years of Discretion, they may be prosecuted. But it is proper to respite Execution in order to obtain a Pardon. And as one *Non Compos Mentis* shall not be arraigned for a capital Offence; so if he become *Non Compos* after Conviction, he shall not be executed. Yet

b 1 Inst. 247. b.
3 Inst. 4. 6,
108.
2 Rep. 27.
4 Rep. 124.
H. P. C. 43.
44.
Dalt. ch. 147.
p. 350.

Yet if an Infant or *Non Compos* commits a *Trespass* against the Person or Possession of another, he must answer for the Damage in a civil Action. Men *Drunk* or in a *Passion* are not to be excused, if they commit Offences; for their Acts are voluntary and owing to their own Folly. 2. One that is at *Liberty*, but under the Power of another, may be sometimes excused. As a *Feme Covert* shall not suffer for a bare Theft in Company with her Husband; for it shall be presumed to be done by Coercion. The bare Command of her Husband will not save her. But if she commits Treason, Murder, or Robbery in Company with her Husband, she is punishable in like Manner as the Husband. And in all Offences not Capital a Wife may be put to answer with her Husband, or alone without him, tho' they both join'd in the Commission of the Offence. A Servant is not to be excused the Commission of any Crime, tho' he acts by the Command or Coercion of his Master. For a Master hath no such Power over him.

In all Crimes there must be an evil *Intention*; a mere *Mistake* is not punishable. Nor is an evil *Intention* punishable equally with the Fact; except in Treason.

Where one hath the Use of his Reason, and is at Liberty, his Endeavour to commit a Felony is punishable; tho' not to that Degree, as if the Felony had been actually committed. For in such Cases the Will shall not be taken for the Deed.

Not only they which actually commit the Offence are punishable, but those that *command, persuade, advise, procure, hire, abet, or consent* to the Commission of an Offence, or *conceal* it after it is done, are esteemed to offend.

All Crimes or Offences are *Capital* or *not Capital*. *Capital* are those for which the Offender shall lose his Life. *Not Capital*, for which the Offender may forfeit his Lands or Goods, or both, or for which he may be fined; or suffer corporal Punishment; or suffer both Fine and corporal Punishment; but not loss of Life.

Capital Offences are of three Sorts, *High Treason, Petit Treason, Felony*.

Of capital Crimes or Offences.

Privilegium non valet contra Republicam. Necessitas publica major est quam privata. Bacon 32.

Mandata licita strictam interpretationem recipiunt, sed illicita latam et extensivam. Bacon 66. 3 Inst. 51.

Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud. 5 Rep. 115.

Crimen non contrahitur nisi nocendi voluntas intercedit. Bracton, Lib. 1. ch. 4.

Voluntas non reputabitur pro facto. 3 Inst. 69. 11 Rep. 98.

Non officii conatus, nisi sequatur effectus. 6 Rep. 42.

Pœna potius mollienda sunt, quam exasperanda. 3 Inst. 220.

Qui non habet in ore, luat in corpore. 2 Inst. 173.

Qualibet pœna corporalis, quamvis minima, major est qualibet pœna pecuniaria. 3 Inst. 220.

Nobiles magis plebuntur pecunia, plebei vero in corpore. 3 Inst. 220.

Dignitas personæ augeat pœnam. 2 Inst. 218.

Interest Republicæ ne maleficia remaneant impunita. 4 Rep. 45. 5 Rep. 109.

Impunitas semper ad deteriora invitat, et continuum affectum tribuit delinquendi. Ibid.

Minatur innocentes qui parit nocentibus. 4 Rep. 45.

Treason (from *Trabison*, *Proditio*, *Betraying*) is either, 1. *High* *Treason*, or 2. *Petit* *Treason*.

Of High
Treason.
a West's
Symb. § 63
3 Inst. 8.

I. *High* *Treason* is an Offence committed against the Security of the King or Kingdom, and is described in the Statutes hereafter mentioned. Concerning *High* *Treason* there were different Opinions before 25 *Ed. 3. ch. 2.* But all Treasons were settled by that Statute, and confirmed by 1 *Mar. Sess. 1. ch. 1.* which takes away the Power to *adjudge* any Thing else to be *Treason* than what is declared and expressed to be such by 25 *Ed. 3.* taking no Notice of the Clause in that Statute relating to the Parliament's Power of *declaring* any Thing else to be *High* *Treason*. So that no Crime is at this Day *High* *Treason*, *Petit* *Treason*, or *Misprision of* *Treason*, unless it be declared by 25 *Ed. 3.* or is *made* such by some Statute since 1 *Mar. Sess. 1. ch. 1.* And no Indictment for *Treason* can be without the Word *Proditorie*.

3 Inst. 4, 15.

Natural-born Subjects (except Infants under the Age of Discretion, Idiots, and Lunatics totally deprived of their Reason) tho' they live in the Dominions of a foreign Prince, and have sworn Allegiance to him, and all Subjects of foreign Princes living in the Dominions of our King, by Reason of their local Allegiance, may be guilty of *High* *Treason*. The Queen, Wife of a King regnant, may be also guilty. But an Alien, who in an hostile Manner invades the Kingdom, ought not to be punished as a Traitor; but is to be dealt with as an Enemy. An Ambassador, that is guilty of

4 Inst. 152.

acc.

2 Danv 327.

Grot. de jure

belli, Lib. 2.

ch. 18.

Zouch de Le

gat. del. Ind.

Comp.

3 Inst. 7.

H. P. C. 12.

Treason against the King's Life may be condemned and executed; but for other Treasons he shall be sent Home with a Demand to punish him, or to send him back to be punished. (24.)

By 25 *Ed. 3. St. 5. ch. 2.* *High* *Treason* may be committed in the seven Instances following, (viz.)

1. By compassing and imagining the Death of the King or Queen, or of their eldest Son and Heir.

A King *De facto* and in Possession is here to be understood; and *High* *Treason* against him may be punished by the right Heir, when he gets the Crown afterwards. He that hath only a Right, is not within this Act. [See 11 *H. 7. ch. 1.*] The Heir of the last King, before his Coronation, is a King within the Act, when the Crown descends upon him. The Husband of a Queen, that reigns in her

3 Inst. 6, 7, 8.

H. P. C. 12.

own Right, is not a King within its Meaning. But a Queen reigning is a King within the Intention of it, as she is invested with Royal Power. [See 1 *Mar. Sess. 3. ch. 1.*] Her Husband may commit *Treason* against her, for she is a distinct Person from him to this and many other Purposes. A Queen Dowager is not within the Act. Nor a *Pra-Rex* or Guardian of the Kingdom; nor a collateral Heir apparent, till he is declared Heir apparent by Act of Parliament, with a special Provision for that Purpose.

3 Inst. 8, 9.

H. P. C. 12.

H. H. P. C.

125.

By eldest Son and Heir, The second Son after the Death of the first may be understood.

[See 1 *W. & M. Sess. 2. ch. 2. §. 9.* Whereby one that is a Papist, or marries a Papist, is incapable to enjoy the Crown; and in every such Case the People are absolved from their Allegiance.]

Protestatio trahit subjectionem, et subjectionis protestationem. 7 Rep. 5.
Salus populi est suprema lex. 10 Rep. 139.

Some

Some *Overt-Act* or open Deed must be alledged in every Indictment for High Treason; for tho' the Words *and be provably there- of* [see *infra*] yet they relate to all the several Treasons therein before expressed. And the Compassing and Imagining the Death of the King must be manifested by an *Overt-Act* to make it High Treason; as by providing Arms to effect it; by consulting to levy a War against him (for my Lord Coke's Opinion to the contrary is denied to be Law), if it be with Design to kill, depose, or imprison him, or to put any Force upon him; by writing Letters, to excite others to join with them; by assembling Men, in order to imprison or depose the King; by writing Letters to a foreign Prince, to persuade him to invade the Realm; these *Overt-Acts* may be alledged to *prove* that one imagined the Death of the King, that he may be *provably* (not probably) attainted. Bare Words are not such an *Overt-Act*; nor Words set down in Writing, and kept privately in one's Study; but Words set down in Writing, and published by the Delinquent himself, are a sufficient open Deed within the Statute. Words without an *Overt-Act* are to be punished in another Manner, as an High Misprision, or a Great Misdemeanor. If a Man is indicted only for Words, that cannot amount to High Treason [*sed Quare*]. Tho' if one doth any Thing, by which he sheweth his Liking or Approbation to a traiterous Design by Words or Actions, he is guilty of High Treason.

2. By Violating the King's Companion, or the King's eldest Daughter unmarried, or the Wife of the King's eldest Son and Heir.

To violate is to know carnally. The King's Companion is the King's Wife, which implies, that the Violation must be during the Marriage with the King; for after the Death of the King she is not his Companion. And therefore it extendeth not to a Queen Dowager. If the Wife of the King doth yield and consent to him that committeth this Treason, it is Treason in her. The eldest Daughter, i. e. the eldest Daughter, not married, at the Time of the Violation, tho' there was an elder Daughter than her, who is then dead. For she, as the eldest alive, is inheritable to the Crown upon Failure of Issue Male.

Or the Wife of the King's eldest Son and Heir, implies also that the Violation must be during the Coverture. If she yields and consents to the Adulterer, it is likewise Treason in her.

3. Or if a Man do levy War against the King in his Realm.

Not only by rebelling and taking up Arms to dethrone the King, but to reform Religion or the Laws; to remove Persons from the Ministry; to resist the King's Forces by defending a Castle, to pull down all Inclosures, all Bawdy-Houses, or to do any Thing else for publick Reformation, is an Invasion on the King's Authority, and a Levying of War. Those that join with them also are guilty, tho' they know not their Intent: [But it should seem that the bare being in Company in such Case cannot amount to Treason.] To raise a Force to pull down a particular Inclosure or Bawdy-House, is only a Riot.

A bare Conspiracy to levy War cannot amount to Treason within this Branch. It must be an actual Levying of War. A Conspiracy to levy War against the King may be alledged as an *Overt-Act*.

^a 3 Inst. 9. Overt-Act of Compassing his *Death*; as hath been said. ^a If a War is levied, the Conspirators are all Traitors, tho' all are not actually in Arms.

^b 3 Inst. 10. Those that join themselves to Rebels for fear of Death, and return at the first Opportunity, are not guilty of Treason.

4. Or be adherent to the King's Enemies in his Realm, giving to them Aid or Comfort in the Realm or elsewhere; and thereof be provably attainted of open Deed.

^c 1 Inst. 261 b. An Adhering may be proved, by giving the King's Enemies Aid and Comfort *within* the Realm, or *without*, but for Necessity-sake the Adherency without the Realm must be alledged in some Place within *England*; and if the Jury finds upon Evidence any Adherency without the Realm, they must find the Delinquent Guilty. So an Adherency may be proved by surrendering the King's Castle for Reward, or selling Arms. To succour a Rebel fled into another Realm, is not within this Clause; because a Rebel is not properly an Enemy; and because the Statute is to be taken strictly. ^a Enemies are those that are out of the Allegiance of the King.

^d 3 Inst. 11. 7 Rep. 245, 255 Calvin's Case. 5. Or if a Man counterfeit the King's Great Seal, or Privy Seal, or his Money.

This Branch of 25 Ed. 3. does not extend to a Fixing of the Great Seal by the Chancellor to a Patent without any Warrant for

^e 3 Inst. 15, 16. it; nor to the Taking the ^a Wax impressed by the Great Seal, from

^f 12 Rep. 13. one Patent, and fixing it to another; for this is not Counterfeiting

^g H. P. C. 18. the Great Seal, but a Mis-using of it. There must be an actual

^h Kely. 80. Counterfeiting, not an Intent or going about to counterfeit. Also

ⁱ Contra St. Pl. Cr. 3, a. it must have a Likeness of the King's Great Seal. Those who aid and consent to the Counterfeiting, are equally guilty within the Act.

^j See of the Privy Council. [See 7 W. 3. ch. 3.] This Statute mentions only the Great and Privy Seal; so that the Counterfeiting of the Sign Manual or Privy Signet is not Treason within this Act. But it is made High Treason in both Cases by 1 M. Sess. 2. ch. 6.

^k 2 Inst. 577. Those who coin Money in this Realm without the King's Authority (whether they utter it or not) are Guilty of High Treason;

^l 578. and those that have Authority to coin Money, are guilty of High

^m 3 Inst. 16, 17. Treason, if they make it of greater Alloy or of less Weight than

ⁿ Dalt. ch. 140. they ought. Clippers are not within this Statute. The King's

^o P. 320. Money here is such only as is coin'd by the King's Authority in

^p 1 H. H. P. C. 211, 112. Gold and Silver (not in Brass or Copper) within this Realm. But concerning the King's Coin, and the Counterfeiting of foreign Money current in this Realm, it is further provided for by subsequent Statutes since 1 Mar. Sess. 1. ch. 1. which see *infra*. Forging or Counterfeiting of foreign Money not current within this Realm is

Misprision of Treason.

6. Or if a Man bring false Money into this Realm, Counterfeit to the Money of England, knowing the Money to be false, to merchandize or to make Payment in Deceit of the King and his People.

^q 3 Inst. 18. It must be brought over actually counterfeited according to

^r H. P. C. the Likeness of English Money. [But see 1 & 2 P. & M. ch. 11. *infra*.] It must be brought by one that knows it to be

false; it must be brought from a foreign Nation, and not from any Place subject to the Crown of England; and he that brought it over

must

must utter it in Payment, otherwise it is not High Treason within *H. H. P. C.* this Statute. (24.) 129. *contra.*

[See the Statutes concerning the Coin, *infra.*]

7. Or if a Man slay the Chancellor, Treasurer, or the King's Justices of the one Bench or the other, Justices in Eyre or Justices of Assize, or other Justices assigned to hear and determine, being in their Places, doing their Offices.

This Branch extends to no other Officers besides those expressly named; and to them only while they are in actual Execution of their Offices, representing the Person of the King. It also extends only to a Killing, not to a Wounding without Death. [See 3 *H. 7. ch. 14.* in *Felony, post.*]

All these Acts are High Treason by the Common Law, and are declared to be so by the forementioned Statute of 25 *Ed. 3. ch. 2.* and 1 *Mar. Sess. 1. ch. 1.* And all other Statutes (as hath been said) made between those two Statutes concerning High Treason are abrogated. And there wanted nothing to the Perfection of the Statute of *Ed. 3.* but a Limitation of some certain Time wherein the Offender should be accused. [As to which see 7 *W. 3. ch. 3.*]

But since 1 *Mar.* many Offences are made High Treason by Statutes which were not so before. As concerning the Coin, the Pope, Popish Priests, and Papists, the Protestant Succession, and concerning Soldiers.

1. Of High Treason concerning the Coin.

By 1 *Mar. Sess. 2. ch. 6.* Forging or Counterfeiting any foreign Coin of Gold or Silver, current by the King's Proclamation, is High Treason. [See 14 *El. ch. 3.*]

By 1 & 2 *Ph. & M. ch. 11.* To bring into the Realm Money counterfeited according to the Similitude of foreign Coin current here, to the Intent to utter, or make Payment with, the same within this Realm, by Merchandizing or otherwise, is High Treason.

By 5 *El. ch. 11.* Whosoever shall for Lucre or Gain wash, clip, round, or file; Or,

By 18 *El. ch. 1.* Impair, diminish, falsify, scale, or lighten the proper Money of this Realm, or that of other Realms made current here by Proclamation, shall be deemed as an Offender in Treason, and forfeit all his Chattels absolutely, and his Hereditaments for Life, but without Corruption of Blood or Loss of Dower.

By 8 & 9 *W. 3. ch. 26.* Whosoever (except such as are employed in the Mint) shall knowingly make or mend, or assist therein, or buy, or sell, or hide, or conceal, or knowingly have in his House or Possession, any Mould, Press, or Tool, for Coining, or convey any Tool or Instrument for Coining out of the King's Mint, or mark upon the Edges any current Coin, or any diminished, or counterfeited Coin, or colour, gild, or case over any Coin resembling the current Coin of this Kingdom, shall be guilty of High Treason, but without Corruption of Blood, or Loss of Dower. [See 6 & 7 *W. 3. ch. 17.* 7 *An. ch. 24.* and 15 *G. 2. ch. 28.* As to the Reward for Apprehending and Convicting a Counterfeiter or Clipper of the Coin, and Pardon for Discovery and Conviction of Accomplices or like Criminals.]

By 15 *Geo. 2. ch. 28.* To wash, gild, or colour a lawful Shilling or Six-pence, or a false one, or to add to, or alter the Impression to make it look like a Guinea, or half Guinea; or a Half-penny, or Far-

thing, to make it look like a Shilling, or Six-pence, is High Treason; but without Corruption of Blood or Loss of Dower.

See Hawk. P. C. B. 1. p. 44. *Papists.* 2. Of High Treason concerning the Pope, popish Priests, and

By 5 El. ch. 1. If any one shall by Writing, Cyphering, Printing, Preaching, or Teaching, or by any Speech, open Deed, or Act, advisedly maintain the Jurisdiction of the Bishop of Rome heretofore claimed in this Realm, he is guilty of a Præmunire for the first Offence, and of High Treason for the second Offence; but without Corruption of Blood or Loss of Dower. And if any Person, who shall have a Charge, Cure, or Office in the Church, or an Office, or Ministry in an Ecclesiastical Court, or shall wilfully refuse to observe the Orders, and Rules for Divine Service in the Church of England, after he shall be admonished by the Ordinary; or such as shall openly deprave any the Rites and Ceremonies of the Church of England, or that shall say or bear private Mass, shall refuse a second Tender of the Oath of Supremacy, [See 1 W. & M. Sess. 1. ch. 8. which hath altered the Form of the Oath] he shall be guilty of High Treason; but without Corruption of Blood or Loss of Dower.

By 13 El. ch. 2. If any shall put in Ure any Bull or Instrument for Absolving the Subjects from their Allegiance, obtained from the See of Rome, or willingly receive any such Absolution; or shall obtain from the See of Rome any Bull or Writing whatsoever, and put it in Ure, he is guilty of High Treason.

By 23 El. ch. 1. and 3 Ja. 1. ch. 4. To absolve Subjects from Obedience, and reconcile them to the Obedience of Rome, is Treason in the Reconciler and Reconciled. But,

By 3 Ja. 1. ch. 4. A Person reconciled beyond the Seas, returning into this Realm, and taking the Oaths within six Days after such return, shall not (as for and touching the Point of being reconciled only) be deemed within that Act.

By 27 El. ch. 2. If any Ecclesiastick born in the Queen's Dominions, that is ordained or professed by popish Authority, shall remain in the Queen's Dominions, or come from beyond Sea, and not submit to some Bishop, or some Justice of Peace within three Days, and take the Oaths, he shall be guilty of High Treason.

And if any Subject, not being an Ecclesiastick, shall not return from a popish Seminary within six Months after a Proclamation in London, and submit, and take the Oaths within two Days, he shall be guilty of High Treason, whenever he shall otherwise return.

3. Of High Treason concerning the Protestant Succession.

By 1 An. St. 2. ch. 17. If any shall attempt maliciously, advisedly, and directly, by any Overt-Act, to deprive or binder any Person, who shall be next in Succession to the Crown for the Time being (according to the Limitation by 1 W. & M. Sess. 2. ch. 2. and 12 W. 3. ch. 2. From succeeding after the Decease of her Majesty; he is guilty of High Treason. [2y. If this Act related to any but the Queen's immediate Successor, and therefore if now of any Force.]

By 13 W. 3. ch. 3. To have Correspondence, or keep Intelligence, with the pretended Prince of Wales, or knowingly with any Person employed by him, or knowingly by Bill of Exchange, or otherwise, to

remit

remit or pay any Money for his Use or Service, is High Treason. And,

By 4 An. ch. 8. and 6 An. ch. 7. Whosoever shall maliciously, advisedly, and directly, by Writing, or Printing maintain, that the pretended Prince of Wales, or any other, hath any Right to the Crown, otherwise than according to the Acts of 1 W. & M. ch. 2. or 12 W. 3. ch. 2. Or that the Kings within this Realm, with and by the Authority of Parliament, cannot make Laws to limit and bind the Crown, and the Descent, Limitation, Inheritance, and Government thereof, shall be guilty of High Treason.

By 17 Geo. 2. ch. 39. If any Subject of the Crown of Great Britain, within the Realm or without, hold any Intelligence or Correspondence in Person, or by Letters, or otherwise, with any Son of the Pretender, or any Person employed by him, knowing him to be so employed, or remit or pay any Money for his Use or Service, knowingly, 'tis High Treason.

If any Son of the Pretender lands, or attempts to land, or be found in Great Britain, Ireland, or any of the Territories, or Dominions belonging to the Crown of Great Britain, 'tis High Treason.

Offences out of the Realm may be tried in England or Scotland.

4. Of High Treason by Soldiers.

By 2 & 3 An. ch. 20. Officer or Soldier in the King's Army, either upon Land out of Great Britain or at Sea, holding Correspondence with, or giving Advice or Intelligence to, any Rebel or Enemy, is guilty of High Treason.

By 7 An. ch. 21. Crimes and Offences which are High Treason, and Misprision of Treason by the Laws of England, shall be adjudged so in Scotland, and no other.

[See 7 W. 3. ch. 3. For regulating Trials in Cases of High Treason, and 7 An. ch. 21 & 17 G. 2. ch. 39. For mitigating the Rigour of the Laws relating to High Treason, after the Decease of the Pretender and all his Sons, B. 4. ch. 5. post.]

II. * *Petit Treason* is a Crime, where one out of Malice taketh away the Life of a Subject, to whom he oweth a special Obedience. It is called *Petit Treason* comparatively in respect to High Treason, which is against the King. It may be committed in three Cases. For,

By 25 Ed. 3. ch. 2. It is *Petit Treason*, when a Servant killeth his Master, when a Wife kills her Husband, or when a Secular or Religious slayeth his Prelate, to whom he oweth Faith and Obedience. [See 1 Mar. Seff. 1. ch. 1.]

If a Servant kills his Mistress, or the Wife of his Master, it is *Petit Treason*, for she is his Master within the Letter of the Statute. A Servant intended to kill his Master, and did lye in Wait to do it, while he was his Servant, but did not do it till he had been a Year out of his Service, it was adjudged *Petit Treason* within the Act. A Servant procured another to kill his Master, who killeth him in the Servant's Presence, this was *Petit Treason* in the Servant, and Murder in the other. If the Servant had been absent, he would have been only accessory to the Murder.

If

Of Petit Treason.
3 Inst. 20.
Dalt. ch. 142.
p. 336.

11 Rep. 34.
3 Inst. 20.
H. P. C. 24.

3 Inst. 20.
H. P. C. 24.
Dalt. ch. 142.
p. 337.

If a *Wife* and a *Stranger* kill the *Husband*, it is *Petit Treason* in the *Wife*, and *Murder* in the *Stranger*.

And so it is in the *Case* of an *Ecclesiastick Person*, secular or regular, if he kills his *Prelate* or *Superior*, to whom he oweth *Faith* and *Obedience*.

^a 3 Inst. 20. H. P. C. 24. If a *Child* kills his *Father* or *Mother*, he is out of the *Statute*; unless the *Child* served the *Mother* for *Wages*, or for *Meat*, *Drink*, or *Apparel*, in which *Case* he shall be indicted by the *Name* of a *Servant*.

^b Crompt. 19, 20. H. P. C. 24. *Aiders*, *Abettors*, and *Procurers*, are within the *Act*; ^c but in all these *Cases*, if the *Killing* is upon a sudden *Falling out*, or *Se Defendendo*, or not such a *Killing* as would be *Murder* in any other, it is not *Petit Treason* in a *Wife*, *Servant*, or *Ecclesiastick*. [See of *Principal* and *Accessory*, *cb. 2.* and of *Judgments* in *High Treason* and *Petit Treason*, *B. 4. cb. 5. post.*]

Of Felony.
• Spelm.
Gloss. v.
Felon.

¹ Inst. 391. a.
³ Inst. 15, 38.

III. ^c *Felony* (*Felonia*, from *Feab Fee*, and *Lon Price*) formerly was every capital *Crime* committed with an evil *Intention*. But a bare *Intention* to commit *Felony* is not punishable as *Felony*, though *finable*. [But see 3 *H. 7. cb. 14.* 9 *An. cb. 16.*] It is a *Word* so appropriated by *Law*, that *Felony* cannot be expressed by any other. So that *Felonice* must of *Necessity* be laid in the *Indictment* for *Felony*. At this *Day* *Felony* includes *Petit Treason*, *Murder*, *Homicide*, burning of *Houses*, *Burglary*, *Robbery*, *Rape*, *Chance-medley*, *Death* occasioned by *Self-Defence*, *Petit Larceny*, *Breach* of *Prison*, *Rescous* and *Escape* after one is *imprison'd* or *arrested* for *Felony*, &c.

² *Ld. Ray.*

981.
¹ *Haw. P. C.*
B. 1. p. 125.
St. Tri. temp.

Treason.
¹ *J. 2.*
² *Inst. 468.*
³ *Inst. 46,*
172.
H. P. C. 8.

When an *Offence* amounts to a *Felony*, it drowns the *Misprision*, unless the *Crown* chuses to prosecute for the lesser *Offence* only; as was done in the *Case* of *Hampden* for *Misprision* of *Treason*.

Note, ^d That where a *Statute* makes a second *Offence* *Felony*, or lays a heavier *Punishment* than for the first *Offence*, it is always implied, that such second *Offence* ought to be committed after *Judgment* given for the first. For the *Indictment* for the second *Offence* must recite the former *Attainder*. But it is not necessary that the second *Offence* should be of the very same *Nature* with the first.

Felony is either by *Common Law* or by *Statute*. *Felonies* by *Common Law* are *Murder*, *Manslaughter*, *Felo de se*, *Se Defendendo*, *Chance-medley*, *Larceny*, *Robbery*, *Burglary*, *Arson*, or *House-Burning*, *Breach* of *Prison*. *Felonies* by *Statute* are very many, which will appear in their *Order*. There are also *Felonies* punishable by the *Civil Law*, as *Piracy*, *Robbery*, or *Murder* upon the *Sea*.

Felonies likewise are either of a *publick* or *private* *Nature*.

• *West's*
Symb. p. 86.
§. 4, 5, 6, 65.

I. ^e *Publick Felonies* are those that are directly hurtful to the *Commonwealth* and the *King's Government*. These are *Felonies* relating, 1. To the *Coin*. 2. *Felonies* against the *King*, and the *King's Councillors*, &c. 3. *Felonies* of *Soldiers* and *Mariners*. 4. *Felony* by *Imbezilling* the *King's Armour*. 5. *Felonies* relating to *Popish Priests*. 6. *Felonies* by *Rioters*. 7. *Felonies* relating to *Turnpikes* and *Floodgates*. 8. *Felony* in not performing *Quarentine*. 9. *Felonies*

9. Felonies by Breach of Prison, Escape, and Rescue; and 10. Felonies relating to the Revenue and Trade.

1. Of Felonies relating to the Coin.

By 8 & 9 W. 3. ch. 26. It is Felony to blanch Copper for Sale, or Hawk. P. C. to mix blanch'd Copper with Silver, or knowingly and fraudulently to buy, B. 1. p. 46. or sell, or offer to sale, blanch'd Copper alone, or mixt with Silver, or any Mixture that shall be heavier than Silver, and look, and touch, and wear like standard Gold, but be manifestly worse; or to receive, pay, or put off, any counterfeit mill'd Money, or mill'd Money unlawfully diminished, and not cut in pieces, at a lower Rate than the same by its Denomination shall import, or was coined or counterfeited for.

By 15 G. 2. ch. 28. Uttering false Money knowingly, is six Months Imprisonment, and Security for Behaviour for six Months more, on Conviction for the first Offence; and on Conviction for the second Offence, two Years Imprisonment, and Security for Behaviour for two Years more; and on Conviction for the third Offence, it is Felony without Clergy.

He that utters false Money, knowing it to be so, and on the same Day, or within ten Days after, utters other false Money, knowing it to be so, or at the Time of Uttering hath more in his Custody, shall be deemed a common Utterer of false Money, and shall suffer a Year's Imprisonment, and find Sureties for two Years more; and if after being convicted as a common Utterer of false Money, he shall again utter false Money, such second Offence is Felony without Clergy.

[See 6 & 7 W. 3. ch. 17. 15 G. 2. ch. 28. As to the Reward for Discovery of Coiners, and Clippers, and of Pardon, B. 4. ch. 5. post.]

2. Of Felony against the King, and the King's Councillors, &c.

By 3 H. 7. ch. 14. It is Felony for any sworn Servant in Hawk. P. C. the Cheque-Roll of the King's Household, under the State of a Lord, B. 1. p. 48. to make any Confederacy, Compassing, Conspiracy, or Imagination with any Person, to destroy or murder the King, or any Lord of this Realm, or any other Person, sworn to the King's Council, or Steward, Treasurer, or Comptroller of the King's House, being thereof convicted by twelve of the said Household before the Steward, Treasurer, and Comptroller, or any two of them.

A Conspiracy or Imagination by Words only, within the King's Household, makes it Felony by this Statute without any Overt-act.

The Person against whom the Conspiracy is form'd, must be the King, or of the King's Privy Council, except such great Officers as the Steward, Treasurer, and Comptroller of the King's Household, who need not be of the Privy Council. See of Ld. Steward's Court B. 4. ch. 2. post.

By 9 An. ch. 16. Unlawfully to attempt to kill, or unlawfully to assault and strike, or wound a Privy Counsellor in the Execution of his Office, is Felony without Benefit of Clergy.

3. Concerning Felony of Soldiers and Mariners.

By 7 H. 7. ch. 1. and 2 & 3 Ed. 6. ch. 2. It is Felony without Benefit of Clergy, for any Soldier, not being a Captain, to leave the King's Service without Licence. See p. 46.

By 3 Ja. 1. ch. 4. It is Felony to go out of the Realm to serve any foreign Prince, or State, without taking the Oaths of Allegiance before Departure. [See for the new Oaths, 1 G. 1. St. 2. ch. 13.]

See Ibid.

And if any Gentleman, or Person of higher Degree, or any Person who hath born any Office in Camp or Army, shall go out of the Realm to serve such foreign Prince or State, without being bound with two Sureties in a Bond, not to be reconciled to the See of Rome, and not to enter into any Conspiracy against the King, he shall be adjudged a Felon.

By 9 Geo. 2. ch. 30. If any Person enlists or enters himself, or procures any Subject to enlist or enter himself, or hires or retains any Person, being a Subject of his Majesty, with an Intent to cause such Person to enlist or enter himself, or procures any such Person to go beyond Sea, or embark, with an Intent and in order to be enlisted to serve any foreign Prince, State, or Potentate, as a Soldier, without Licence first obtained under his Majesty's Sign Manual, such Offender shall suffer as a Felon without Benefit of Clergy. But if the Person so enlisted, inticed, or inveigled, shall, within fourteen Days, discover the Person who so enlisted or inticed him, so as that he may be apprehended and convicted, the Party enlisted or inticed shall be indemnified from the Penalties in this Act. And,

[By 29 Geo. 2. ch. 17. If any Subject shall agree to go beyond Sea, or embark with an Intent to enlist in any foreign Service, tho' no enlisting Money be paid; or if any Person hire or procure any Subject, tho' no enlisting Money be actually paid, to agree to go beyond Sea, or embark without Licence; and if any Subject shall accept of any military Commission, or otherwise enter into the military Service of the French King, as a Commission or non Commissioned Officer, without Licence, or being an Officer, or private Soldier, then in such Service, without Licence, and not returning and taking the Oaths within the Time limited by this Act, shall suffer Death as a Felon, without Benefit of Clergy.]

Offences against these Acts committed out of the Kingdom may be laid to be committed, and may be tried in any County in England.

By 39 El. ch. 17. Soldiers and Mariners wandering without a Testimonial, or idle Persons which wander as Soldiers and Mariners with a forged Testimonial, shall suffer as in Case of Felony without Clergy.

[By 22 & 23 Car. 2. ch. 11. Mariners laying violent Hands on their Commander, to hinder him from Defending his Ship and Goods against Pirates, shall suffer Death as Felons without Clergy. See of Piracy; and also of Felonies concerning Ships, post.]

[See the Offences which are made capital in Soldiers, and the Punishments they are liable to in the Act for preventing Mutiny and Desertion, which is annually passed; and 22 G. 2. ch. 33. for explaining, amending, and reducing into one Act, the Laws relating to the Government of the King's Ships and Forces by Sea.]

See 1 Geo. 1 St. 2. ch. 47. For the Punishment of Soldiers that are of the popish Religion; and the Punishment for seducing Soldiers to desert.

4. Of Felony by Imbezzling the King's Armour, &c.

By 31 El. ch. 4. If any Person having the Charge or Custody of the King's Armour, Ordnance, Munition, Shot, Powder, or Habillments of War, or of any Victuals provided for Soldiers or Mariners, shall for Lucre wilfully imbezzil the same to the Value of twenty Shillings (tho' at several Times) he shall be adjudged guilty of Felony. And by 22 Car. 2. ch. 5. without Benefit of Clergy, as to naval Stores. [See 9 & 10 W. 3. ch. 41. and 1 Geo. 1. St. 2. ch. 25. To preserve the Stores belonging to the Navy. See also of Forfeiture, B. 4. ch. 5. post.]

5. Of Felony relating to popish Priests.

By 27 El. ch. 2. Whosoever shall willingly receive, relieve, aid, or maintain, any Jesuit, Seminary, or other popish Priest, being at Liberty or out of Hold, knowing him to be such, is guilty of Felony without the Benefit of Clergy.

By 35 El. ch. 2. If such popish Recusant, as is mentioned in the Statute, departs not the Realm within the Time limited, if he does not conform himself within three Months, as the Statute requires, or if he returns without the King's Licence, he shall be adjudged a Felon without Clergy.

6. Of Felony by Rioters.

By 1 Geo. 1. ch. 5. If any Persons to the Number of twelve, or more, being unlawfully, riotously, and tumultuously assembled together, to the Disturbance of the publick Peace, (being required by any Justice of Peace, Sheriff of the County, Under-Sheriff, Head Officer of any City or Town corporate, where such Assembly shall be, by Proclamation made in the King's Name, in the Form by the Act directed, immediately to disperse themselves) shall afterwards unlawfully, riotously, and tumultuously continue together by the Space of an Hour after such Proclamation, they shall be adjudged Felons without Clergy. And if any Persons with Force and Arms shall wilfully and knowingly oppose, obstruct, or let hinder, or hurt any Person beginning or going to make such Proclamation, whereby the same shall not be made, or shall continue together, to the Number of twelve, and not disperse themselves within one Hour after such Let or Hindrance so made, having Knowledge thereof, they shall be adjudged Felons without Clergy. So if any Persons unlawfully, riotously, and tumultuously assembled, to the Disturbance of the publick Peace (altho' under the Number of twelve, and whether any Proclamation be made or not) shall unlawfully and with Force demolish or pull down, or begin to demolish or pull down any Church or Chapel, or Building for Religious Worship, certified and registered according to 1 W. & M. Sess. 1. ch. 18. or any Dwelling-House, Barn, Stable, or other Out-house, they shall be adjudged Felons without Benefit of Clergy.

7. Of Felony in Destroying of Turnpikes, and Flood-Gates.

By 8 Geo. 2. ch. 20. If any Person shall either by Day or Night wilfully or maliciously pull down, pluck up, throw down, level, or otherwise destroy, any Turnpike-Gate, or any Post, Rail, Wall, Chain, Bar, or other Fence, set up or erected, or hereafter so to be, to prevent Passengers from passing by without paying any Toll, laid and directed to be paid by any Act of Parliament already made, or hereafter

after to be made for that Purpose, or any House erected or to be erected for the Use of any such Turnpike-Gate, or other Fence; or any Lock, Sluice, Floodgate, or other Works on any Navigable River erected or to be erected by Authority of Parliament, or forcibly rescue any Person, being lawfully in Custody of any Officer or other Person for any of the said Offences; in any of the said Cases every Person so offending, being thereof lawfully convicted, shall be adjudged guilty of Felony sans Clergy; not to work Corruption of Blood, Loss of Dower, or Forfeiture of Lands or Goods. [See 1 G. 2. St. 2. ch. 19. and 5 G. 2. ch. 33. for less Punishments for these Offences.]

8. Of Felony in not performing Quarentine.

By 26 G. 2. ch. 6. If any Person obliged to perform Quarentine shall refuse or neglect to repair, within convenient Time after Notice, to the Lazaret, or other Place appointed, or shall escape from thence before Quarentine performed, or if any Person shall conceal from the Officers of Quarentine, or convey any Letters or Goods from any Ship under Quarentine, or from any Lazaret, he shall be deemed guilty of Felony without Clergy.]

9. Of Felonies by Breach of Prison, Escape and Rescous.

^a H. P. C. 87. Breach of Prison and Escape may be committed by the ^b Party himself; also an Escape by an Officer and a private Person; a Rescous by a Stranger.

^b H. P. C. 87.
² Inst. 589.
S. P. C. 30.

1. Of Breach of Prison and Escape by the ^b Party himself.

Breach of Prison, for any Cause, as Trespass, was Felony at the Common Law. But now Breaches of Prison for Offences not Capital are not Felonies. For,

² Inst. 589,
&c.

By 1 Ed. 2. St. 2. None that Breaketh Prison, shall have Judgment of Life and Member for breaking of Prison only, except the Cause, for which he was taken and imprison'd, did require such Judgment, if he had been convicted.

^c S. P. C. 30. b.
³¹ a.
² Inst. 589.
H. P. C. 107.
^d 2 Inst. 590.
H. P. C. 108.

^c A Prison within this Statute is the Stocks; the Prison of a Lord of a Franchise; the Custody of any, that lawfully arrests; or the House of the Constable, that lawfully arrests, or other Person, where detained, as well as the Common Gaol. ^d But if the Prison is fired without the Privity of the Prisoner, he may lawfully break it, to save himself. If a Gaoler does voluntarily permit a Felon to escape, it is Felony in the Gaoler, not in the Prisoner: If the Gaoler is Negligent, it is Felony in the Prisoner, and a Misdemeanor in the Gaoler. If the Prison is broke by Strangers without the Prisoner's Procurement, no Felony in the Prisoner. ^e To go out of the

^e 2 Inst. 589,
590.
S. P. C. 30, 31.
H. P. C. 108.

Prison, when the Doors are open, is not Felony, no more than when the Gaoler suffers the Prisoner to go at large. For the Statute requires an actual Breaking with Force and Violence, by the Prisoner himself, or others through his Procurement, or at least with his Privity. If he was no way concerned in the Breaking, and yet escapes through the Breach, he can be indicted only for the Escape. Though he breaks the Prison by opening a Passage to escape, yet if he does not escape, the mere Breaking does not amount to Felony. If one is committed only for ^f Suspicion of Felony, yet if the Felony is done, it is Felony to break the Prison; otherwise if no Felony was done. But if the Offence, for which

^f 2 Inst. 592.
H. P. C. 109.
³ Inst. 69, 70,
221.

which the Party was committed, appears by Matter of Record, as when a Person present in Court is committed, or the Party is taken by a *Capias*, it is Felony to break the Prison, though the Party was innocent, or no Felony done. Whereas if the Sheriff, &c. by the Authority which the Law gives him, arrests an innocent Man, he may rescue himself. So Note a Difference betwixt a Warrant of Record and a Warrant in Law. One must be committed by lawful *Mittimus*, else the Breach of Prison is no Felony. ^a Breach of Prison turns into Felony only, though the Prisoner was committed for High Treason. For it is not made Treason by 25 Ed. 3. ch. 2. or by any subsequent Statute. ^b But if a Prisoner breaks a Prison to let out Traytors, this is Treason; because there are no Accessories in High Treason. If one is imprisoned for ^c Petit Larceny, or for killing a Man *se Defendendo*, or by Misfortune, and breaks the Prison, it is not Felony. ^d ^e

H.P.C. 109.

^a 2 Inst. 590.^b Cro. 583.^c H. P. C. 109.^d Kely. 77.^e 1 Ld. Ray.^f 67.^g 2 Inst. 590.

Thus of Breach of Prison by the Party himself.

By Escape after an Arrest, Felony also may be committed by the Party. If a Person Escapes ^a before an Arrest, he cannot be punished as a Felon. But if Flight is found he shall forfeit his Goods. ^b

H.P.C. 111.

^c 271.

^d Persons present at the Committing of a Felony must use their endeavour to apprehend the Offender; otherwise they are to be fined and imprisoned. [See 3 Ed. 1. ch. 9. 13 Ed. 1. St. 2. ch. 1. Of Hue and Cry. And 3 H. 7. ch. 1. in Case a Murderer escapes, *infra*.]

^e 3 Inst. 53.^f 117, 158.^g H. P. C. 89.

[By 6 G. 1. ch. 23. §. 6. Felons ordered for Transportation, being afterwards at Large within any Part of Great Britain, without lawful Cause, before the Expiration of the Term for which they were ordered to be transported, shall suffer Death as Felons without Benefit of Clergy.]

2. By an ^a Officer, there may be a Felony by a voluntary Escape. ^b The Punishment for a negligent Escape is a Fine. But for a voluntary Escape the Officer is esteemed to be guilty of the same Crime, that the Person permitted to escape stood committed for, whether for Treason or Felony. Escapes suffered by ^c private Persons, who have Felons in their Custody, are punished (generally speaking) as Escapes suffered by Officers. [See concerning the Escape of Felons *West*. 1. ch. 3. 31 Ed. 3. ch. 14. 1 R. 3. ch. 3. 19 H. 7. ch. 10.]

^d S. P. C. 34.^e H. P. C. 113.^f 114, 115.^g See p. 76. &^h 77. ante.ⁱ H.P.C. 112.

3. Felony may be committed by a Stranger, when publick Justice is hindred by a ^a Rescue, or when a Stranger takes one away by Violence, that is arrested for Felony by lawful Authority. A Hindrance to arrest one that hath committed a Felony, is a Misdemeanor only. ^b But if the Party is arrested, and then rescued, if the Arrest was for Felony, the Rescuer is a Felon; if for Treason, a Traytor, because they are all Principals. If for Trespas, &c. the Rescuer is fineable. ^c

^d S. P. C. 31.^e 2 Inst. 589.^f 590.^g H. P. C. 116.^h Kely. 45. 77.ⁱ S.P.C. 31. b.^j 32. a.^k 2 Inst. 590.^l Kely. 77.^m 3 Wms. 439.ⁿ &c.^o 2 Inst. 592.^p H. P. C. 116.

^q There must be a Felony really done, and a lawful Commitment. By 9 Geo. 1. ch. 28. It is Felony knowingly and wilfully to oppose serving or executing any Process, or Rule, or Order of Court, or any Warrant of a Justice in the Mint, or to abuse any Person serving or for having served the same, whereby such Person shall receive any Damage

or bodily Hurt; or to make rescue, or conceal a Prisoner there: And to join in any Riot or Tumult there, or oppose the Execution of Process there in a Disguise, is Felony without Clergy.

By 11 Geo. 1. ch. 22. It is Felony for three or more in any Place within the Bills of Mortality, which hath been presented by the Grand Jury at the County Sessions, as a Place where Persons unlawfully assemble and associate for the Sheltering themselves from their Debts, to oppose serving any Writ, Rule, or Order of Court, or legal Process, and assault the Person serving, whereby he shall receive bodily Hurt; or for any Person to oppose an Officer of Justice, or his Assistants, in the Execution of any Writ or legal Process, or to rescue or conceal a Prisoner taken there.

[By 6 G. 1. ch. 23. §. 5. It is Felony without Benefit of Clergy to rescue an Offender, condemned to be transported, out of the Hands of those who have contracted to transport him.]

By 16 Geo. 2. ch. 31. If any Person be assisting to any Prisoner to attempt to make his Escape from any Gaol, or convey, or cause to be conveyed, into any Gaol, any Vizard or other Disguise, or any Instrument or Arms, to facilitate the Escape of Prisoners, and deliver, or cause the same to be delivered, to any Prisoner in such Gaol, or to any other Person for the Use of such Prisoner, without the Privy of the Gaoler, although no Escape be actually made, such Prisoner being then attainted or convicted of Treason or Felony (except Petty Larceny) or lawfully committed or detained for Treason or Felony (except Petty Larceny) expressed in the Warrant; he is guilty of Felony, and to be transported for seven Years. But if the Prisoner's Offence was Petty Larceny, or a lesser Crime, or he was in Gaol for Debt, amounting to 100l. it is a Misdemeanor, and liable to a Fine and Imprisonment.

To assist any Prisoner to attempt to make his Escape from the Custody of any Constable, or other Person who has the lawful Charge of such Prisoner, in order to carry him to Gaol, by Virtue of a Warrant of Commitment for Treason or Felony (except Petty Larceny) expressed in such Warrant; and to aid any Felon to attempt to make his Escape from on Board any Boat or Vessel, carrying Felons for Transportation, or from the Contractor for their Transportation, or any other Person to whom such Felons shall be lawfully delivered for Transportation, is Felony, and Transportation for seven Years.

Prosecution to be within a Year after the Offence.

Returning from Transportation punishable as in Case of other Felons transported.

[By 25 Geo. 2. ch. 37. §. 9. Any Person who shall rescue, or attempt to rescue, or set at Liberty out of Prison, any Person committed for, or found guilty of, Murder, or rescue, or attempt to rescue, any Person convicted of Murder, going to, or during Execution, shall suffer Death as a Felon, without Benefit of Clergy. And any Person by Force rescuing, or attempting to rescue, the Body of such Murderer, after Execution, out of the Custody of the Sheriff or his Officers, or from the Surgeons Company, or from the House of any Surgeon, where the same shall be deposited pursuant to this Act, shall be deemed guilty of Felony, and transported for seven Years.

By 11 G. 2. ch. 26. §. 2. 24 G. 2. ch. 40. §. 28. Tumultuously assembling to the Number of five or more, to rescue any Offender against any Acts relating to spirituous Liquors, or to assault any

any Person informing against such Offender, is Felony, and Transportation for seven Years.]

10. [Of Felony relating to the Revenue and Trade.

By 8 Geo. 1. ch. 18. §. 6. Persons knowingly and willingly passing with foreign Goods, landed without Entry, within twenty Miles of the Coast, being more than five in Number, or being armed or disguised, or who shall forcibly resist the Officers of the Customs or Excise in seizing run Goods, shall be guilty of Felony, and transported for seven Years. And,

By 9 G. 2. ch. 35. §. 13. Persons, being two or more in Company, passing within five Miles from the Coast, or from any navigable River, with one or more Horses, or with any Carriage, whereon there shall be laden more than six Pounds of Tea, or more than five Gallons of spirituous Liquors, not having paid the Duties, and not having a Permit, or any other foreign Goods of above thirty Pounds Value, landed without Entry and Payment of Duties, and being armed or disguised, or forcibly resisting any Officer of the Customs or Excise in the Execution of his Office; shall be deemed Runners of foreign Goods within the Meaning of 8 G. 1. and shall be guilty of Felony, and transported for seven Years. The Proof of the Entry and Payment of Duties to lie on the Persons found with the Goods.

By 18 G. 2. ch. 28. All Persons who, before the first of May 1745, have incurred any Penalty for running Goods are indemnified. But if any Person, having been guilty of any such Offence, for which he is liable to be transported, shall take the Benefit of this Act, and afterwards commit any the like Offence, he shall suffer as a Felon, without Benefit of Clergy.

And by 19 G. 2. ch. 34. If any Persons, to the Number of three or more, armed with fire Arms or other offensive Weapons, shall be assembled, in order to assist in the illegal Exportation of Wool or other Goods prohibited to be exported, or in the Carrying of Wool or other such Goods in order to such Exportation, or in Running any prohibited or uncustomed Goods, or Goods liable to pay Duties which have not been paid, or secured, or in re-landing Goods shipped upon Debenture or Certificate, or in rescuing the same after Seizure, or in rescuing any Person apprehended for any Offence made Felony by any Act relating to the Customs or Excise, or in preventing his being apprehended; or if any Person shall have his Face blacked, or wear any Disguise when passing with such Goods, or shall forcibly hinder or assault any Officer in the seizing such Goods, or maim, or dangerously wound any Officer attempting to go on board any Vessel, or shoot at, maim, or dangerously wound him when on board, and in the due Execution of his Office; he shall be guilty of Felony without Benefit of Clergy.

And Persons charged with such Offences, by Information on Oath before one Justice, certified to a Secretary of State, who shall not surrender within forty Days after a Publication, in two successive Gazettes, of his Majesty's Order in Council, and Proclamation thereof pursuant to the Act, or who shall escape after such Surrender, shall be attainted of Felony without Benefit of Clergy.

And if any Person, after the Time appointed for Surrender, shall knowingly harbour such Offender, he shall, if convicted within one Year,

Year, be adjudged guilty of Felony, and transported for seven Years.

And Offences relating to the Customs or Excise, made Felony by any Act, may be tried in any County; but the Attainder on this Act shall work no Corruption of Blood, Loss of Dower, or Forfeiture of Lands.]

[See 6 G. 1. ch. 21. and 9 G. 2. ch. 35. Whereby it is made Transportation for seven Years to forcibly hinder, wound, or beat, in the Execution of his Office, any Officer of the Customs, by any Persons armed, and tumultuously assembled, to the Number of eight, or any Officer of Customs or Excise being on board any Ship.]

By 4 Geo. 1. ch. 11. Persons imprisoned for exporting Wool, or Woolfells [or by 12 G. 2. ch. 21. for aiding and abetting therein] refusing to plead, Judgment shall be entered against them by Default; and if they do not pay the Sum recovered against them within three Months after Judgment, they shall be transported as Felons for seven Years.

[By 12 G. 2. ch. 21. §. 26. It is Felony and Transportation for seven Years, to oppose Officers seizing Wool, &c.]

By 12 G. 1. ch. 34. §. 7. Willfully and maliciously to destroy any Serges or Woollen Goods in the Loom, or on the Rack, or any Rack on which the same are hanged in order to dry, or break or destroy any Tools used in the Making such Serges or Goods, without the Consent of the Owner, is Felony without Clergy.

And this Act is declared to extend to Combers of Jersey and Wool, and to Framework-knitters, and Weavers, or Makers of Stockings.]

[See more of this Act at the End of Title Felonies against the Body; and also of Title Burglary, post.]

a West's
Symb. p. 86.
§. 6, 65.

2. ^a Private Felonies are those that are immediately hurtful to particular Persons; tho' these too are against the King, his Crown and Dignity. These private Felonies, more immediately against the inferior Members of the Commonwealth, are such as are committed, 1. Against the Life of a Subject. 2. Against his Body, without taking away his Life. 3. Against his Goods. 4. Against his Habitation, and, 5. There are some private Felonies made Capital by Statutes, which more immediately do concern the Subject.

1. Of private Felonies which are against the Life of the Subject.

The Life of a Subject may be destroyed several Ways; as 1. By Murder. 2. By Manslaughter. 3. By Chancemedley. 4. By Necessity.

Murder and Manslaughter are properly Felonies; but in all the Instances before mentioned one may be arraigned for Felony and Murder.

b 1 Inst. 287. b.
3 Inst. 54.
H. P. C. 28,
29.
Dalt. ch. 145.
p. 342.
Kely. 121,
122.

1. ^b Murder (*Murdrum*, Sax. *Mordrue*) may be committed upon one's self, or upon another.

1. Murder of one's self may be committed, when one kills himself by hanging, poisoning, drowning, stabbing, &c. with Deliberation and a direct Purpose. In this Case one is termed *Felo de se*.

^c *Majus est delictum seipsum occidere, quam alium.* 3 Inst. 54.

But

^d *Malitia*

But the Person that commits this Felony, must be of the Age of Discretion and *Compos Mentis*. Therefore, if an Infant under the Age of fourteen Years, or a Lunatick during his Lunacy, or one distracted by Force of a Disease, or an Idiot, kills himself, it is not Felony. If one, during the Time that he is *Non Compos Mentis*, giveth himself a mortal Wound, whereof, when he recovereth his Memory, he dieth, he is not *Felo de se*; for at the Time of the Stroke he, was not *Compos Mentis*. * In some Cases he who maliciously attempts to kill another, and in Pursuance of such an Attempt unwillingly kills himself, is a *Felo de se*. As when one hastening to kill another, falleth upon his Weapon, which he held up in his own Defence. [Qu.] But as in other Felonies, Death must ensue within a Year and a Day after the Stroke.

2. Murder committed upon another is when a Man of sound Mind and Memory, and of the Age of Discretion unlawfully killeth any reasonable Creature in Being, under the King's Peace within any County, with Malice forethought, either express or implied, so as the Party wounded or hurt dies of the Wound or Hurt within a Year and a Day. The Killing may be by a Weapon, Poison, Crushing, Bruising, Smothering, Suffocating, Strangling, Drowning, Burning, Burying, Famishing, Throwing down, Inciting a Dog, Bear, &c. to bite or hurt, whereby Death ensueth, and by laying a sick Man in the Cold in the open Air, against his Will, by Reason whereof he dieth.

But to explain this Definition of the Murder of another.

* One under the Age of Discretion, or one *Non Compos Mentis*, cannot be guilty of the Murder of another. But if it appears by Circumstances, as the Infant's hiding the Body, or the like, that he could distinguish the Nature of the Act, it is Felony. If one that is drunk kills a Man, it is Murder.

It must be a Killing some reasonable Creature, Man or Woman, Subject or Alien; whether attainted of Treason or Felony, *Præmure*, or not, Christian or Heathen. And the reasonable Creature must be born alive.

It must be within some County. For if it is done out of the Realm, it cannot be determined by the Common Law but must be heard and determined before the Lord High Constable and Marshal.

[But by 2 Geo. 2. ch. 21. If a Stroke or Poison is given at Sea, or any where out of England, and the Party die thereof within England; or if the Stroke or Poison be given in England, and the Party die thereof at Sea, or in any Place out of England, the Principal or Accessary in such Murder may be indicted and tried in the County where the Death, Stroke, or Poisoning happened, as if both the Death, and the Stroke, or the Poisoning, had been in that County.]

It must be with Malice forethought. Malice is a formed Design of doing Mischief to another; so that Hatred and Malice differ. He that doth a cruel and voluntary Act, whereby Death ensueth, doth it of Malice prepens'd and forethought in the Esteem of the Law, though he doth it of a sudden. Therefore Malice is expressed by the Party, or implied by the Law. 1. Express Malice is when the Killing is with Malice prepens'd or forethought; with a sedate

* *Malitia supplet ætatem.* S. P. C. 16. b.

Mind and formed Design to wound, poison, or to do some personal Injury to him that is kill'd, the Malice continuing until the mortal Wound or Hurt is given. This Malice may be in the Principal that doth the Act, or in the Principal aiding and abetting; and in the Accessory before the Fact. When a Person in cold Blood, maliciously, unlawfully, and deliberately ^a beats another, or doth other corporal Damage, in such a Manner that he afterwards dieth thereof, he is guilty of Murder by express Malice, tho' he did not design to kill him; but where a Master beats his Servant, or School-master his Scholar, or Parent his Child, with such Things as are usual and fit for Correction, in such a Manner as that it appears he only meant to chastise him, it is Manslaughter only. If one executes his Revenge upon a sudden Provocation in such a cruel Manner, with a *dangerous Weapon*, as shews a malicious and deliberate Intent to do Mischief, and Death ensues, it is express Malice from the Nature of the Fact, and Murder. ^b If two or more come together to do an *unlawful Act*, as to beat a Man, to commit a Riot, to rob a Park, &c. and one of them kills a Man, this is Murder in all of that Party that are present, aiding or assisting, or that were ready to aid and assist, tho' but Lookers on. Otherwise of them that come by chance. It is certain, that where the principal Intent was to commit another *Felony*, and a Killing happens in pursuance of that unlawful Purpose, all are guilty of Murder; for all will be said to intend the Murder. And such Persons are said to be present that are in the same House, tho' in another Room, or in the same Park, tho' at Half a Mile Distance, or out of View. And so it is when Death happens, where several Persons intend only a Breach of the Peace, and to resist all Opposers. ^c If *A.* upon a Quarrel with *B.* tells him that he will not strike him, but that he will give him a Pot of Ale to strike him, and thereupon *B.* strikes, and *A.* kills him, he is guilty of Murder; for this was only to cover his mischievous Intention. ^d If upon a sudden Quarrel one being provoked by bare Words or Gestures makes a Push at another with a Sword, before the other's Sword is drawn, and thereupon a Fight ensues, and he who made the Assault kills the other, he is guilty of Murder; because he shew'd at first, that he intended to kill him. But if he had made no Pass at him, till his Sword was drawn, and till he was upon his Guard, and then fights with him and kills him, he is guilty of Manslaughter only. ^e Sometimes the Malice, intended to one, makes the accidental Death of another to be Murder. As *A.* having Malice to *B.* strikes at him, and misseth him, and kills *C.* this is Murder in *A.* If one lays Poison to kill *B.* and *C.* takes it and dies, this is Murder in him that laid the Poison. If one resolves to kill the next Man he meets, and does kill him, it is Murder, tho' he knew him not; for it is Malice against all Mankind. In the Case of *Duelling*, it is agreed, that where two Persons meet and fight in cold Blood upon a precedent Quarrel, or at such a Day after the Quarrel, in which it may be presumed the Blood was cool'd, and one killeth the other, he is guilty of Murder; tho' he had often declin'd to meet him. ^f For

^a H. P. C. 49.
50.
Kely. 64, 65,
127, 133, 134.

^b 3 Inst. 56.
Crompt. 25.
Dalt. ch. 145.
p. 347.
H. P. C. 31.
44, 51.
Kely. 87, 116,
117, 127.

^c H. P. C. 48.

^d Kely. 55.
56, 61, 65.
130, 131.

^e 3 Inst. 51.
9 Rep. 81.
H. P. C. 50.

^f H. P. C. 47.
48, 49.
Kely. 56.

^g Kely. 27.
2 Ld. Ray.
1493.

^h In criminalibus sufficit generalis malitia intentionis cum Facto paris gradus. Bacon 65.

where

where a Man is killed, the Law will not presume that it was upon a sudden Quarrel, unless it is proved so to be; therefore if *A* kills *B.* and no sudden Quarrel appears, it is Murder; for, it lies upon the Party indicted, to prove the sudden Quarrel. If *A.* challenges *B.* and *B.* refuses to meet him, but tells *A.* that he shall go the next Day to such a Town about Business, and then *A.* meets *B.* on the Road the next Day, and assaults him, whereupon they fight, and *B.* kills *A.* he is guilty of Manslaughter only. If *A.* challenges *B.* and *B.* refuses to meet him, but tells him that he always wears a Sword, and shall be always ready to defend himself, and then *A.* meets him and attacks him, and *A.* is kill'd, *B.* is not guilty of Murder, nor of Manslaughter, if the Killing was necessary in his own Defence. In Duelling, not only the Principal who actually kills the other, but also the Seconds are guilty of Murder, whether they fought or not. And the Seconds of the Person kill'd are equally guilty, by Reason of the Encouragement which they gave their Principals, by joining with them. [2u.] [See 9 *Ab.* ch. 14. where any Person assaults and challenges another to fight for Money won at Play.] These are Instances of express Malice, because the Acts are cruel, and unlawful, and deliberate, or in Pursuance of an unlawful Act, tending immediately, or by necessary Consequence, to the Hurt of another. 2. But there is also a Malice implied by the Law, where it is not expressed in the Nature of the Act. This may be in three Cases. In respect of the Manner of Killing; as by Poisoning [See 1 *Ed.* 6. ch. 12.] or when one killeth another without any Provocation, or upon a slight Provocation. No Affront by bare Words or Gestures is sufficient Provocation. In respect of the Person killed; as if a Constable or Watchman is kill'd doing his Duty, or any other that comes in aid of the King's Officer, while he is executing his Office, tho' the Killer knew them not to be such Persons, yet it is Murder. Others contend, that he ought to have Notice from them, that they come to keep the Peace, &c. If a Bailiff is executing a lawful Warrant, and is kill'd, here Malice will be implied, tho' the Bailiff arrests on a Sunday [2u. Since 29 *Car.* 2. ch. 7.] or tho' he shews not his Warrant, where it may be demanded, and tho' the Process is erroneous. But if the Bailiff do that which is unwarrantable, (as if he breaks open an House to arrest in civil Cases, either by Night or Day) and is slain, Malice shall not be implied to make it Murder. So it is where the Bailiff hath no Authority at all. In respect of the Person killing; as if one assaults another to rob him, and in Resistance kills him; if a Prisoner by Duress of the Gaoler comes to an untimely End; if one is executed by Command of a Judge who hath no Jurisdiction in the Cause, if Execution is not by a lawful Officer; or if the Sheriff, when he ought to hang the Party attainted, does burn or behead him; or if an Officer authorized to whip, does it with such Rigour, that by Means thereof the Offender dieth; in all these Cases the Law doth imply Malice. [See the Statute of Stabbing, 1 *Ja.* 1. ch. 8. post.]

Lastly, It is said in the Definition of Murder, that the Dying must be within a Year and a Day after the Stroke, Wound, or Poison given. For if one that is wounded or poisoned dies after that Time, the Law presumes he died a natural Death. So it is

^a Kely. 26. in Case of a *Felo de se*. The whole Day on which the Hurt was done, shall be reckoned the first. It is no Excuse where another is wounded, if the Party dies thro' his own Negligence or disorderly Living; for the Wounds were the principal Cause of the Death which ensued.

By 3 H. 7. ch. 1. *When one is slain in the Day-time, and the Murderer escapes untaken, the Township that suffers it, shall be amerced, and the Coroner shall enquire thereof upon the View of the dead Body.*

The Town shall be amerced, if any Man kills another in his own

^b 2 Inst. 315. ^b Defence, and escapes.

^c 3 Inst. 53.

⁷ Rep. 6, 7.

H. P. C. 89.

If a Murder is committed in the Day-time (not in the Night) in a Town not inclosed, and the Murderer escapes, the Township shall be amerced. But if it is inclosed, whether the Murder is committed by Night or Day, the Township shall be amerced, if the Offender escapes. For the Gates ought to be shut from Sunset till Sun-rising. [See 13 Ed. 1. ch. 1. and of Hue and Cry under Robbery, *post*.]

Hawk. P. C.

B. 2. p. 438.

By 21 Ja. 1. ch. 27. *If any Woman be delivered of any Issue of her Body, Male or Female, which being born alive, should by Law be a Bastard, and she endeavour privately, either by Drowning, or secret Burying thereof, or any otherways, either by herself, or the Procuring of others, so to conceal the Death thereof, as that it may not come to light whether it were born alive or not, but be concealed, she shall suffer Death, as in Case of Murder, except she can prove by one Witness, at the least, that the Child was born dead.*

2. Of Manslaughter.

^a 1 Inst. 217. b.

³ Inst. 55.

¹ Str. 499.

^d Manslaughter is the Killing of another without Malice, in a present Heat on a sudden Quarrel, upon a just Provocation, or in the Commission of a voluntary and unlawful Act, without any deliberate Intention of doing Mischief. There is no Difference betwixt Murder and Manslaughter, but that Murder is upon Malice forethought, express, or implied; and Manslaughter upon a sudden Occasion, or without an ill Intent. Therefore in Manslaughter there can be no Accessories before the Fact.

^e Crompt. 25.

¹ Kely. 56.

¹ Lev. 180.

² Cro. 296.

It must be upon a sudden Quarrel, where the Party guilty did not appear to be Master of his Temper, by talking calmly upon the Quarrel, or afterwards upon other Discourse, whereby the Heat of the Blood might be presum'd to be cool'd. Therefore where two meet together, and striving for the Wall, one kills the other, this is Manslaughter. And so it is if they had upon a sudden Occasion gone into the Field and fought, and the one had kill'd the other. For all is one continued Act of Passion upon the first sudden Occasion. If two fall out on a sudden and fight, and one breaks his Sword, and a Stranger standing by lends him another, and he kills therewith, Manslaughter in both.

³ Inst. 51.

⁵⁵.

H. P. C. 56.

⁵⁷.

Dalt. ch. 146.

P. 349.

Or it must be upon a just Provocation. But when it appears that one hath kill'd another, it shall be intended at first that he did it maliciously, unless he can prove that he did it upon a just Provocation. ^b No Breach of a Man's Word, or Trespass either on Lands

¹ Kely. 27.

² Ld. Ray.

¹ 493.

^b Kely. 130.

^{131, 132, 134}.

^a *Delinquens, per iram provocatus, puniri debet mitius.* 2 Inst. 55.

or Goods, no Affront by Words or Gestures will excuse the Killing of another, from the Guilt of Murder, or be thought a just Provocation. But if upon ill Words (as giving the Lie, or calling another Son of a Whore) both the Parties suddenly fight, and one kills the other, this is but Manslaughter. For it is a Combat betwixt two upon a sudden Heat. Just Provocations may be in the following Manner. As if one upon angry Words shall assault another, as by pulling him by the Nose, or flapping upon his Forehead, and he that is so assaulted shall draw his Sword, and immediately kill the other, this is only Manslaughter. For the Peace was broke by the Person kill'd, and an Indignity was offered to the Slayer, so that he might reasonably apprehend that there might be some further Design upon him. If a Man's Friend is assaulted by another, or engaged in a Quarrel that comes to Blows, and one in the Vindication of his Friend shall on a sudden take up a mischievous Instrument, and kill the Enemy of his Friend, that is but Manslaughter. So it is if a Man sees another injuriously restrained of his Liberty, and out of Compassion comes to his Rescue, and kills any of those that so injuriously restrained him, that is Manslaughter. Again, when a Man is taken in Adultery with another's Wife, and the Husband presently kills the Adulterer, this is a just Provocation, and makes it Manslaughter. For here was the highest Invasion of Property.

The *unlawful Act* must be without Deliberation, and without Intention of doing a *personal Hurt*, to make it Manslaughter. For if the unlawful Act is deliberate, and tends to the personal Hurt of any immediately, or by way of necessary Consequence, and Death ensues, it is Murder as before observed. So that any unlawful Act without an ill Intent, is Manslaughter; with an ill Intent, Murder. As when two play at Foils, and one kills the other, it is Manslaughter only. For tho' the Act was unlawful, yet there was no deliberate Intention of doing a personal Hurt. If two Masters of Defence, without the King's Command, play at Hand-Sword, and one hurts the other so that he dies within a Year and a Day, it is only Manslaughter. (It is not Felony, if it is by the King's Command.) For that in friendly Manner they play by Consent, and for Sport to try their Manhood, or that they may be able to do the King a Service in that Kind, as Occasion shall be offered. So if Death happens by playing at Foot-ball, by Wrestling, and such like Sports, which are attended with no apparent Danger of Life, and are used only for Sport and Exercise, it is not Felony, but Chance-Medley, or Homicide *per Infortunium*. If one killeth another by throwing a Stone over a Wall, in a Place where Men often resort, or by throwing a Stone wantonly at another in Play, or by doing such idle Action as cannot but endanger the bodily Hurt of some one or other, it is Murder, if done with an evil Intention to hurt; if without such Intention, it is Manslaughter. The Intention of Evil, tho' not against a particular Person, makes Malice implied. Certainly, if a Man knoweth that People are passing by in the Streets (as in London, where there is a continual Concourse of People passing up and down) and throws Rubbish, a Piece of Timber, or great Stones, from a House, and killeth another, it is Murder, tho' he calls out to the People to stand aside, [*Quia*] because in common Presumption his Intention was to do Mischief,

when he casts a Thing down amongst a Multitude of People. Otherwise if he had call'd out in a Country-Town, where there is no such Frequency of Passengers. If one by Shooting at wild Fowl, or Hare, kills a Man by Accident, if he is not qualified to keep a Gun, it is Manlaughter. [2g.] But if he was qualified to

keep a Gun, and the Act was lawful, it is Chancemedly only. But, tho' qualified, if he shoots at a Cock or Hen, or any tame Fowl of another Man's, and he kills a Stander-by, it is Murder, for the Act is unlawful. So if one, meaning to steal a Deer in the Park of another, accidentally killeth a Boy that is hid in a Bush, this is Murder. But *Quare*, because the unlawful Act doth not tend immediately or by necessary Consequence to the Hurt of another.

If a Physician gives one such Physick, that the Patient dies of it in the Operation, it is not Homicide, if there was no felonious Intent. But if one that is not of the Faculty of Physicians takes upon him the Cure of a Man, and he dieth of the Potion, it is said to be Homicide and Felony.

But there is a Manlaughter, which is punishable as Murder. For,

By 1 Ja. 1. ch. 8. *When one thrusts or stabs another, not having then a Weapon drawn, or then striking first, so that he dies thereof within six Months after; although it were not of Malice or Forethought, he shall not enjoy the Benefit of his Clergy.*

This Act shall not extend to charge any with Thrusting or Stabbing, when it is done only *Se Defendendo*, by Misfortune, or in keeping the Peace, or in chastising a Child, or Servant, with no Intent or Purpose to commit Manlaughter.

Observe upon this Statute, that where a Person who kills another, was at any Time struck by the other in the Quarrel, or where he had a Weapon drawn at any Time in the Quarrel, Before the Thrust, or Stab, or mortal Wound was given, the Slayer is out of the Statute, tho' he gave the first Blow. For the Words *That hath not*

T H E N first stricken, or *That hath not T H E N* any Weapon drawn, shall be construed to be the Stroke given by the Party slain at any Time of the Quarrel, and not to any Stroke just before the Thrust or Stab; and so *then* shall be construed to a Weapon drawn at any Time during the Quarrel.

The Statute extends to him only that actually gave the Stroke, or that stabb'd the other; and not to those that were aiding and abetting in the Fact. For they shall be allowed Clergy. So that if it cannot be proved, by whom the Stroke was given, the Case is out of the Statute.

A Killing with a Hammer cannot come under the Words *Thrust or Stab*. But if the Party slain had discharged a Pistol, or threw a Pot or Bottle, at the Party that stabb'd, it is within the Equity of the Words, *Having then a Weapon drawn*. For penal Statutes shall be construed favourably for the Subject. For this Reason, if one had drawn out a Pistol only, and level'd it at the Party, without Discharging it; or held up a Pot or Bottle, threatening only to throw it; this seems to be a *Weapon drawn*. [But *Quare*.]

He

• He that is ousted of Clergy by this Statute, must be specially indicted pursuant to it; and yet the Jury may find Manslaughter generally. For the Statute makes no new Offence, but only takes away the Benefit of the Clergy, which was allowed at Common Law. For the Statute is but a Declaration of the Common Law, and made to prevent the Compassion of Juries, who oftentimes were apt to believe, that to be a Provocation to extenuate a Murder, which in Law was not.

Thus of Murder and Manslaughter, which are *voluntary* Homicides.

Involuntary Homicide is either by *Chancemedley*, or thro' *Necessity*.

• But these are not *properly* Felonies, because not accompanied with a felonious Intent.

3. • *Chancemedley* (*Chance-Messe*) is where a Man is doing a lawful Act without Intent of Hurt to another, and the Death of some Person doth by Chance ensue. Manslaughter is call'd *Chancemedley*; but then it signifies the Killing of a Man upon a sudden Brawl or Contention by Chance. For *Messe*, *Medle*, or *Melle* is Brawling. But *Chancemedley* in common Speech is where Death happens, when one is doing a lawful Act, and without an ill Intent. So then while one is using a lawful Diversion, as by Shooting at Rovers or at wild Fowl, or when one is hewing a Tree, and the Head of the Hatchet flies off, and a Stander-by is accidentally kill'd, this is *Chancemedley*. Also if one is doing a lawful Thing that may breed Danger, and gives Warning (as where a Workman flings down Timber or Rubbish from a House, and gives Warning to all Persons to take care and stand aside) and yet kills one that happens to be underneath, it is *Chancemedley*. • Otherwise in populous Cities, where People are continually passing up and down. If a Man whips his Horse in the Street to make him gallop, and the Horse runs over a Child and kills it, it is Manslaughter: But if another had whipp'd the Horse, it would be Manslaughter in him and *Chancemedley* in the Rider. • If a Schoolmaster in correcting his Scholar, or a Father his Son, or a Master his Servant, or an Officer in whipping a Criminal, in a reasonable Manner, happens to occasion his Death, it is *Chancemedley* and Misadventure. But if they exceed the Bounds of Moderation, they are guilty of Manslaughter. • And if they correct with an improper Instrument for Correction, as with a Sword, an Iron Bar, or kick the Scholar to the Ground, and then stamp on him, and kill, it is Murder; because of the Cruelty and Barbarity of the Action.

In *Chancemedley* the Offender forfeits his Goods, but hath a Pardon of Course.

Note, That there is a Death *Per Infortunium*, without the Fault or Procurement of another, occasioned by some Animal, or else by a Thing without Life; as where one is kill'd by a Fall from a Horse, Mow, or Rick of Corn, Hay, Cart, which tho' it is not properly Homicide, or the Killing of a Man by a Man, nor punishable as a Crime, yet the Law takes Notice of it, and makes that Thing that occasion'd the Death, to be forfeited to the King as a *Deodand*. • But if a Man is slain in such Manner by the wilful Default of another, it is Felony. And,

[By 10 G. 2. ch. 31. §. 8. In case any greater Number of Passengers than thirty-seven at one Time, and three by the Way, are taken or received into any Tilt-Boat or Row-Barge, or more than eight, and two

by the Way, into any other Boat, working for Hire or Gain on the Thames, between Gravesend and Windsor, and any Passenger shall then be drowned, every Person who shall for Hire or Gain work or navigate such Boat, shall be deemed guilty of Felony, and transported as Felons.]

4. The Life of a Man may be taken away upon a Necessity. This Necessity makes is excusable or justifiable Homicide.

1. Excusable Homicide is *Se Defendendo*, or where one has no other possible Means of Preserving his own Life, than by Killing the Person, who reduced him to such a Necessity: It is said that it must be a Killing upon an inevitable Necessity; but Necessity always implies the Act to be inevitable, or that it could not be otherwise.

3 Inst. 55, 56.
H. P. C. 41.
42.
Dalt ch. 150.
p. 357, 358.
Kely. 128.

The Party assaulted is not to be excused, unless he gives back to the Wall, Hedge, River, beyond which he cannot go, before he kills the other. But if the Assault is so fierce, and in such a Place, that giving back would endanger his Life; he need not go back. Certainly this must be a Killing *Se Defendendo*, or in his own Defence. And tho' one retreats from an Assault to the Wall, and gives the other divers Wounds in his Retreat, yet if he gives him no mortal Wound 'till he gets thither, he is guilty of excusable Homicide and *Se Defendendo* only. But if the mortal Wound was first given, then Manslaughter. If one assaults another to kill him upon Malice prepensed, and then flies to the Wall, and there in his own Defence kills him, it is Murder. For he was the original Cause of the Killing. But if there is Malice betwixt A. and B. and A. strikes first, and B. retreats to the Wall, and there in his own Defence kills A. this is *Se Defendendo* notwithstanding there was Malice between them.

2 If a Prisoner assaults a Gaoler, or one assaults an Officer of Justice, that hath a lawful Warrant, in the Execution of his Office, they are not bound to give back before they kill in their own Defence. So it is, where a Thief offers to rob or murder another either abroad or in his House. And so it is declared by 24 H. 8. ch. 5.

A Man in Fight falleth to the Ground, there his Flying to the Wall is not necessary.

3 A Man cannot draw a Weapon in his own Defence in a Church or Church-yard, [See 5 & 6 Ed. 6. ch. 4.] or in View of the King's Courts of Justice, or in any of the King's Palaces.

4 Upon an Indictment for Murder, one cannot set forth his Case in a special Plea; but must plead Not guilty, and give the special Matter in Evidence. And tho' the Verdict is Chancemedley or *Se Defendendo*, he shall forfeit all his Goods and Chattels. But he shall have a Writ of Restitution, and a Pardon of Course. This Forfeiture is made, that Men may be wary and careful, how they take away the Life of any Man. The Pardon was obtained formerly by *Certiorari* out of Chancery to remove the Record, which being certified, the Lord Chancellor issued forth a Pardon: But now it is done by Certificate of the Judge or Justices.

3 Inst. 140.
2 Cro. 367.

2 Inst. 315.
317.
H. P. C. 38.

Quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur. 1 Inst. 162. 1.
2 Inst. 384, 590. 3 Inst. 56.
Vim vi repellere licet, modo fiat cum moderamine inculpatae tutelae. 1 Inst. 162. 1.

There

There can be no ^a Accessories before or after the Fact in excusable Homicide. ^a Inst. 316. ³ Inst. 56.

By 24 H. 8. ch. 5. If one is indicted or appealed for the Death of another attempting to murder him, or rob him on the Highway, or in his House, (and so found by Verdict) he shall forfeit no Lands or Goods for the same; but shall be acquitted and discharged thereof. [See 6 Ed. 1. ch. 9.] ^b See B. 4. ch. 5. §. 12. post.

So then *Se Defendendo* is an excusable Homicide. And thus it may be said of *Chancemedley*. ^{See of Bail, B. 4. ch. 5. §. 2. post.}

2. ^c Justifiable Homicide must be also upon a Necessity. This is either of a publick or private Nature. 1. Publick, occasion'd either by the due Execution of publick Justice, or the Advancement of it. By the due Execution of Justice, when Judgment of Death is given by one that hath Jurisdiction in the Cause, and when Judgment is executed by a lawful Officer, and the Execution is pursuant to the Judgment. But if the Judgment is only erroneous (as Death in Trespas by Justices of the Peace) the Officer is not guilty of Felony, tho' the Judge is guilty. In Advancement of Justice, either in Relation to criminal or civil Causes. Criminal, as when a Sheriff or Bailiff, having a lawful Warrant, arrests a Person that hath actually committed a Felony, or that is indicted of Felony, tho' no Felony done, or the Party is innocent, and he will not obey; or when he will not suffer himself to be arrested, but defends himself; or when one either with or without Warrant, pursues a Felon upon Hue and Cry, that flies for it, or one that is indicted of Felony, or if a Prisoner assaults those that conduct him to Gaol, or his Gaoler while he is endeavouring to escape; if those who are engaged in a Riot, [See 1 Geo. 1. ch. 5. §. 3.] or forcible Entry or Detainer, stand in Opposition to a Justice's Command or lawful Warrant; if any are doing Trespas in a Forest, Chace, Park, or in any inclosed Ground where Deer are kept, and will not render themselves to the Keepers, but fly or defend themselves; [See 3 W. & M. ch. 10. Against Deer-stealers; and 4 & 5 W. & M. ch. 23. For Preservation of the Game.] In all these Cases a Killing may be justified. Civil, as a Sheriff may kill a Man that resists an Arrest. But he cannot kill one that barely flies from the Execution of a civil Process. So it is, if the Sheriff endeavours to retake one that hath been arrested, and hath made his Escape, and doth resist him. But no private Person hath this Authority upon an Arrest in a civil Matter, as he hath upon an Arrest for Felony. Neither hath the Sheriff this Authority either in criminal or civil Cases but upon a Necessity as aforesaid; as when an Offender cannot be taken without Killing him. If he might be taken without Killing him, it will be esteem'd Murder. 2. Private, occasion'd in Defence of one's Person, House, or Goods. As when a Woman kills one that attempts to ravish her, or when one kills another that attempts to murder him, rob him, abroad, or in his House. [See 24 H. 8. ch. 5. ante.] When one in Danger of Drowning, thrusts another from the same Plank, which is not able to support both, whereby he is drowned; when the Owner of a House, his Servants, or Lodgers, kill one that endeavours to rob or burn the House, or to commit any other Felony. But if the Assault in the House were in the Day-time, not to rob me, but to beat me, it would be a Killing *Se Defendendo*. If one comes into my House, claiming a Title, ^a Inst. 156. ^{221.} ^{H. P. C. 32.} ^{Dalt. ch. 150.} ^{p. 355.} ^{H. P. C. 38.} ^{Dalt. ch. 150.} ^{p. 355.} ^{Kely. 28.} ^{H. P. C. 39.} ^{Dalt. ch. 150.} ^{p. 356.} ^{357.} ^{H. H. P. C. 485, &c.} ^{H. P. C. 40.} ^{Dalt. ch. 150.} ^{p. 357.} ^{358.}

Title, or breaks open my Windows to arrest me, or doth any private *Trespass* to my Goods, and I kill him, it is Manlaughter at least. In Defence of the Possession of my Goods I may justify to beat him that will wrongfully take them from me; but I cannot justify the Killing of him except he is a Thief. If one enters wrongfully and forcibly into the House of another, and the Owner endeavours to fire the House, and the Wrong-doer kills him, it is also Manlaughter. [See 1 *Ja. 1. ch. 1.*]

¹ 1 Inst. 283. a.
² 1 Inst. 316.
³ 1 Inst. 220.
H. P. C. 38.

Upon the special Matter found, the Party is to be dismissed without any Forfeiture or Pardon purchased; or the Jury may find him Not guilty generally.

These are the *Felonies* (at least supposed Felonies at first) committed against the *Life* of the Subject.

2. Private Felonies may be against the *Body* of the Subject, without taking away his *Life*; and may be committed by 1. *Buggery*, 2. *Rape*, 3. *Forcible Marriage or Defilement of Women*, 4. *Polygamy*, 5. *Mayhem*.

¹ 3 Inst. 58,
59.
12 Rep. 36,
37.
H. P. C. 177.
1 H. H. P. C.
628.
Dalt. 160.
p. 382. cont.
Exod. xxii. v.
19
Levit. xviii.
v. 22, 23.

1. *Buggery* or *Sodomy* is the carnal Knowledge of the Body of Man or Woman, or of Beasts against the Order of Nature. It may be committed by Man with Man or Woman, or by Man or Woman with a Beast. Some kind of Penetration, and also of Emission [2y.], must be proved. If a Boy or Girl thus abused is within the Age of Discretion, it is no Felony in them, but in the Agent only. Otherwise it is Felony in both Agent and Patient. Not only he that doth the Act is a Principal, but they that are present, aiding and abetting the Misdooer, are also Principals. This is Felony by the antient Common Law.

By 25 H. 8. ch. 6. and 5 El. ch. 17. *Buggery* is made Felony without Clergy.

The Word *Persons* in the Statute extends to a Woman as well as a Man.

¹ 1 Inst. 123. b.
124. a.
2 Inst. 180,
433.
3 Inst. 59, 60.
12 Rep. 37.
H. P. C. 177,
118, 186.
Dalt. ch. 160.
p. 392.
1 H. H. P. C.
628. contr.
Deut. xxii.
v. 25.
2 S. P. C. 24.
Finch 204.
1 H. H. P. C.
731.

2. *Rape* (*Raptus*) is the carnal Knowledge of the Body of a Woman by Force, and against her Will. There must be Penetration, and Emission [2y.], otherwise an Assault only. Emission may be Evidence of Penetration, tho' not full Evidence. This is also Felony by the Common Law. It is no *Excuse* that the Woman consented after the Fact, or before the Fact, if it was for fear of Death or Imprisonment; or that she was a common Strumpet; or that she conceived. But it is a strong Presumption against the Woman, that she made no Complaint in a reasonable Time after the Injury.

Aiders and Abettors may be indicted as principal Felons, whether Men or Women.

The Word *Raptus* signifies as much as *Carnaliter Cognovit*, and is necessary in the Indictment.

By 18 El. ch. 7. It is Felony without Clergy to commit a *Rape*; and whosoever shall carnally know and abuse any Woman-child under the Age of ten Years, shall suffer as a Felon without

¹ *Agentes et consentientes pari poena plebentur.* 3 Inst. 59. 5 Rep. 80.

Clergy.

Clergy. [See *West.* 1. or 3 *Ed.* 1. *ch.* 13. *West.* 2. or 13 *Ed.* 1. *ch.* 34.]

It is not material whether such Child consented, or was forced. Yet it must be proved that the Offender entered her Body.

3 Cro. 332.
Dalt. ch. 160.
P. 393.

3. *Forcible Marriage or Defilement of a Woman of Estate is Felony.* For,

By 3 H. 7. ch. 2. If any Person shall take away any Woman, being a Maid, Wife, or Widow, having Lands or Goods, or that is Heir Apparent to her Ancestor, against her Will, and marry or defile her; the Takers, Procurers, Abettors, and also the Receivers of the same Woman so taken against her Will, and knowing the same, shall be deemed principal Felons. Provided that this Act extend not to any Person taking any Woman, claiming her only as his Ward or Bond-Woman. [See 39 El. ch. 9. *infra*.]

The Woman must have Lands or Goods, or be Heir Apparent. She must be taken away [or at least detained] against her Will, and she must be married to the Misdoer, or to some other by his Consent, or defiled, as appears by the Preamble of the Statute, to which the enacting Clause does refer by the Words, *so* against her Will. If these do not concur, it is no Felony within this Statute; but the Misdoer must be otherwise punished.

3 Inst. 61.
H. P. C. 118,
119.
12 Rep. 20,
100.
Hob. 182.
3 Cro. 482,
484, 488, 492.
Hawk. P. C.
B. 1. p. 118.

If the Taking is unlawful, and against the Will of the Woman, altho' the Marriage was with her Will, it is Felony within the Statute.

Those that after the Fact receive the Offender, and not the Woman, are not Principals within this Statute, but Accessories according to the Rules of Law.

Privies to the Marriage, and not Parties to the Force, are not within the Statute.

The Indictment ought to alledge, that the taking was for Lucre.

By 39 El. ch. 9. All Persons, who shall be Principals, Procurers, or Accessories before the Offence committed, in the taking away of Women against their Will, contrary to 3 H. 7. ch. 2. shall be excluded the Benefit of Clergy.

4. *Polygamy* is where a Man marries two or more Wives together, or where a Woman marries two or more Husbands together. Here the Body of the Husband and Wife may be said to be injured by a second Marriage while either are living. Therefore,

3 Inst. 88.
See p. 56.
ante.

By 1 Ja. 1. ch. 11. If any Person within England and Wales, being married, do marry any Person or Persons, the former Husband or Wife being alive, every such Offence shall be Felony. Provided that this Act shall not extend to any Person or Persons, whose Husband or Wife shall be continually beyond Sea for seven Years, or whose Husband or Wife shall be absent for seven Years together in any of the King's Dominions, the one not knowing the other to be living within that Time. Provided also, that this Act shall not extend to Persons divorced by Sentence in the Ecclesiastical Court, or whose former Marriage is declared void by Sentence there, or whose former Marriage was had within Age of Consent.

And

And the Offender may be proceeded against, tried, and executed in the County where apprehended, as if the Offence had been committed in that County.

^a 3 Inst. 88.

H. P. C. 121.

122.

So that if either is absent seven Years beyond Sea, Notice of being alive is not material; but if absent seven Years in the King's Dominions, they can marry only where there has been no Notice at all that either Party is living.

^b 3 Inst. 89.

H. P. C. 121.

122.

3 Cro. 461.

462.

Kely. 27.

1 H. H. P. C.

694.

* See p. 56.

ante.

^b Not only a Divorce à Vinculo Matrimonii, but a Divorce à Mensâ & Thoro is within the Proviso of this Statute; because a penal Statute must be construed favourably. (Qu.)

* Where either of the Parties are within the Age of Consent at the Time of the first Marriage, and doth disagree to the first Marriage at the Age of Consent, the Husband or Wife may marry a second Time.

^c Terms of

the Law, v.

Mayhem.

1 Inst. 126. b.

127. a. 288 a.

3 Inst. 63.

118.

H. P. C. 133.

180.

2 Roll. Abr.

578.

1 Inst. 127. a.

1 Ld. Ray.

176.

5. Mayhem (Maybaigne, Mayhemium) is a Hurt of any Part of Man's Body, whereby he is rendered less able in Fighting, either to defend himself or annoy his Enemy. As if a Bone, Joint, or Finger is broken, or disabled by shrinking up, or an Eye put out, or the Fore-teeth broken, or the Skull broke, or where one is castrated. But it is not Mayhem to cut off an Ear or Nose, because this is not weakening, but disfiguring a Man.

All Mayhem is Felony, but no Mayhem at Common Law is punished with Death, or otherwise than by Fine and Imprisonment. But when a Fine is set for this Offence, the Court of K. B. may increase it upon View of the Party maimed. The Words Felonice Mayhemavit are necessary in the Indictment. Mulieris or Obtruncavit, is not sufficient.

By 5 H. 4. ch. 5. If any Man do cut out the Tongue, or put out the Eyes, of any of the King's Subjects, of Malice prepensa, it is Felony.

By 22 & 23 Car. 2. ch. 1. If any on Purpose, and of Malice forethought, and by lying in Wait, shall cut out or disable the Tongue, put out an Eye, slit the Nose, cut off the Nose or Lip, or cut off or disable any Limb or Member of any Subject, with Intention to maim or disfigure him; such Persons, their Counsellors, Aiders, and Abettors, are Felons without Clergy. Provided that there shall be no Corruption of Blood, Loss of Dower, or of Lands, Goods, or Chattels of the Offender.

These are Felonies against the Body of the Subject, without taking away his Life. [Besides which there are also new Felonies by Statute, which do not properly come under any of the above Heads. As,

By 9 G. 1. ch. 22. Whereby wilfully and maliciously to shoot at any Person in any Dwelling-house or other Place; knowingly to send any Letter without a Name subscribed thereto, or signed with a fictitious Name, demanding Money, Venison, or other valuable Thing, (and by 27 G. 2. ch. 15. to send such anonymous or fictitious Letter threatening to kill any one, or to burn his House, Out-house, Barn, or Stack of Corn, or Grain, Hay, or Straw, tho' no Money, &c. be thereby demanded) is made Felony without Benefit of Clergy. [See more of this Act under Title Felony concerning the Game, post.] And,

By 12 G. 1. ch. 34. §. 6. To assault or abuse any Master Wool-comber or Weaver, or other Person concerned in any Woollen Manufacture, whereby he shall receive any bodily Hurt, for not complying with the illegal By-Laws, made by Combinations of Workmen in those Manufactures; or to write, or knowingly send, or cause to be written or sent, any Letter, or Writing, or Message, threatening Harm to such Master, &c. or to burn or destroy his House, Out-house, or Trees, or to maim or kill his Cattle, for not complying with the Demands of his Workmen, or such illegal By-Laws; is Felony, and Transportation for seven Years.

3. Private Felonies against the Goods of the Subject are Larcenies, from Latrocinium. These are of two Sorts. 1. Simple Larceny, or, 2. Mixt Larceny. To which may be added, 3. Piracy.

Simple Larceny also is of two Sorts. 1. Grand Larceny, and 2. Petit Larceny.

1. Grand Larceny is a felonious and fraudulent Taking and Carrying away, by Man or Woman, the mere personal Goods of another, above the Value of twelve Pence; not from the Person, or in the House of the Owner.

To explain the Definition of simple Grand Larceny.

It must be a felonious and fraudulent Taking, or with an Intention to steal, when it first cometh to his Hands and Possession. The Intent of Stealing must be at the Time of the Receiving. For if one hath the Possession of Goods once lawfully, tho' he carrieth them away with an ill Intention afterwards, it is no Larceny. It must not be by Bailment or Delivery; for that is a Receipt, and not a Taking. Thus if a Carrier receives Goods, to carry them to a certain Place, or a Taylor receives Cloth delivered to him, to make a Suit of Clothes. These cannot commit Felony by Imbeziling them. The Remedy must be by Action. But if the Privity or Possession by the first Delivery is determined, that is, if by Agreement the Goods were to be carried to a certain Place, and after the Carrier hath brought them to the Place, he takes them with an Intention of Stealing them, then it is Larceny. And if the Carrier, before he hath brought them to the appointed Place, opens the Pack, and takes away Part of the Goods delivered to him, with an Intent to steal them, it is also Felony. So if a Miller, who receives Corn to grind, takes away Part of it with an Intention to steal it. For such Possession of a Part, distinct from the Whole, was not delivered by the Owner. [See 7 Ja. 1. ch. 7. For punishing Frauds committed by Workers of Wool that imbezil any Part of it.] But if I lend a Friend a Horse, or if he hires him, to go to York, or any other certain Place, and goes to York accordingly, and there rides away with him, it is not Larceny, tho' the Privity was determined. [24. the particular Reason of this Case.] But I may have my Action for the Damage. So if I lend one a Horse, and he kills him, I may have an Action on the Case. If a Shopkeeper delivers Goods to a Person that pretends to buy them, and he runneth away with them, it is Felony; for the Goods were not out of the Possession of the Owner. If one comes on Pretence to buy a Horse, and the

2 Inst. 189.
3 Inst. 107.
H. P. C. 60.
Dalt. ch. 154.
p. 365, 366.
Kely. 68.

3 Inst. 167.
108.
Pult. 126.
Dalt. ch. 155.
p. 367.
H. P. C. 61.
62.
Kely. 81, 82.
83, 84, 85.
5 Rep. 13.

contra IV Blac. 498
Vid Cases Patch, Hor.
new & aickles in Seal
246, 226, 239.

Raym. 275.
Kely. 82.

Owner

5 C

By

Owner gives him leave to ride him, to try his Paces, and he rideth away with him, it is Felony.

3 Inst. 108.
H. P. C. 61.
5 Rep. 13, 14.

One that hath the bare *Charge* of Goods, and not the Possession (as a Butler that hath the Charge of Plate, a Shepherd of Sheep, a Servant that hath the Charge of my Chamber by Delivery of the Key to him,) may be guilty of Larceny. So where one hath a special Use only; for if a Guest, that hath a Piece of Plate set before him in a Tavern or Inn, takes it away, he is guilty of Felony; for this is no Bailment or Delivery, but a Grant of a special Use to a special Purpose. [See 3 & 4 W. & M. ch. 9. Concerning the taking away of Furniture let to use with Lodgings, *post.*] But if my Shepherd, whom I trust with my Sheep, suffers them by his Negligence to be lost, or drowned, Action upon the Case lieth; tho' the Defendant cometh to the Possession of them by the Act of the Plaintiff; and so it is in the other Cases of a Butler or Servant before mentioned.

3 Inst. 64,
108.
H. P. C. 63.
1 Sid. 254.
Kely. 43, 44.

If one, *intending to steal my Goods*, gets Possession of them by Replevin; or by Judgment in Ejectment, obtained by false Oath, gets Possession of my House without any Colour of Title, and then takes away my Goods; the *legal Process*, in Abuse of the Law, shall not excuse him from a felonious and fraudulent taking away of my Goods.

2 S. P. C. 61.
H. P. C. 64,
284.

If one feloniously takes away my Horse, and another feloniously takes away the Horse from him, the last Man may be indicted for a felonious taking from me; because in Judgment of Law, the Possession and Property always continued in me.

3 Inst. 108.
H. P. C. 61:

If one loseth his Goods, and another *finds* them, and converts them to his own Use with an Intention to steal them, it is no Larceny; for the first Taking was lawful. So if one finds Treasure-Trove, Waife, or Stray.

3 Inst. 107.
H. P. C. 61.
Kely. 24.

Note, That there must be an *actual* Taking; for the Indictment must be *Felonice Cepit*; *Felonice Abduxit* or *Asportavit* only, is not good.

By 21 H. 8. ch. 7. and 5 El. ch. 10. If a Servant (being of the Age of eighteen Years, and not an Apprentice) goes away with Money or Goods of his Master or Mistress delivered to him to keep, or being in the Service of his Master or Mistress, imbezils them, or converts them to his Use, with an Intention to steal them, contrary to his Trust, if the Goods are of the Value of forty Shillings, or above, it is Felony. Apprentices and Servants under Eighteen shall stand in like Case as before this Statute. [See 12 Ann. ch. 7. *post.*]

Dalt. ch.
155. p. 388.
H. P. C. 62, 63.

He must be a Servant at the Time of the Delivery of the Goods, and at the time of his going away. Therefore for imbeziling Goods after his Master's Death, see 33 H. 6. ch. 1.

Dyer 5.

If one Servant delivers the Goods to another Servant, this is a Delivery by the Master.

Dyer 5.
3 Inst. 105.
H. P. C. 63.
Hawk. P. C.
B. 1. p. 92.

If the Master or another Servant, delivers a Bond or Obligation, or delivers Cattle to sell, and the Servant goes away with the Bond or other Thing in Action, or receives the Money due on the Bond, or for the Cattle, and goes away with the Money, this is not Felony within the Statute. So if a Servant receives his Master's Rents. For the Master did not deliver the Money to the Servant. It must be of such Things as are delivered to keep. If Goods delivered to the Servant to keep, are under the Value of 40 s. and he goes away with them, this is only a Breach of Trust, because of the Delivery.

Dalt. ch.
155. p. 369.

But

But if the Servant shall imbezil or convert to his own Use, or go away with any Goods of his Master's which were not delivered to him. This is Felony, tho' the Goods were under the Value of forty Shillings. [See 12 *An. ch. 7. infra.*]

[By 15 G. 2. ch. 13. §. 12. If any Officer or Servant of the Bank of England (and by 24 G. 2. ch. 11. Of the South Sea Company) being intrusted with any Note, Bill, Bond, Dividend Warrant, Deed, or other Security, Money, or Effects belonging to the Company, or having any Note, &c. of any other Person lodged or deposited with the Company, or with him as an Officer or Servant of the Company, shall secrete, imbezil, or run away with the same, or any Part thereof, he shall suffer Death as a Felon without Clergy.]

And carrying away. This is also necessary. The least Removing of the Thing from the Place where it was, is sufficient, tho' it is not quite carried off. As if one is apprehended, ^a before he gets the Goods stolen out of the House, or before he has led a Horse out of the Pasture, ^b or when one takes Goods out of a Trunk, and lays them on the Floor, and is apprehended before he can carry them off. For by thus taking them and carrying them so far, he hath the Possession of them. ^c If one kills my Sheep and strips them, and then carries away their Skins, or pulls off the Wool from their Backs, and carries it away, it is Larceny and Felony. ^d All Indictments in Larceny must say *Felonice Cepit & Asportavit*, or *Cepit & Abduxit*.

By Man or Woman. ^e An Infant under fourteen Years of Age may commit Larceny, but Judgment is usually respited, though there are Precedents, that Infants under fourteen Years of Age have been burnt in the Hand. [But this must be understood, when it appears by Circumstances that he hath more Discretion than the Law presumes ^f at that Age.] A Feme Covert ^g alone may commit Larceny. ^h If one ready to starve take Victuals from another, to satisfy his present Hunger, it ought not to be adjudged Larceny. [29.]

The mere personal Goods. ⁱ Mere, for if the personal Goods favour any Thing of the Realty, it cannot be Larceny. Here then we must not understand Things annexed to the Freehold, as Corn, Grass, Wood, or Fruit growing, or Lead on a Church or House: [But by 9 G. 1. ch. 22. It is Felony without Clergy, unlawfully and maliciously to cut down or destroy any Trees planted in any Avenue, or growing in any Orchard, Garden, or Plantation, for Ornament, Shelter, or Profit. See more of this Act under Title Felony relating to Game, post.] But it is Larceny, if they are severed from the Freehold, or if the Thief severs them at one Time, and then comes again at another Time and takes them. [By 4 G. 2. ch. 32. It is Felony to steal Lead or Iron Bars from a House, or other Building, or any Garden, Court-Yard, Fence, or Outlet belonging to any Building. Also by 25 G. 2. ch. 10. To steal black Lead out of Mines, or enter therein with Intent to steal, or to assist or hire any Person so to do, and the Offender may be committed for a Year and publicly whipt, or transported for seven Years.] Thus no Larceny can be committed by taking

^a *Necessitas inducit privilegium quoad jura privata.* Bacon 29.

and

and carrying away an Infant in *Ward*, because in the Realty. If the Realty is the principal Thing, it is not Larceny; as stealing of a Chest with Writings relating to a Freehold, tho' the Chest is of Value. [24.] Therefore of Paper and Parchment, on which Conveyances are written concerning Lands, or of Bonds and Obligations, relating to some other Thing which cannot be stolen, Larceny cannot be committed. Besides, the Law does not presume, that any one would steal such Things that are of no Value or Use to any one but the Owner. But by 2 Geo. 2. ch. 25. *Stealing personal Securities is made Felony of the same Nature, as stealing Goods of a like Value.* The personal Goods also must not be of a *base Nature*, as Dogs or Cats, if they may be said to be one's personal Goods. Some Things that are *wild* by Nature, and made tame, cannot be taken away feloniously as personal Goods; as (for Example) Bears, Apes, Monkeys, Pole-cats, Ferrets, Squirrels, Parrots, singing Birds. And where no Felony can be committed of the Thing that is wild and reclaimed at *Age*, Felony cannot be committed of the *Young* in the Nest, Kennel, or Den.

^a 3 Inst. 109.
⁷ Rep. 18.
 H. P. C. 66.

^b 3 Inst. 110.

^c 7 Rep. 18.

² Inst. 201.

³ Inst. 109.

^{110.}

H. P. C. 66.

67, 68.

Dalt. ch. 156

p. 370.

^d See of the

Game. ch. 3.

post.

^e 3 Inst. 109.

H. P. C. 67.

^b By the Goods of *another*, we must understand Goods that are the Property and in the Possession of another.

Therefore to take away *wild Beasts* out of the Possession of another, is not Larceny; neither to take Deer, Hare, Conies, in a Forest, Chase, or Warren; because no one has any Property in them. [See 3 *W. & M. ch. 10.* and 5 *G. 1. ch. 15.* and 28. and 9 *G. 1. ch. 22.* For the more effectual Discovery and Punishment of Deer-stealers; and 4 & 5 *W. & M. ch. 23.* Against destroying the Game^d.]

But if the wild Beasts are fit for *Food*, and are reduced to Tameness [as Deer, wild Boar, Hares, Conies,] he that stealeth them, knowing them to be tame, committeth Felony.

Observe then the Difference between wild Beasts tam'd serving for *Food*, and wild Beasts tam'd serving for Pleasure only. But tho' Deer, Boars, &c are wild, yet when they are kill'd, Larceny may be committed of the *Flesh*.

To take *Fish* in a River is no Felony. But it is Felony to take away Fish out of a Net, Trunk, or Pond; because then they are not at their natural Liberty.

As to *wild Fowls*, the Law is the same as of *wild Beasts*, observing the Difference betwixt such as are for Food, or Pleasure only.

Of Swans mark'd or pinion'd, or tam'd which are kept in a Pond or private River; as also of Young Pigeons in a Dove-house, or young Hawks out of their Nests in another's several Ground, Larceny may be committed. But to take old Pigeons out of a Dove-house is not Larceny, unless they were shut up there; because there is no certain Property in any one. Felony may be committed, by taking away Cocks, Hens, Peacocks, Turkeys, Geese, Ducks and their young ones. Also to take away the Eggs of tame Fowl is Felony; except the Eggs of Swans and Hawks tam'd, which is punishable by Fine and Imprisonment by 11 *H. 7. ch. 17.*

By 37 Ed. 3. ch. 19. *To steal Hawks reclaim'd is Felony.* [See 34 Ed. 3. ch. 22. and see of absolute and qualified Property, p. 318. ante.]

Generally Larceny may be committed of all Creatures that are of a tame Nature, whether domestick Beasts or Fowls; especially if they are fit for Food.

By 2 & 3 Ed. 6. ch. 32. *Stealing of a Horse, Mare, or Gelding, is Felony without Clergy.* [See 31 El. ch. 12.]

And by 14 G. 2. ch. 6 and 15 G. 2. ch. 34. *Stealing any Sheep, Bull, Cow, Ox, Steer, Bullock, Heifer, Calf, or Lamb, (and no other Cattle whatsoever) or wilfully killing the same, with a felonious Intent to steal the whole, or any Part of the Carcase; or to assist any Person in the committing any such Offence, is Felony without Clergy.*

Also of all moveable Goods, the Property of which is in any Person, Larceny may be committed; as Money, Household-Stuff, Hay, Corn, Trees, and Fruit severed from the Ground. To take away Goods, whereof the Owner is *unknown*, sometimes is no Felony; as ^a Treasure-Trove, Wrecks, Waifs, Strays, before Seizure by the Person who hath a Right thereto. This Fact shall be punished only by Fine, &c. but in other Cases a Man may be guilty of Felony in taking away Goods, the Owner whereof is *unknown*. In which Case the King shall have them, and the Indictment shall be for taking *Bona cuiusdam Hominis ignoti*. One also may be guilty of Felony, for taking away the Goods of a Church or Chapel, or the Goods of Parishioners, as Plate, Bells, Books, Vestments. And he who takes off a ^a Shroud from a dead Corpse, may be indicted, as having stolen it from the Executors or Administrators, or other Owner thereof when it was put on. For a dead Man is not capable of having any Property. And there is a special Case wherein a Man may commit Felony by taking away his *own* Goods in the Possession of another. (For a felonious Taking may be of the Possession; or of the Property with Possession; not of the Property removed from the Possession.) Thus when the Owner delivers Goods to a Tailor or Carrier, and afterwards steals them from him, with an Intent to charge him for them, it is Felony, for tho' the Owner had the general Property in himself, yet the Tailor or Carrier had a special Property and the Possession for a Time. And therefore in that Sense it is a Taking the Goods of *another*. So if one lends or delivers Goods to keep, and he steals them. ^a The Wife cannot steal Goods from her Husband, for they are not the Goods of *another*; the Husband and Wife being one Person in Law. Thus of the Goods of *another*.

Above the Value of twelve Pence. If the personal Goods stolen amount to ^a above the Value of twelve Pence, then it is Grand Larceny. But if one is indicted for stealing Goods to the Value of ten Shillings, or any other Value above twelve Pence, and the Jury find specially, ^b which they frequently do, that he is guilty, but that the Goods are worth but ten Pence, he shall not have Judgment of Death, but only as for Petit Larceny; for the Things stolen may be reasonably valued according to the Rate of an Ounce of Silver at this Day, which Lord Coke says was only of the Value of twenty Pence in the Time of Ed. 1. when the Stat. of West. 1. which describes Grand Larceny was made. [See 3 Ed. 1. ch. 15.] Some are of Opinion, that the Stealing of Goods to the Value only of twelve Pence is Grand Larceny: But the Law is settled otherwise now.

^a H. P. C. 70.
Dalt. ch. 154.
p. 366.
Pult. 125.
² Inst. 190.

If two steal Goods to the Value of thirteen Pence, this is Grand Larceny in both; for each Person is as much a Felon, as if he had stolen that Sum alone. If one at different Times steals several Parcels of Goods from the same Person, which together do exceed the Value of twelve Pence, they may be put together in one Indictment, and the Offender may be found guilty of Grand Larceny. But this is seldom practised.

[By 24 G. 2. ch. 45. If any Person shall feloniously steal any Goods, of the Value of forty Shillings, in any Ship, Boat, or Vessel, on any navigable River, or in any Port of Entry or Discharge, or from any Wharf, or Key, or shall be present or assisting therein, he shall be guilty of Felony without Benefit of Clergy.]

By 18 G. 2. ch. 27. To steal any Linen, Fustian, or Cotton Yarn, or Goods, to the Value of ten Shillings, laid to be printed, bleached, or dried; or to aid or hire another to commit such Offence, is Felony without Clergy: But the Court may order such Offender to be transported for fourteen Years.]

[See 5 An. ch. 31. As to Receivers of Felons and stolen Goods, and 29 G. 2. ch. 30. Of stolen Lead, Iron, &c. and 25 G. 2. ch. 10. Of black Lead, and also 4 Geo. 1. ch. 11. and 6 Geo. 1. ch. 23. For pretending to help one to stolen Goods, and Tit. Larceny from the House, post.]

^b Inst. 189.
190.
³ Inst. 109.
H. P. C. 70.
Dalt. ch. 154.
p. 365, 366.

2. ^b Petit or Petty Larceny is when the Goods stolen do not exceed the Value of twelve Pence. If one is indicted for stealing Goods of the Value of forty Shillings, and the Jury find specially, as they may, the Value to be but ten Pence, it is but Petty Larceny, as before observed, and to be punished with Forfeiture of Goods and Chattels, Transportation, [See 4 Geo. 1. ch. 11.] Whipping, or other corporal Punishment. Petty Larceny is Felony, tho' not punishable with Death; and agrees with Grand Larceny in all Things, except only as to the Value of the Goods; which makes the Difference of Punishment.

^c See B. 4. ch. 5. §. 11. post.

Thus of Simple Larcenies, whether Grand or Petty Larceny.

2. *Mixt or complicated Larceny* has a further Degree of Guilt in it, and is either a Taking 1. From the Person of a Man, or 2. From his House, for Simple Larceny is a Taking away the Goods of another, but not from the Person or the House, as hath been said.

1. Larceny from the Person, either puts him in Fear, or 2. Does not put him in Fear.

1. That Larceny from the Person, that puts him in Fear, is ROBBERY.

^d Inst. 288. a. ^e Inst. 68, 69. H. P. C. 71, 72, 73. H. H. P. C. 533, &c. ^f Inst. 236. ROBBERY (*Rapina, Robberia*, from the *Rob* or Garment) is a felonious and violent Taking from the Person of another Goods or Money, to any Value, putting him in Fear. Tho' Robbery is sometimes taken (in a large Sense) for a wrongful taking away of Goods.

In this Definition these Things are to be considered more particularly, (*viz.*) The violent Assault upon the Person, the Taking away from the Person of another, the putting of him in Fear.

The violent Assault. This agreeth with the Indictment, *Violenter* 23 Inst. 68.
& Felonice Cepit. Dalt. ch. 134.
 P. 363.
 H. H. P. C.

Taking away. Therefore an Attempt to rob by bidding one stand, without any Taking is not Felony. For *Cepit* implies that the Thief must be in Possession of the Thing stolen. Yet for this Assault he is punishable by Fine and Imprisonment. If a Thief, with or without Weapon drawn, bids the Party deliver his Purse, and he delivers it, this is a Taking to make it Robbery. And the Thief, finding little in the Purse, delivers it back again, yet it is Robbery. If a Thief compels one by Fear to swear that he will fetch him a Sum of Money, which he doth accordingly, and the Thief receives it, this is a Taking away and Robbery. If a Thief cuts my Girdle, to which my Purse is fastened, and the Purse falls to the Ground, no Robbery. But if the Thief takes up the Purse, it is Robbery, though he letteth it fall again, and leaves it there. So that you may observe that there is a Taking in *Deed*, and a Taking in *Law*; and that the Words *Taking away* are to be largely extended.

[But by 7 G. 2. ch. 21. If any Person shall with any offensive Weapon or Instrument maliciously assault, or shall by Menaces, or in any forcible or violent Manner demand any Money, Goods, or Chattels, from any Person with a felonious Intent to rob or commit Robbery upon such Person, he shall be adjudged guilty of Felony, and transported for seven Years; and such Convicts, breaking Gaol, or escaping, or returning from Transportation, are Felons sans Clergy.]

By 6 Geo. 1. ch. 23. If any shall wilfully and maliciously assault any Person in the publick Streets or Highways, with an Intent to tear, spoil, cut, burn, or deface, and shall tear, &c. the Garments or Cloaths of such Person, upon Conviction he shall suffer as in Case of Felony, and may be transported for seven Years.

All that come in Company to rob are Principals, and are esteemed to take away, tho' one of the Gang only actually doth it. Nay, tho' the Gang miss of their first intended Prize, and one of them rides from the rest, and robs another in the same Highway out of View of the rest, and returns to them, all are guilty of the Taking and the Robbery, tho' they all did not consent to the Fact; because they all came with a Design of Robbing, and to assist one another in Case of Need.

From the Person of another. These Words also are not to be nicely construed, tho' the Indictment is *a Person*. In some Cases it may be Robbery, tho' the Thief doth not take the Goods from the Person of the Owner, nor yet assault him. For not only the Taking away a Horse from me, on which I am actually riding, or Money out of my Pocket, but the Taking away of my Horse standing by me, or of any Thing belonging to me, in my Presence or before my Face, and against my Will, is in Law a Taking from my Person: A Claim of Property without Colour for it, will not avail. Thus if the Thief takes my Purse, which in my Fright I cast into a Bush, or robs my Servant of my Money in my Presence, or drives my Cattle out of my Ground, while I am standing by not daring to resist him, this is Robbery. But if one leaves his Horse tied, and steps aside, or if a Carrier follows his Horses at a Distance, and they are taken by a Thief, it is not a Taking from the Person, or Robbery.

To

^a 3 Inst. 69. *To any Value.* • Somewhat must be taken; [but see 7 G. 2. above] and if it is but a Penny, it is a Robbery. Here it is Felony of Death, tho' the Sum is under twelve Pence, or never so small. In other Larcenies Judgment of Death is only, where the Thing stolen is above the Value of twelve Pence.

^b 3 Inst. 68. *Putting him in Fear.* • This distinguishes the Robber from a Cut-Purse, or other Stealing from the Person. For if he taketh any Thing from my Person on the Highway, without putting me in Fear by Assault or Violence, it is not Robbery; but a Felony for which the Offender shall have his Clergy. If with his Sword drawn, he bids me deliver my Purse, and afterwards prays me to give him an Alms, and I give him an Alms accordingly, this is Robbery; for I did it thro' Fear.

^c See ch. 2. post. Robbery is Felony without Clergy. The Statutes of 23 H. 8. ch. 1. 25 H. 8. ch. 3. 1 Ed. 6. ch. 12. 5 & 6 Ed. 6. ch. 10. 4 & 5 Ph. & Mar. ch. 4. take away the Benefit of Clergy from those who commit Robberies in or about or near the Highway. Therefore if it is not laid in the Indictment, that the Robbery was committed in or about or near the Highway, and to have put the Person robbed in Fear, the Robbery is not within these Statutes; and the Offender shall have the Benefit of the Clergy.

But by 3 W. & M. ch. 9. One that shall rob any Person, or shall comfort, aid, abet, assist, counsel, hire, or command any Person to commit such Offence, (and be convicted thereof) or stand mute, or challenge peremptorily above twenty, shall not have the Benefit of Clergy.

By West. 1. or 3 Ed. 1. ch. 9. All Persons are to be ready at the Summons of the Sheriff, and Cry of the Country, to pursue and arrest Felons and Robbers, &c. in pain, after Attainder thereof, to make Fine to the King. • This is an Affirmance of the Common Law. [See 4 Ed. 1. Officium Coronatoris.]

^a 3 Inst. 117. ^b 3 Inst. 172. &c. If Default be in the Lord of a Franchise, the King shall seize his Franchise; but if in the Bailiff, he shall be imprisoned for a Year, and fined, &c.

By the Statute of Winchester or 13 Ed. 1. ch. 1. and 28 Ed. 3. ch. 11. Immediately upon Robberies and Felonies committed fresh Suit shall be made from Town to Town, and Country to Country, by Horsemen and Footmen, to the Sea-side. The Constable, (the Person being described, &c.) is to call upon the Parishioners to assist him in the Pursuit in his Precinct; and to give Notice to the next Constable, who is to do the same as the first, &c. If the Country will not answer the Bodies of the Offenders, the whole Hundred shall be answerable for the Robberies there committed, &c.

In great Towns walled, the Gates shall be shut from Sun-set to Sun-rising.

Between Ascension-day and Michaelmas, Watch shall be kept in Cities, Boroughs, and Towns, all Night, from Sun-set to Sun-rising.

[See 28 Ed. 1. ch. 17. 7 R. 2. ch. 6. 5 H. 4. ch. 3.]
^c 1 Cro. 204. A Stranger cannot be compelled to keep watch. Every Inhabitant is bound to keep it in his Turn, or to find another to keep it for him; otherwise indictable for a Refusal.

By 27 El. ch. 13. The Person robbed shall maintain an Action against the Hundred in which he was robbed, if he gives Notice with convenient speed of the Robbery to some of the Inhabitants of some near Town, Village, or Hamlet, and within twenty Days before Action brought, is examined upon Oath before a Justice of Peace, dwelling within or near the Hundred where, &c. whether he knew the Parties that robbed him, or any of them, and commences his Suit within one Year after the Robbery done, and if, upon Examination, he appears to know the Parties, he shall give Bond to prosecute them; and upon ob-
2 Str. 1247.

This Statute hath altered the Statute of Winchester; for now Notice must be given of the Felony, Oath made before a Justice of Peace whether he knew the Parties; and if one of the Offenders is taken in the Pursuit, it shall excuse the Hundred, &c.

If the Robbery is committed in the Night, the Hundred shall not be charged; for no Negligence can be imputed to the Hundred, in not guarding the Country, or not pursuing, by Night. Robbers assault a Man in the Hundred of D. and carry him into the Hundred of S. and there rob him; the Hundred of S. alone is liable in an Action upon the Statute. Robbers assault a Man in the Hundred of D. in the Day-time, and carry him into the Hundred of S. and rob him at Night; he cannot have an Action. So if seized in a Highway, and carried into a Mansion-House; otherwise if carried into a Coppice, and robbed there.

By the Common Law Day-light before Sun-rising or after Sun-setting is accounted Part of the Day, and not of the Night. Days are natural and artificial. Natural, which consist of twenty-four Hours, and contain the solar Day and the Night. Artificial, which begin from the Rising of the Sun, and end when it sets. But we are speaking of Day-light; which (I say) is here accounted Part of the Day, tho' the Sun is down.

To go on with the Statute.

Where Damages are recovered against one, or some few, of the Inhabitants of the Hundred, and the Rest refuse to contribute, two Justices of the Peace (1 Q.) dwelling within or near the same Hundred, shall for the Levying thereof, set a Tax upon every Parish within that Hundred; according to which the Constables of every Town shall Tax the particular Inhabitants, and levy the Money by Distress and Sale of Goods. [See 1 Geo. 1. St. 2. ch. 5. §. 6. Concerning the Taxation of a Hundred upon demolishing of any Church, Chapel, &c. by Rioters.]

The Robbery must be committed upon the King's Highway, to entitle the Party robbed to an Action against the Hundred; not if it is committed in a Close distant from the Highway, (2y.) or in a House. Every Man's House is his Castle, which he ought to defend. And if any one is robbed in his House, it shall be esteemed his own Fault.

The Action is grounded upon 13 Ed. 1. The 27 El. shews only how the Examination shall be, &c.

It is not material if the Notice was given in another Hundred, if near the Place of the Robbery.

7 Rep. 6, 7.
 2 Inst. 569.
 3 Inst. 117.
 1 Cro. 753.
 2 Ld. Ray.
 826, &c.

7 Rep. 6.
 1 Cro. 270.
 2 Cro. 106,
 497.

3 Cro. 267.
 H. P. C. 242.
 3 Inst. 220.
 Contra,
 1 Mod. 221.
 2 Ld. Ray.
 828.
 7 Rep. 6.
 2 Inst. 569.
 1 Cro. 753.
 3 Cro. 41,
 379.

And by 8 Geo. 2. ch. 16. Where a Robbery is done, in order to enable the Party robbed to sue the Hundred, he must not only give such Notice as is directed by 27 El. ch. 13. but must also, with all convenient speed, give Notice to one of the Constables of the Hundred, or to some Constable, Borsholder, Headborough, or Tythingman of some Town, Parish, Village, Hamlet, or Tything, near the Place where, &c. either personally, or by Writing left at his House, describing, as far as the Nature of the Case will admit, the Felon or Felons, and Time and Place of the Robbery, and within twenty Days after the Robbery, cause publick Notice thereof to be given in the Gazette, describing the Robber and Robbery, Time and Place, and Goods and Effects lost, and before Action enter into a Bond to the High Constables of the Hundred, in the Penalty of one hundred Pounds, with two sufficient Securities, to be approved of by the chief Clerk, Secondary, or Filazer of the County where robbed, or Clerk of the Pleas in the Court where the Action is intended to be brought, or their respective Deputies, or the Sheriff of the County, for securing to such high Constables their Costs, in Case of a Nonsuit, Discontinuance, or Judgment against the Plaintiff in such Action. And the Hundred is not to be charged, if any of the Robbers are taken within forty Days after such Notice in the Gazette: And ten Pounds are to be given by the Hundred for apprehending any Offender in the Time limited. Constables, &c. neglecting to make Hue and Cry, forfeit five Pounds: And Process against Hundreds shall not be served on any Inhabitants, but upon the high Constable, who shall appear and defend the Action on their Behalf.

4 Cro. 142.
3 Cro. 37,
336.

2 Saund.
380.

If a Servant is robbed of his Master's Goods, the Master may sue. But then the Servant must be examined upon Oath *ut supra*, for he might know the Robbers. But the Master may be Witness in his own Cause, to make clear Proof of the Value of the Goods. If a Carrier is robb'd of another Man's Goods, either he or the Owner may sue the Hundred. But the Carrier must give Notice, and make Oath as in Case of a Servant, tho' the Owner brings the Action. Each Man here may be a Witness in his own Cause.

By 6 Geo. 1. ch. 1. No Receiver General, or any of his Agents or Servants, employed for carrying any Money to be received on Account of Taxes, shall maintain any Action against any Hundred for being robb'd on the King's Highway of the said Money, unless the Persons so carrying such Money shall at the Time of such Robbery be together in Company, and be in Number three at the least, to attest the Truth of their being robb'd.

2 Inst. 172,
173.
3 Inst. 116,
117.
7 Rep. 6, 7.

There are two Kinds of Hues and Cries (from Huer to Hoot or Shout) the one by the Common Law for the King, and the other by Statute, where the Party grieved is to have his Remedy by Action.

Not only those that refuse to levy Hue and Cry, or do not pursue upon the Hue and Cry, shall be punished by Fine and Imprisonment, but those that are present when a Man is murdered or robbed, and do not endeavour to arrest the Offender, or levy a Hue and Cry.

There must be a Felony done, or else the Arresting of the Party is unlawful, tho' it was upon Hue and Cry. But if a Felony is committed, and the Hue and Cry is against one that is not of ill Fame

Fame, or suspected, or unknown, yet the Arrest is lawful, tho' he is not Guilty. For the Hue and Cry will justify the Arrest, where a Felony is committed. He that levieth Hue and Cry upon another without Cause, shall be punished for Disturbance of the King's Peace.

By 29 Car. 2. ch. 7. *If Persons travelling on the Lord's Day are robbed; the Hundred shall not be charged. But Hue and Cry shall be made.*

But if a Person be robbed on a Sunday in going only to his parish Church, this is not within this Stat. Car. 2. and the Action lies against the Hundred. Comy. 345.
1 Str. 406.
S. C.

By 22 Geo. 2. ch. 24. *No Person shall recover upon the Statutes of Hue and Cry more than two hundred Pounds, unless the Person or Persons robbed shall at the Time of the Robbery be together in Company, and be in Number two at least, to attest the Truth of the Robbery.*

[By 9 Geo. 1. ch. 22. *Called the Black Act, the Hundred are to make Satisfaction, for Damages by killing or maiming of Cattle, cutting down Trees, or setting Fire to Houses, or Buildings, or Stacks of Corn, Hay, or Wood, against that Act.*]

See 22 Geo. 2. ch. 46. §. 34. *For ascertaining the Method of levying Writs of Execution against the Inhabitants of Hundreds.*

By 4 & 5 W. & M. ch. 8. *He who apprehends and prosecutes a Highway-Man to Conviction, shall within a Month afterwards receive of the Sheriff of the County, where the Robbery was committed, forty Pounds (producing the Certificate of the Judge or Justices, before whom the Person was convicted) with his Horse, Furniture, Arms, Money, and other Goods, taken with him; not taking away the Rights of any Persons claiming the same, from whom they were before feloniously taken.*

If one is kill'd by a Highway-Man, when pursuing or endeavouring to apprehend him, his Executors or Administrators upon Certificate shall receive the said Sum of forty Pounds.

If any Person out of Prison, having committed any Robbery, shall afterwards discover two or more Robbers, so as two or more of them shall be convicted, such Discoverer is entitled to a Pardon.

By 6 Geo. 1. ch. 23. *The Streets of Cities, Towns, and Places, are deemed to be Highways, within the Meaning of 4 & 5 W. & M. ch. 8.*

2. *Larceny from the Person which does not put him in Fear, is either done privily without his Knowledge, or openly with his Knowledge. * Privily and without his Knowledge, as by picking the Pocket, or by cutting the Purse, and Stealing from thence to the Value of twelve Pence. * If it is laid in the Indictment to be done Clam et secretè à Personâ, pursuant to 8 El. ch. 4. the Offender is excluded his Clergy. If those Words are wanting, a private Larceny from the Person shall have the Benefit of the Clergy. Openly and with his Knowledge, in his Sight and before his Face; as if one takes off my Hat or Wig from my Head, and runs away with it; or comes into a Shop and cheapens Goods, and runs away*

*3 Inst. 68.
H. P. C. 75.
Dalt. ch. 153.
p. 365.*

* *Clam delinquens magis punitur quam palam.* 8 Rep. 127.

with

with them without paying for them. In all these Cases of open Larcenies with Knowledge, the Offenders are by the Common Law within the Benefit of the Clergy. [But as to *Dwelling-Houses, Shops, &c.* See 12 *An. ch. 7. post.*]

By 8 El. ch. 4. *None that taketh any Thing privily and feloniously from the Person of another, shall have the Benefit of his Clergy.*

The Words are Taking *ANYTHING* (generally) from the Person of another privily and feloniously; yet by Construction the Thing taken must be above the Value of twelve Pence. The Statute not altering the Offence, but taking away the Privilege of the Clergy, if above that Value; which the Offender had before the Statute. Therefore, if it is under twelve Pence, it is *Petit Larceny* as at Common Law.

^a H. P. C. 75.
Dalt. ch. 153.
p. 365.

This Statute extends not to any *Accessories* before or after. Thus of Larceny from the Person.

^b H. P. C. 76. 2. ^b Larceny from the House is also a mixt and complicated Larceny, and oust of the Clergy by Statute, tho' but simple Felony by the Common Law.

By 23 H. 8. ch. 1. *To rob any Person in his Dwelling-house, the Owner, his Wife, or Servants, being there, and put in Fear, is Felony without Clergy.* [See 1 Ed. 6. ch. 12. 25 H. 8. ch. 3. *revised* by 5 & 6 Ed. 6. ch. 10. 4 & 5 Ph. & M. ch. 4. *All which Statutes relate to a Robbery in a Dwelling-house, &c.* putting some Person in Fear. See also 3 *W. & M. ch. 9. infra.*]

^c See *infra.*

If the House had been broke open in the Night, and Goods stol'n, or with Intention to steal, tho' no one was put in Fear, it had been *Burglary*^c.

By 39 El. ch. 15. *A felonious Taking of Goods to the Value of five Shillings out of Dwelling-house or Out-house, in the Day-Time, tho' no Person there, oust of Clergy.*

Robbing the House, when no Person was therein, was not so penal (before this Statute) as robbing it when some Person was therein. But bad Persons took Opportunity to commit Robberies in Houses, when People were gone to Church, or about their Business.

[See 5 & 6 Ed. 6. ch. 9. For Robbing any Person in his Dwelling-house, Booth, or Tent, in any Fair or Market; whether the Owner be sleeping or waking; which Statute ousts of Clergy, if a Person is in the House, tho' not put in Fear.]

By 3 W. & M. ch. 9. *If any Person shall feloniously take away any Goods or Chattels, being in any Dwelling-house, the Owner or any other Person being therein, and put in Fear; or shall rob any Dwelling-house in the Day-time, any Person being therein, or shall comfort, hire, command, or aid one to commit any of the said Offences, or to break any Dwelling-house, Shop, or Warehouse thereunto belonging, in the Day-time, and take any Money, Goods, or Chattels, to the Value of five Shillings, altho' no Person be therein, he shall not have the Benefit of the Clergy.*

If any Person shall take away with Intent to steal, imbezzil, or purloin, any Chattel, Bedding, or Furniture, which by Agreement he is to use, or shall be let to him to use, in Lodgings, such Stealing is Larceny and Felony.

By 10 & 11 W. 3. ch. 23. *All Persons who by Night or Day shall in any Shop, Ware-house, Coach-house, or Stable, privately and feloniously steal any Goods to the Value of five Shillings or more, though such Shop, &c. be not broke open, or though any Person be or be not in such Shop, &c. or that shall assist, hire, or command any Person to commit such Offence, be shall lose the Benefit of his Clergy.*

If any Person shall commit any Burglary, House-breaking, or Felony in stealing any Horse, or any Money, Wares, and Goods, from whom the Benefit of the Clergy is by this Act taken away, and being out of Prison shall discover, or cause to be discovered and apprehended, two or more, who have committed any such Burglary, &c. and who shall be convicted thereof, be shall be intitled to a Pardon of all Burglaries, &c.

Any Person taking and prosecuting such Felons to Conviction, upon the Judge's Certificate thereof, which he is to have gratis, or his Assignee thereof, be himself not having made Use thereof, shall be exempt from Parish and Ward Offices in the Parish or Ward where such Felony was committed. Persons slain by any such House-breakers, Horse-stealers, or other Felon aforesaid, by endeavouring to apprehend them, their Executors or Administrators shall have such Certificate.

By 5 An. ch. 31. *A Reward of forty Pounds is given to any one, that shall take and convict one guilty of the felonious Breaking or Entering any House in the Day-time; and to the Executors or Administrators of any Person who shall be killed in endeavouring to apprehend such Offender. [See 6 Geo. 1. ch. 23.] And if any Person shall commit such Felony, and afterwards being out of Prison, discover two or more, who have committed such Felonies, so as they be convicted, such Discoverer shall have forty Pounds, and shall have his Pardon for all Felonies, except Murder and Treason.*

And if any Person shall receive or buy knowingly any stolen Goods, or knowingly harbour or conceal Felons, be shall be taken as Accessory to the Felony, and suffer Death as a Felon.

By 12 An. St. 1. ch. 7. *If any Person shall steal any Money, Goods, or Wares, of the Value of forty Shillings or more, being in any Dwelling-house, or Out-house thereunto belonging, though such House, &c. be not broken by such Offender, and though any Person be or be not in such House, &c. or if any Person shall assist another to commit such Offence, be shall be debarr'd the Benefit of the Clergy.*

This Act shall not extend to Apprentices under the Age of fifteen Years, who shall rob their Masters.

By 4 Geo. 1. ch. 11. *When any Person taketh Reward under the Pretence of Helping any one to stolen Goods, be shall (unless be apprehends the Felon, and causes him to be brought to Tryal for the same, and gives Evidence against him,) suffer as a Felon, as if he himself had stolen the Goods. And,*

By 6 Geo. 1. ch. 23. *Whosoever shall discover, apprehend, and prosecute to Conviction of Felony without Benefit of Clergy, any Person for taking a Reward to help any Person to stolen Goods, (who has not apprehended the Felon, &c.) shall be entitled to a Reward of forty Pounds.*

See of the
Clergy, ch. 2.
And see B. 4.
ch. 5. §. 11.
post.

After *simple* and *mixt* Larcenies, let us say something of *Piracy*.

3 Inst. 111,
112, 113.
H. P. C. 77.
Hawk. P. C.
B. 1. p. 98. &c.
2 H. H. P. C.
14, 15.

3. *Piracy* (α πειρα Dolus or Deceit) is a Felony against the Goods of a Subject, by a Depredation or Robbing at Sea. This is a capital Offence by the Civil Law; but by Act of Parliament it is to be enquired of, heard, and determined according to the Course of the Common Law, as if it had been done upon the Land. It still remains an Offence by the Civil Law, and therefore a Pardon of all Felonies, doth not discharge it. It being a special Offence, it ought to be specially mentioned. [For the Method of Trial according to the Common Law, See 28 H. 8. ch. 15. 11 & 12 W. 3. ch. 7. and see of the Court of Admiralty, and Court by Commission upon the 28 H. 8. B. 4. ch. 1. post.]

By 11 & 12 W. 3. ch. 7. If any natural-born Subjects or Denizens shall commit any Piracy or Robbery, or any Act of Hostility against others of his Majesty's Subjects, upon the Sea, under Colour of any Commission from any foreign Prince, or any other whatsoever, such Offenders shall be taken to be Pirates, Felons, and Robbers, and shall suffer as Pirates, Felons and Robbers upon the Seas. [Or by 18 G. 2. ch. 30. Shall commit any Hostilities in the Time of War on the Seas, or in any Place within the Admiral's Jurisdiction, against the King's Subjects, by Virtue or under Colour of any Commission from the King's Enemies, or be any otherways adherent, or giving Aid or Comfort to the King's Enemies on the Seas, or in such Place, &c. may be tried, and shall suffer as Pirates.]

If any Commander or Master of any Ship, or any Seaman, shall within the Admiral's Jurisdiction betray his Trust and turn Pirate, Enemy, or Rebel, and run away with his Ship, or any Boat, Ordnance, Ammunition, or Goods, or yield them up voluntarily to a Pirate, or combine with, or attempt to corrupt any Commander, Officer, or Seaman, to yield up or run away with any Ship or Goods, or go over to Pirates, or if any Person shall lay violent Hands upon his Commander, to hinder him from fighting in Defence of the Ship or Goods committed to his Trust, or confine his Master, or endeavour to make a Revolt in the Ship, he shall be adjudged a Pirate, Felon, and Robber, and suffer as Pirate, &c.

If any shall on the Land or Sea, knowingly set forth any Pirate, or aid, maintain, command, or advise any Person to commit Piracy, and such Person shall thereupon commit such Piracy, they shall be adjudged accessory to such Piracy. Likewise if any Person, knowing such Piracy to be done, shall upon Land or Sea entertain or conceal such Pirate, or receive any Ship, Vessel, or Goods, which have been by such Pirate piratically taken, he shall be adjudged accessory to such Piracy, and shall be tried according to 28 H. 8. and suffer as the Principals ought to suffer.

[And by 4 G. 1. ch. 11. §. 7. Such Offenders are ousted of Clergy. [See B. 4. ch. 1. §. 10. post.]

[By 8 G. 1. ch. 24. If any Master of a Ship, or other Person, shall any wise trade with any Pirate, by Truck or otherwise, or furnish him with any Ammunition, Provision, or Stores, or shall fit out any Ship knowingly, or with Intent to trade or correspond with, or shall consult, combine, confederate, or correspond with any Pirate, knowing him to be guilty, he shall be deemed guilty of Piracy, Felony, and

and Robbery, and be tried and suffer accordingly. And if any Person, belonging to any Ship, upon meeting any Merchant Ship on the High Seas, or in any Port, Haven, or Creek, shall forcibly enter such Ship, and (tho' they do not seize or carry off such Ship) shall throw overboard or destroy any Part of the Goods belonging to such Ship, he shall be deemed, and punished as, a Pirate.

All Persons declared Accessories to Piracy, by 11 & 12 W. 3. ch. 7. shall be deemed Principals, and suffer as such.

Offenders against this Act are excluded from the Benefit of Clergy.]

[In Time of War there are temporary Statutes made for the Regulation of Privateers, and for the making it Piracy in them to take Ransom for a neutral Ship without bringing her into Port, &c. as by 32 G. 2. ch. 25.]

4. *Private Felonies against the Dwelling or Habitation of a Man*
are of two Kinds, 1. *Burglary*, 2. *Arson*.

1. *Burglary* (*Burglaria*, *Burglar*, from *Burg* a House, and *Laron* a Thief) is a Felony at Common Law; and by the *Common Law* is where a Person in the Night breaketh and entereth into the Mansion-House of another, to the Intent to commit some Felony there, whether the felonious Intent be executed or not.

In the Night. The Word *Noctanter* is necessary in every Indictment for Burglary; for if there was so much Day-light at the Time, that a Man's Face might be discerned thereby, it is not Burglary. The Night aggravates the Offence. If the like Offence is committed by Day, it is called *House-breaking*.

Breaketh and Entereth. ⁴ The *Breaking* and *Entering* is also necessary to make it Burglary, not Breaking only. *Felonia & Burglariter Fregit & Intravit* are the Words of the Indictment. Therefore as to *breaking*; if a Door is open, or a Window is open, or a Hole is made in the Wall before, and the Thief enters and steals, or draws out the Goods, it is not Burglary; tho' this is Breaking in Law. In Burglary there must be an actual Breaking of the House. If the Thief breaketh the Glass of the Window, a Hole in the Wall, draws the Latch, unlocks the Door, to rob, &c. This is an actual Breaking of the House. As there must be a Breaking, so there must be an *Entry*. Setting the Foot over the Threshold, after the Door is broke open; putting a Hand, Hook, or Pistol within the Window or Door broke open, is an *Entry*.

If a Master lies in one Part of the House, and his Servant in another Part, and the Servant in the Night draws the Latch of the Master's Chamber, and enters it, to rob and murder him [or if a Servant draws the Bolt of his Mistress's Chamber, and enters it with Design to commit a Rape] here is both a Breaking and Entry.

But in some Cases one may be guilty of a Burglary, without actual Breaking. As when one comes down a Chimney by Night, to rob [2y.] or when several Persons come in the Night, with a Design to commit Burglary, and one does it, while the rest watch near the House, that no Help should come to the Owner, here

the Act of one is by *Interpretation* esteemed to be the Act of all of them. But if a Servant opens a Window, to let in a Thief, who comes in and steals, it is Burglary in the Stranger, and Robbery in the Servant. [*Qu.* if not Burglary in both?]. * When Thieves, having an Intent to rob, pretend Business, to get into the House by Night, or raise Hue and Cry, and bring the Constable, to whom the Owner opens the Door, and when they come in, they bind the Constable, and rob the Owner; this being done in * Abuse of the Law, is by Interpretation esteem'd to be an actual Breaking and Burglary; and the whole Act shall be imputed to the Thieves. [See 12 Ann. ch. 7. post.]

* 4 Rep. 40. *The Mansion-house of another.* * Here a Church may be understood, for it is the Mansion-house of God. (*Qu.*) If a Church is not to be called a Mansion-house, it is a distinct Burglary to break and enter it in the Night to rob it. [See 1 Ed. 6. ch. 12.] The Out-buildings adjoining to the Mansion-house, as *Barns, Stables, Dairy-houses*, are to be understood as Parcel of the Mansion-house, and Burglary may be committed in them. But if the Barn or Stable is at any Distance from the House, it is not Burglary. For the Indictment for Burglary must set forth, that *Fregit et Intravit Domum Mansionalem*. A Shop may be Parcel of a Mansion-house. * But if it is severed from the Mansion-house by Lease, and is for one to work in by Day only, though he goes into his Shop by the same Door with the other Inhabitants to work, it is no Burglary to break it open in the Night.

Burglary may be committed in a Mansion-house, though all the Family are absent. If a Man hath * two Houses, and sometimes lives in one, and and sometimes in the other, Burglary may be committed in either of them. A Chamber in an *Inn of Court*, where one usually lodges, is a Mansion-house. For every one hath a several Property there. If one hires Part of a House to lodge in, which is divided from the rest, and hath a Door of its own to the Street, this is his Mansion-house. * But a Chamber above Stairs or below, where any Person doth lodge as an Inmate, cannot be called his Mansion-house; so that if a Burglary is committed in his Apartment, the Indictment shall lay the Offence to be in the Mansion-house of him that let it. For if the Owner of the House breaks into the Rooms of his Lodgers, and steals their Goods, it cannot be Burglary, to break into his own House; but it is Felony, to steal their Goods.

* 3 Inst. 65. *To the Intent to commit some Felony within the same.* * If one breaks a House, and enters, with an Intent to commit a *Trespass*, as to beat the Owner, &c. it is no Felony. But if the Intent was to commit a Felony, by breaking and entering, it is Burglary, tho' the Intent was not executed, or the Thief did no Harm: Otherwise of Robbery.

By 5 & 6 Ed. 6. ch. 9. *To rob any Person in a Booth or Tent in a Fair or Market, the Owner, or any of his Family, being within the same, is to be punished in like Manner as Burglary, and without*

* *Frustra Legis auxilium invocat, qui in legem committit.* 3 Inst. 64. *Merito beneficium legis amittit, qui legem ipsam subvertere intendit.* 2 Inst. 53.

Benefit

Benefit of Clergy, though without his, his Children, or his Servants Notice or Hearing.

By 18 El. ch. 7. None shall have his Clergy, that commits Burglary.

By 3 W. & M. ch. 9. He that shall counsel, hire, or command any Person, to commit any Burglary, shall not have the Benefit of the Clergy.

[See 3 W. & M. ch. 9. 10 & 11 W. 3. ch. 23. p. 384, &c. ante. Concerning Robberies of Shops, Warehouses, Coach-houses, or Stables, and concerning the Reward for Taking and Discovering of Persons guilty of Burglary. For those Statutes make Larcenies from the House punishable in the like Manner as Burglaries.]

By 12 An. St. 1. ch. 7. If any Person shall enter the Mansion or Dwelling-house of another by Day or Night, without breaking the same, with an Intent to commit Felony, or being in such House, shall commit any Felony, and shall in the Night-time break the said House to get out of the same, such Person shall be taken to be guilty of Burglary, and shall not have the Benefit of Clergy. [See other Parts of this Act, p. 385. ante. And 6 Geo. 1. ch. 23. Concerning the Reward of 40 l. for apprehending and convicting any Person for Burglary. And 24 H. 8. ch. 5. p. 369. ante.]

[By 12 G. 1. ch. 34. §. 7. To break or enter by Force into any House or Shop, by Day or by Night, with Intent to cut or destroy any Serge, or any other Woollen Goods, in the Loom, or any Tools employed in the Making thereof, is Felony without Clergy. See more of this Act, p. 360 & 373. ante.]

2. ^a *Arson* (from *Ardeo* to burn) or House-burning, is a Felony at Common Law, and is a malicious and voluntary Burning the House of another, by Night or by Day. ^{11 Rep. 18; 2 Inst. 183. 3 Inst. 66. H.P. C. 85.}

It must be a *Burning*; for to put Fire into a House, or any Part of it without Burning, is not Felony. But if Part of the House is burn'd thereby, it is Felony, tho' that Part is not wholly burn'd. If it doth burn, and goeth out of itself, it is Felony. For the Words of the Indictment are *Incendit et Combussit*.

It will be intended to be done ^b maliciously, if one, designing to burn the House of *A.* only, does burn the House of *B.* or if one maliciously burns his own House, to the Intent to burn others, if the Intention is executed. But if only his own is burn'd it is not Felony; but it is a great Misdemeanor, and punishable with Fine, Pillory, &c. If a House is fired by Negligence or Mischance, it cannot amount to *Arson*. For the Words of the Indictment are *Voluntarie ex Malitia sua Præcogitata et Felonice*. [See 9 An. ch. 31.] ^{3 Inst. 67. H. P. C. 85. 3 Cro. 378.}

By the House of another, not only a Mansion-house and the principal Parts thereof, but also any other Houses or Out-buildings, as Barn, and Stable, Cow-house, Sheep-house, Dairy-house, Milk-house, Parcel of the Mansion-house, are to be understood. To burn Barns wherein there is Corn, whether they are adjoining to any House or not, is *Arson*. But by the Common Law, to burn a Barn, not Parcel of a Mansion-house, is not Felony. The Burning of a Frame of a House is not accounted House-burning, because the Frame of a House cannot come under the Word *Domus*, which ^c ^d ^e ^f ^g ^h ⁱ ^j ^k ^l ^m ⁿ ^o ^p ^q ^r ^s ^t ^u ^v ^w ^x ^y ^z ^{aa} ^{ab} ^{ac} ^{ad} ^{ae} ^{af} ^{ag} ^{ah} ^{ai} ^{aj} ^{ak} ^{al} ^{am} ^{an} ^{ao} ^{ap} ^{aq} ^{ar} ^{as} ^{at} ^{au} ^{av} ^{aw} ^{ax} ^{ay} ^{az} ^{ba} ^{bb} ^{bc} ^{bd} ^{be} ^{bf} ^{bg} ^{bh} ^{bi} ^{bj} ^{bk} ^{bl} ^{bm} ^{bn} ^{bo} ^{bp} ^{bq} ^{br} ^{bs} ^{bt} ^{bu} ^{bv} ^{bw} ^{bx} ^{by} ^{bz} ^{ca} ^{cb} ^{cc} ^{cd} ^{ce} ^{cf} ^{cg} ^{ch} ^{ci} ^{cj} ^{ck} ^{cl} ^{cm} ^{cn} ^{co} ^{cp} ^{cq} ^{cr} ^{cs} ^{ct} ^{cu} ^{cv} ^{cw} ^{cx} ^{cy} ^{cz} ^{da} ^{db} ^{dc} ^{dd} ^{de} ^{df} ^{dg} ^{dh} ^{di} ^{dj} ^{dk} ^{dl} ^{dm} ^{dn} ^{do} ^{dp} ^{dq} ^{dr} ^{ds} ^{dt} ^{du} ^{dv} ^{dw} ^{dx} ^{dy} ^{dz} ^{ea} ^{eb} ^{ec} ^{ed} ^{ee} ^{ef} ^{eg} ^{eh} ^{ei} ^{ej} ^{ek} ^{el} ^{em} ^{en} ^{eo} ^{ep} ^{eq} ^{er} ^{es} ^{et} ^{eu} ^{ev} ^{ew} ^{ex} ^{ey} ^{ez} ^{fa} ^{fb} 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is necessary in every Indictment for *Arson*. In *Arson* it must be *Domus*, tho' a Barn, Malt-house, &c. whereas in Burglary it must be *Domus Mansionalis*, as above-mentioned. And it must be the House of another. So that the House which he has in his own Possession by a Lease for Years, is not meant, if the Owner burns it, and no other House is burn'd with it, as before observed.

11 Rep. 30,
&c.

By 23 H. 8. ch. 1. *Burning of Houses, or Barns wherein any Corn is, the Principals and Accessories are out of Clergy.* [See 25 H. 8. ch. 3. 1 Ed. 6. ch. 12. 6 Ed. 6. ch. 10. and 4 & 5 Ph. & M. ch. 4.]

By 43 El. ch. 13. *To burn, or cause to be burned, wilfully or of Malice, (or to aid, procure, or consent to the Burning of) any Barn, or Stack of Corn or Grain, in the Counties of Northumberland, Cumberland, Westmoreland, or Durham, is Felony without Clergy.*

By 22 & 23 Car. 2. ch. 7. *It is Felony to burn in the Night-time maliciously any Rick or Stack of Corn, Hay, or Grain, Barns, or other Houses or Buildings, or Kilns, in any Place whatsoever. But the Offender may make Election to be transported for seven Years.*

[And by 9 Geo. 1. ch. 22. *If any Person shall set fire to any House, Barn, or Out-house, or to any Hovel, Cock, Mow, or Stack of Corn, Straw, Hay, or Wood, (or by 10 Geo. 2. ch. 32. To any Delph of Coal) he shall suffer as a Felon without Clergy.* [See more of this Act under Title, *Felony relating to the Game, infra.*]

By 1 Geo. 1. St. 2. ch. 48. *If any Person shall maliciously set on fire or burn any Wood, Underwood, or Coppice, or any Part thereof, he shall suffer as a Felon.* [See concerning the Destruction of Corn and Wood, in ch. 3. *post.*]

5. There are other private Felonies immediately hurtful to the Subject, made Capital by Statutes; which could not properly be reduced to Felonies against the Life, Body, Goods, or Habitation. These concern Records, Cattle, Game, Ships, Bankrupts, River and Sea Banks, Hop-poles, Grain, and Forgery.

1. Concerning Records.

To deface or alter a Record is an Offence at Common Law, and punishable by Fine, &c. But,

By 8 H. 6. ch. 12. *If any Clerk or other Person shall steal, or willingly take away, withdraw, or avoid any Record, or Parcel of the same, Writ, Return, Panel, Process, or Warrant of Attorney, in the King's Court of Chancery, Exchequer, the one Bench, or the other, or in his Treasury, by Reason whereof any Judgment shall be reversed, it is Felony in the Stealers, &c. their Procurers, Counsellors, and Abettors.*

3 Inst. 71,
72.

This Act does not extend to Judges of any Court, because it begins with naming Clerks, which are inferior to them, [See 8 Ri. 2. ch. 4.] and it extends only to the Courts expressly named; and to the Courts of Chancery and Exchequer so far only, as they proceed according to the Course of the Common Law.

These Words, *By Reason whereof any Judgment shall be reversed*, signify, whereby any Judgment shall not take Effect; so that if the Alteration is made before or after the Judgment, it is within the Act.

By

By 21 Ja. 1. ch. 26. To acknowledge, or procure to be acknowledged, any Fine, Recovery, Deed enroll'd, Statute, Recognizance, Bail, or Judgment, in the Name of any other Person or Persons, not privy or consenting to the same, is Felony without the Benefit of Clergy; but without Corruption of Blood, or taking away Dower; neither shall it extend to a Judgment acknowledged by an Attorney of Record for another Person. ^{1 Str. 384. 1 H. H. P. C. 696.}

By 4 W. & M. ch. 4. To personate any other Person before any Commissioner authorized to take Bail in the King's Bench, Common Pleas, or Exchequer, whereby the Person so represented may be liable to the Payment of any Money, to be recovered in the same Suit, is Felony.

2. Concerning Cattle.

By 22 & 23 Car. 2. ch. 7. To kill or destroy Horses, Sheep, or other Cattle, in the Night-time, maliciously, unlawfully, and willingly, is Felony. But such Attainder shall work no Corruption of Blood, Loss of Dower, or Disinheritance of the Heir. Yet Liberty is given to the Offender, to avoid Judgment of Death, by making Election of Transportation for seven Years. Any returning within seven Years shall suffer Death.

If any shall, in the Night-time, maliciously maim or otherwise hurt any Cattle, they shall forfeit to the Party grieved treble Damages by Action of Trespass upon the Case.

Upon Complaint of the Parties injured, three or more Justices of the Peace may enquire by the Oaths of twelve Men, Examination of Witnesses upon Oath, or any lawful Means, concerning such Offences and Offenders, and issue Warrants to summon Jurors, and apprehend suspected Persons, and cause others that seem likely to make Discovery to appear and give Information upon Oath, &c.

The Prosecution must be within six Months after the Offence committed.

[By 9 Geo. 1. ch. 22. Wilfully and maliciously to kill, maim, or wound any Cattle, is made Felony without Benefit of Clergy.]

3. Concerning the Game.

By 9 Geo. 1. ch. 22. If any Person, being armed with offensive Weapons, and having the Face black'd, or being otherwise disguised, shall appear in any Forest, Chase, Park, Paddock, or Grounds inclosed, wherein Deer have been or shall be usually kept, or in any Warren, or Place where Hares or Conies have been or shall be usually kept, or in any high Road, open Heath, Common, or Down, or shall unlawfully hunt, wound, kill, destroy, or steal, any red or fallow Deer, rob a Warren, &c. or steal Fish out of any River or Pond; or if any Person shall unlawfully hunt, &c. any red or fallow Deer, fed or kept in any Place inclosed in any of the King's Forests or Chases, or in any Park, &c. or break down the Head or Mound of any Fish-pond, whereby the Fish shall be lost or destroyed, or forcibly rescue any Person, being lawfully in Custody of any Officer or other Person for any of the Offences mentioned in this Act, or by Gift or Promise of Money, or other Reward, procure any to join in any such unlawful Act, or conceal or succour such Offenders, when by Order of Council required to surrender, knowing them to have been so charged and required to surrender, he is guilty of Felony without Benefit of Clergy. ^{See p. 372, 375, & 390. ante.}

4. Concerning

4. Concerning Ships.

By 22 & 23 Car. 2. ch. 11. 1 An. St. 2. ch. 9. 4 G. 1. ch. 12. and 11 G. 1. ch. 29. §. 6. It is Felony without Benefit of Clergy for any Owner, Captain, Master, Mariner, or other Officer, belonging to any Ship, wilfully to cast away, burn, or destroy the said Ship, or procure the same to be done, with Intent to prejudice any Owner, or any Underwriter of any Policy of Insurance thereon, or any Person who hath loaded Goods therein.

By 12 An. Seff. 2. ch. 18. If any Person makes or assists in making any Hole in any Part of any Ship in Distress, or steals any Pump belonging to such Ship, or is aiding or abetting to such Stealing, or wilfully does any Thing tending to the immediate Loss or Destruction of such Ship, he shall be guilty of Felony without Benefit of Clergy. And,

By 26 G. 2. ch. 19. If any Person shall plunder, steal, take away, or destroy, any Goods belonging to any Ship in Distress, or which shall be wrecked or stranded (whether any living Creature be on board or not) or any Tackle, Provision, or Part of such Ship, or shall beat, or wound, with Intent to kill, or otherwise wilfully obstruct the Escape of, any Person endeavouring to save his Life from such Ship, or shall put out any false Light, with Intent to bring any Vessel into danger, he shall be guilty of Felony without Benefit of Clergy: Provided, That when Goods of small Value are stranded, and stolen without Circumstances of Cruelty or Violence, the Offenders may be prosecuted for Petit Larceny only.

5. Of Bankrupts.

By 5 Geo. 2. ch. 30. If any Person becoming Bankrupt, and against whom a Commission of Bankrupt hath been awarded and issued out, shall not, within forty-two Days after Notice in Writing and in the London Gazette, or within such further Time as the Lord Chancellor shall think fit to allow him, not exceeding fifty Days, surrender himself to the Commissioners, and submit to be examined upon Oath (except Quakers, who are to be examined upon the usual Affirmation) touching his Estate and Effects, Trade and Dealings; or if he shall remove, conceal, or imbezil any Part of his Estate or Effects, real or personal (his and his Wife's and Children's necessary Wearing Apparel only excepted) to the Value of twenty Pounds, or any Books of Account, Papers, or Writings, relating thereto, with an Intent to defraud his Creditors, he shall suffer as a Felon without Benefit of Clergy, or the Benefit of any Statute made in Relation to Felons; and such Felon's Goods and Estate shall go to, and be divided among his Creditors under the Commission.

6. Concerning the Destruction of River and Sea Banks, and Hop-poles.

By 6 Geo. 2. ch. 47. If any Person shall maliciously break or cut down the Bank of any River, or any Sea-Bank, whereby any Lands shall be overflowed or damaged, he is guilty of Felony without Clergy. So if he maliciously cut any Hop-binds growing on Poles in any Plantation of Hops. And the Provisions contained in 9 Geo. 1. ch. 22. are by 10 Geo. 2. ch. 32. extended to Offenders against this Act.

7. Concerning Grain.

[By 11 G. 2. ch. 22. §. 2. *Maliciously to throw down or destroy any Store-house, or other Place where Corn is then kept, in order to be exported, or unlawfully to enter the same, and take away any Corn, Flour, Meal, or Grain therefrom, or throw abroad, or spoil the same, or any Part thereof, or unlawfully to enter on board any Ship, Barge, Boat, or Vessel, and maliciously take away, or throw out therefrom, or spoil, or damage any Meal, Flour, Wheat, or Grain therein, intended for Exportation, is Felony and Transportation for seven Years.*]

8. Concerning Forgery of false Deeds, &c. Bank-Notes, &c. Exchequer-Bills, &c. Stamps, South-Sea and East-India Bonds, &c. Lottery-Orders, &c. the Common Seal of either of the Corporations for Assurances of Ships, &c. Mediterranean Passes, Letters of Attorney to transfer Stock, Certificate of the Accountant General in Chancery, &c. Marriage Licences, &c. Seamen's Wills, &c.

Of false Deeds, &c.

By 5 El. ch. 14. *To forge or publish a forged Deed, Court-Roll, or Will in Writing, &c. after Conviction for the first Offence, is Felony without Clergy.* See of Forgery, ch. 3. post.

[By 2 G. 2. ch. 25. *To falsly make, forge, or counterfeit, or cause, or procure to be falsly made, &c. or willingly act or assist in the fals Making, &c. or utter or publish as true, knowing the same to be false, &c. any Deed, Will, Testament, Bond, Writing obligatory, Bill of Exchange, promissory Note for Payment of Money, Indorsment, or Assignment of any Bill of Exchange, or promissory Note for Payment of Money, or any Acquittance, or Receipt, either for Money or Goods, with Intention to defraud any Person, is Felony without Benefit of Clergy, but without Corruption of Blood, Loss of Dower, or Disheirison of Heirs. And,*

By 7 G. 2. ch. 22. To falsly make, alter, forge, or counterfeit, (or to procure, aid, or utter, as in the last Statute) any Acceptance of any Bill of Exchange, or the Number or principal Sum of any accountable Receipt for any Note, Bill, or other Security for Payment of Money, or any Warrant or Order for Payment of Money or Delivery of Goods, with Intent to defraud any Person, is Felony without Benefit of Clergy.]

Of Bank-Notes, &c.

By 8 & 9 W. 3. ch. 20. §. 36. 11 G. 1. ch. 9. and 15 G. 2. ch. 13. §. 11. *To forge or counterfeit the Common Seal of the Bank of England, or to forge, alter, or raze any sealed Bank-Bill, or any Bank-Note, or Bank-Bill of Exchange, Dividend Warrant, or any Bond, or Obligation under the Seal of the Company, or any Indorsment thereon, or knowingly to offer to dispose or demand Payment thereof, with Intent to defraud, is Felony without Clergy.*

Of Exchequer Bills.

By 1 G. 3. ch. 2. and the several former Acts which direct the Issuing those Bills; *to forge or counterfeit them before they are paid off and cancelled, or the Indorsment thereon, or tender in Payment, or demand Money upon any forged or counterfeit Bill (knowing the same to be such) with Intention to defraud, is Felony without Clergy.*

Of Stamps.

By 9 & 10 W. 3. ch. 25. §. 59. To counterfeit or forge any Stamp or Mark, or Impression of the same, upon any Vellum, Parchment, or Paper, thereby to defraud his Majesty of his Duties upon Vellum, &c. or to utter or sell Vellum, &c. with such counterfeit Mark, knowing such Mark to be counterfeit (And by 6 G. 1. ch. 21. §. 60. To cause or procure the same to be forged, or any Vellum, Parchment, Paper, Cards, or Dice, to be marked or stampd with a counterfeit Stamp or Mark) is Felony without Clergy. [See 9 An. ch. 11. & ch. 23. 10 An. ch. 19. & 26. 12 An. St. 2. ch. 9. 5 G. 1. ch. 2. and 30 G. 2. ch. 19. in Relation to the Stamps or Marks provided by those Statutes.]

Of South-Sea and East-India Bonds, &c.

By 9 An. ch. 21. 6 G. 1. ch. 4. §. 56. and 12 G. 1. ch. 32. §. 9. To forge or counterfeit the common Seal of the South-Sea Company, or East-India Company, or to forge, counterfeit, or alter any of their Bonds, or any Assignment or Indorsement thereon, (or any of their Receipts, Warrants, or Indorsements thereon, by 6 G. 1. ch. 11. §. 50.) or to offer to dispose of, or to put away, any such forged, &c. Bond, &c. (knowing the same to be such) or to demand the Money, or any Part thereof, of the Company, or any of their Officers, with Intent to defraud any Person, is Felony without Clergy.

Of Lottery-Orders, Tickets, or Certificates.

By 1 G. 3. ch. 7. and the several former Lottery Acts, To forge or counterfeit any Lottery-Ticket or Certificate, made in the Pursuance of those Acts, or to alter the Number thereof, or to utter, or vend, or offer to dispose of, any forged Ticket, &c. knowing the same to be such, or to bring the same to the Managers, or the Bank, or to any other Person, with a fraudulent Intention, is Felony without Clergy.

Of Policies of Assurance of Ships, and Merchandises at Sea.

By 6 Geo. 1. ch. 18. To forge the common Seal of either of the Corporations, or to forge or alter any Policy, Bill, or Bond, under their common Seal, or to offer to dispose of, or pay away, any such forged Policy, &c. knowing the same to be such, or to demand the Money therein contained, with Intent to defraud, is Felony without Clergy.

Of Mediterranean Passes.

[By 4 G. 2. ch. 18. To forge, counterfeit, alter, or erase any Mediterranean Pass, or forge the Seal of the Admiralty, or the Hands of the Lord Admiral, or Commissioners of the Admiralty thereon, or to procure or assist therein, or publish knowingly, &c. is Felony without Clergy.]

Of Letters of Attorney to transfer Stocks.

[By 8 G. 1. ch. 22. §. 1. & 9 G. 1. ch. 12. §. 4. To forge or counterfeit any Letter of Attorney, or other Authority to transfer, assign, sell, or convey any Share in the Stock or Funds of any publick Company established by Act of Parliament, or to receive any Annuities or Dividends attending the same, or the Name of any Proprietor to such pretended Letter of Attorney, or Authority, or fraudulently to demand,

or endeavour to have such Share transferred, &c. or such Annuities or Dividends received by Virtue thereof, or personating any true Proprietor, whereby to transfer or receive, or endeavour to transfer or receive his Share, Annuities, or Dividends, or to procure or assist in any such Forgery, &c. is Felony without Benefit of Clergy.]

Of Certificates of the Accountant General in Chancery, &c.

[By 12 G. 1. ch. 32. §. 9. To forge or counterfeit the Name of the Accountant General, Register, Clerk of the Report Office, or Cashier of the Bank, to any Certificate, Report, Entry, Indorsment, Declaration of Trust, Note, Direction, Authority, Instrument, or Writing whatsoever, for, or in order to, the receiving or obtaining any of the Money or Effects of the Suitors of the Court of Chancery, or to forge or counterfeit any such Certificate, &c. or to utter or publish the same knowingly, with Intent to defraud, or to procure or assist in any such Forgery, is Felony without Clergy.]

By 32 G. 2. ch. 14. §. 9. To forge the Mark or Hand of the Receiver of Post-Fines, is Felony without Clergy.

Of Marriage Licences, &c.

[By 26 G. 2. ch. 33. Wilfully and with Intent to elude the Force of this Act, to insert, or cause to be inserted, in the Register Book of any Parish or Chapelry, any false Entry of any Thing relating to any Marriage, or falsely to make, alter, forge, or counterfeit any such Entry in such Register, or any Licence of Marriage, or knowingly to publish as true any such forged Register or Licence, or to procure or assist in any such Forgery, or wilfully to destroy, or cause or procure to be destroyed, any Register Book of Marriages, or any Part thereof, with Intent to avoid any Marriage, or to subject any Person to any of the Penalties of this Act, is Felony without Clergy.]

Of Seamen's Wills, &c.

[By 31 G. 2. ch. 10. To personate or assume, or procure any other to personate or assume, the Name or Character of any Officer, Seaman, or other intitled, or supposed to be intitled, to any Wages, Money, or Prize Money, for Service done on board a King's Ship, or of his Executor, or Administrator, Wife, Relation, or Creditor, or to forge, or counterfeit, or procure so to be, any Letter of Attorney, Bill, Ticket, Certificate, Assignment, last Will, or any other Power or Authority whatsoever, in order to receive any Wages, Money, or Prize Money, due, or supposed to be due, on Account of such Service, is Felony without Benefit of Clergy. See of Perjury, ch. 3. post.]

[Besides all which, there are also several other Felonies made such by Statutes, too long to be here inserted. Therefore see of Felonies by Gaslers, 14 Ed. 3. ch. 10. By Hunters in the Night, or with painted Faces, &c. 1 H. 7. ch. 7. By Purveyors, 28 Ed. 1. ch. 2. and 36 Ed. 3. ch. 2, 3, &c. [But Purveyance is now taken away by 12 Car. 2. ch. 24. §. 12.] By Egyptians, 1 & 2 Pb. & M. ch. 4. 5 El. ch. 20. By Cutters of Powdike, 22 H. 8. ch. 11. 2 & 3 Pb. & M. ch. 19. By Destroyers of the Works of Putney Bridge, 12 Geo. 1. ch. 36. Westminster Bridge, 9 G. 2. ch. 29. Walton Bridge, 20 G. 2. ch. 22. Hampton-Court Bridge, 23 G. 2. ch. 37. Ribble Bridge, 24 G. 2. ch. 36. Of the Works for draining Bedford

ford Level, 27 G. 2. *ch.* 19. *Sandwich Bridge*, 28 G. 2. *ch.* 55. *Wye Bridge* 29 G. 2. *ch.* 73. *Black-Fryars Bridge*, 29 G. 2. *ch.* 86. *Jeremy's-Ferry Bridge*, 30 G. 2. *ch.* 59. *Kew Bridge*, 30 G. 2. *ch.* 46. *London Bridge*, 31 G. 2. *ch.* 20. and also *ch.* 59. *Trent Bridge*; some of which are oust of Clergy. By Trespassers on the Borders and Rioters in the Counties of Cumberland, Westmoreland, and Bishoprick of Durham, 43 El. *ch.* 13. For the Suppression of Moss-Troopers, 13 & 14 Car. 2. *ch.* 22. 18 Car. 2. *ch.* 3. §. 2. and 31 G. 2. *ch.* 42. For preventing Abuses in paying Seamen Wages, 9 & 10 W. 3. *ch.* 14. 1 Geo. 1. *ch.* 25. And 4 G. 1. *ch.* 11. For more effectual Transportation of unlawful Exporters of Wool. See of Perjury, and also of Deceit and Cozenage, *ch.* 3. *post.*]

I have now given a summary Account of the capital Offences, (*viz.* Of High Treason, Petit Treason, and Felonies publick and private.) It followeth that I should treat of Misdemeanors or Offences not Capital. Because in this Account I have frequently mentioned Principals and Accessories, and the Benefit of the Clergy, it may not be improper, first to say something of the Nature of the Principals and Accessories, and of the Benefit of the Clergy.

CHAP. II.

Of Principal and Accessory, and of the Benefit of the Clergy.

Of Principals. ^a

^a 3 Inst. 59, 138.

² Inst. 183.

⁴ Rep. 44.

⁹ Rep. 81.

H. P. C. 80,

81, 215, 216,

217.

Dalt. *ch.* 161.

p. 395.

^b H. P. C. 43.

Dalt. *ch.* 161.

p. 401.

^c 3 Inst. 20,

21, 138,

H. P. C. 127,

215.

^d 2 Inst. 183.

12 Rep. 81.

3 Cro. 750.

See p. 371.

ante.

A Principal is he that is an Actor, or present and aiding and abetting in a Felony. In some Cases a Person *absent* may be a Principal, as he that puts Poison into Drink, with an Intent to poison another, and then leaves it, though not present when taken by that Person or any other; or when many come to do an unlawful Act, and one is upon the same Ground, or in the same House, though not within View when the Fact is done. He who incites a Madman to do a Murder is a principal Murderer. In High Treason all are Principals. So that he who by Command or Persuasion induces another to commit Treason, or receives a Traitor knowingly after Treason committed by him, is a Traitor. For whatsoever will make a Man an Accessory in Felony, will make him a Principal in High Treason. In Petty Larceny, and in Trespassing with Arms, all are Principals.

By 8 H. 6. *ch.* 12. Procurers, Counsellors, and Abettors in stealing or imbezzling any Record, are principal Felons.

By 3 H. 7. *ch.* 2. Receivers of a Woman, Wife, Widow, or Maid, having Lands or Goods, and carried away against her Will, and married or defiled, and also Procurers and Abettors to the forcible taking her away, are to be deemed principal Felons.

Here the Common Law is altered by the express Words of the Statutes.

II. An *Accessory, Particeps Criminis, (Accessorius)* is he that is concerned in the Felony by Commandment, Aid, or Receipt. By Commandment all those are included, that incite, procure, set on, or stir up any other to do the Fact, and are not present when the Fact is done. So by *Aiding*, all Persons, counselling, abetting, plotting, consenting, furnishing with Weapons, and encouraging to do the Act may be included, if they are not present when the Act is done. If the Party commanding or aiding is present, he is a Principal. And by some Statutes Accessories are made Principals, tho' not present when the Act is done. Receipt is, when one, knowing of the Felony, receives the Felon and conceals him and his Offence.

In *High Treason* there are no Accessories, but all are Principals.

In *Petty Treason* and other *Felonies* (except *Petty Larceny*) there may be Accessories. Yet the Accessory cannot be guilty of *Petty Treason*, where the Principal is found guilty of Murder. The Offence of the Accessory can never be of a higher Nature than that of the Principal.

There may be an Accessory in *Mayhem, Piracy*, [See 11 & 12 W. 3. ch. 7. 8 Geo. 1. ch. 24. §. 3.] and *Premunire* (25.). In *Petty Larcenies, Trespasses vi & Armis*, there are no Accessories. For as in the highest Offence there is no Accessory, so it is in the lowest Offences, or in all Offences under Felony, as in Riots, Routs, forcible Entries, and other *Trespasses vi & Armis*. Here all are Principals as before observed. He that receiveth a Trespasser on Lands and Goods, after the Trespass is committed, is no Trespasser unless the Trespass was done to his Use and Benefit, and he agreeth to it afterwards; for then his subsequent Agreement amounteth to a Commandment, and makes him a Principal. Yet if the Trespass was on the Person of any one, such After-Agreement will not make him a Trespasser. By the Laws of the *Forest*, a Receiver within the Forest is a principal Trespasser, tho' the Trespass was not done to his Use and Benefit. So if he receives the Flesh of the King's Venison, knowing it to be the King's Venison.

There are Accessories before and after the Fact. 1. An Accessory before the Fact is he that hireth, commandeth, counsels, or aideth in the Commission of a Felony, and is absent when it is done. But when the Execution varies from the Command, as to the Person slain (as by killing one instead of another, not as to the Time or Place) or in the Nature of the Offence, or if the Commander revokes his Command, the Commander is not accessory. But if one commands another to poison such a particular Person, and he shoots him, or if one commands another to beat such a Man, and he beats him to Death, the Commander is accessory. This is the same Felony in Substance. In *Manslaughter* there can be no Accessories before the Fact, because the Killing is supposed to be done suddenly, and without Premeditation. But there may be Accessories in *Manslaughter*, after the Fact. No one can be punished as accessory to any Homicide committed by *Miscance*, or *Se Defendendo*. 2. An

* *Accessorius sequitur naturam sui principalis.* 3 Inst. 139.

Accessory after the Fact is, when one receiveth a Felon by concealing or relieving him, whom he knoweth to have committed a Felony. An Accessory after the Fact is only by receiving. [See 3 W. & M. ch. 9. 5 An. ch. 31. 4 Geo. 1. ch. 11. 6 Geo. 1. ch. 23. Concerning the Buying or Receiving stolen Goods.] A Felony must be committed, and one must know him to be the Felon, to be an Accessory after the Fact. Therefore where a Man receives a Murderer after the Stroke given, but before the Death; he is not Accessory. A Relieving a Felon with Money, Victual, or a Horse for his Journey, knowing him to be such, makes one accessory to the Felony after the Fact. And the Law is so strict in this Case, that a Brother receiving his Brother, or a Husband receiving his Wife, may be Accessories. But if the Wife receives the Husband, she shall not be punished as an Accessory; for she is not bound to discover the Offence of her Husband; neither ought she to accuse him.

If a Man is attaint of Felony in one County, Notice of the Attainder is presumed in the same County, to make one accessory by receiving him; [but it seems to have been the better Opinion formerly, and is now settled, that this Notion of presumptive Notice is not Law] but not in another County.

One receiving a Felon that hath enter'd into a Recognizance to appear, or one sending Letters in his Favour, or advising Witnesses not to appear against him, is not accessory; for this is not receiving the Felon; tho' sending Letters in his Favour, or advising Witnesses not to appear, is a Misdemeanor, and may be punished by Fine and Imprisonment.

One may be an Accessory to an Accessory; as by willingly receiving an Accessory to a Felony.

The same Receipt of an Offender, which will make the Receiver an Accessory after the Fact in Case of Felony, will make him a Principal in High Treason, as hath been already observed.

RULES concerning Accessories.

WHERE an Act of Parliament makes a Felony, it doth incidently make such Accessories, as would be Accessories before or after a Felony at Common Law; tho' many Acts of Parliament, which make an Offence Felony, expressly make mention of Abettors, Councillors, Procurers, and Concealers; which the Law would have interpreted to be included of Course.

He that commandeth or counselleth to commit an unlawful Act, is accessory to all that shall ensue upon that evil Act, if it was executed in the same Manner, as it was commanded or counselled; but not to any Act, that is distinct from it.

The Accessory ought not by Common Law to be forced to answer, before the Principal is attainted or convicted; (2y.) but certainly he cannot be tried first. Yet if the Accessory will, he may pray Process against the Inquest, before the Principal is attainted;

Ubi factum nullum, ibi fortia nulla. 4 Rep. 43.
Ubi non est Principalis, non potest esse accessorius. Ibid.
 1 H. H. P. C. 623.

for every Man may renounce the Right which the Law allows. But the Course is, to indict them both by one Indictment, and then if the Principal pleads, Not guilty, the Accessory shall also plead, Not guilty, and they may be tried by one Inquest. But if the Jury find the Principal Not guilty, they must find the Accessory also Not guilty.

• If the Principal upon his Arraignment confesses the Felony, and before Judgment obtains Pardon, the Accessory is thereby discharged, because the Principal was never attainted. [But see 1 *An. ch. 9. post.*]

• One acquitted as Principal shall not be arraigned as Accessory before the Fact; but he may as Accessory after the Fact. But if he is acquitted as Accessory, he may be arraigned as Principal.

• Accessories before and after the Fact are punishable with Death.

By 2 & 3 Ed. 6. ch. 24. *An Accessory in one County to a Felony committed in another County, may be tried in the County where he was Accessory.*

By 3 W. & M. ch. 9. *If any Person shall buy or receive any Goods, that shall be feloniously taken, knowing the same to be stolen, he shall be taken as accessory to such Felony after the Fact, and shall suffer as an Accessory to the Felony after the Felony committed.*

By 1 An. St. 2. ch. 9. *If the Principal be convicted of Felony, stands mute, or challenges peremptorily above twenty Jurors, the Accessory may be proceeded against, as if such principal Felon had been attainted, notwithstanding such Principal be admitted to his Clergy, pardoned, or otherwise delivered before Attainder. And such Accessory, if he is convicted, or if he stands Mute, or challenges as aforesaid, shall suffer as if the Principal had been attainted.*

Buyers and Receivers of stolen Goods knowingly, may be prosecuted for a Misdemeanor, before the principal is convicted, which shall exempt them from being punished as Accessories, when the Principal is convicted.

By 5 An. ch. 31. *If any Person shall receive or buy knowingly any stolen Goods, or knowingly harbour or conceal Felons, he shall be taken as accessory to the Felony, and being convicted shall suffer Death as a Felon. And if the Principal cannot be taken, so as to be convicted, yet the Person buying or receiving knowingly may be prosecuted for a Misdemeanor; which shall exempt the Offender from being punished as Accessory, if the Principal be afterward convicted.*

[And by 29 G. 2. ch. 30. *The Buyer or Receiver of stolen Lead, Iron, Copper, Brass, Bell-Metal, or Solder, may be convicted altho' the Principal hath not been convicted, and shall be transported for fourteen Years.*]

See of Arraignment, B. 4. ch. 5. *post.*

III. • The Benefit of the Clergy was an ancient Privilege of the Church, where one in Orders claimed to be delivered to his Ordinary, to purge himself of a Felony. For the Pope endeavoured to exempt the Clergy from the Jurisdiction of lay Judges in Case of Life and Member; which the temporal Courts would not yield to, but only in Part (*viz.*) as to this Privilege in Case of Felony. [See *West. 1. ch. 2. Art. Cler. ch. 15.*] The Controversy betwixt the Ecclesiastical

• 2 Inst. 183.
• Rep. 43, 44.
H. P. C. 221.

• H. P. C.
224, 244.
Kely. 25, 26.

• 3 Inst. 138.
Dalt. ch. 116.
p. 396, 400.
See §. 3 *post.*

Of the Benefit
of the Clergy.
• 2 Inst. 633.
• 634, 636, 637.
Hob. 288.
• Cro. 143.
Kely. 99, 100,
101, 102.

ecclesiastical and Temporal Jurisdiction being thus adjusted, all Persons that could read were allowed to be Clerks. For heretofore few were bred up to Learning, unless those who were designed for Orders. But if the Party could not read he was to be hang'd.

Men that were *blind*, or *Women* (which by any Dispensation could not be admitted to be of the Clergy) *Infidels* and *Hereticks* *Convicts*, were not allowed it. But where it was allowable, there were very few Cases, wherein the Common Law denied it.

This Claim of Clergy might antiently be made upon Arraignment, and before Conviction, or as soon as the Prisoner was brought to the

a 2 Inst. 164.
635.
Hob. 289,
290.
H. P. C. 239.
Finch 463.

Bar. Afterwards it could not be claim'd till after Conviction, because it is for the Advantage of the King as to the Forfeiture of the Lands and Goods of the Clerk convict, and for the Advantage of the Clerk himself to make his Challenges to the Inquest; and perhaps he may be acquitted, and then he will not need this Privilege. (See

b 2 Inst. 634.
Hob. 289,
290, 291, 292.
S. P. C. 138.

25 Ed. 3. St. 3. ch. 4.) After Conviction it may be allowed as a Favour, tho' the Party does not claim it; yet others say, that the Criminal must claim it. When it was allow'd, the Clerk was delivered to the Ordinary, to make his Purgation. This Purgation was to be by his own Oath, affirming his Innocency, and the Oaths of twelve Compurgators as to their Belief of it, before a Jury of twelve Clerks. If the Clerk fail'd in his Purgation, he was deprived of his Character, whereby he became a mere Lay-man, or he was to be kept in Prison till a Pardon. If he purged himself, he was set at Liberty. Sometimes the Delivery to the Ordinary was without Purgation, as upon Attainder by Confession of the Felony, or by Verdict, where the Felony was notorious, and then the Clerk was to be degraded, or kept in Prison by the Ordinary. [See 23 H. 8. ch. 1.] tho' the Ordinaries, even in those Cases, would frequently proceed to Purgation.

c 2 Inst. 638.
5 Rep. 110.
11 Rep. 30.
Hob. 289.
Yelv. 38.
H. P. C. 240.
See B. 4. ch. 5.
§. 5. post.
d 2 Inst. 637.
Hob. 288,
294.
H. P. C. 230,
238, 239.
Dalt. ch. 190.
p. 523.

By 4 H. 7. ch. 13. A Convict of Felony (not being within Orders) shall be burn'd in the Brawn of the left Thumb, before he is delivered to the Ordinary.

Every Person (not being within Orders) who hath been once admitted to the Benefit of Clergy, upon the second Arraignment shall not be admitted to it. But if one in Orders asks the Benefit of the Clergy the second Time, he must shew his Orders, or his Ordinary's Certificate.

Hawk. P. C.
B. 2. p. 340,
&c.
2 H. H. P. C.
376, 345, 270.
3 Inst. 37.
Hob. 294.
5 Rep. 50,
110.
H. P. C. 252.
3 Wms. 452,
&c.

So that Clergymen may have the Benefit of the Clergy twice, and shall not be burnt in the Hand; except they shall be outlawed, [or challenge above twenty. 2y.] [See 28 H. 8. ch. 1. and 32 H. 8. ch. 3. which was repealed in Part by 1 Ed. 6. ch. 12. §. 4. and the above Statute of H. 7. thereby became revived.] It was the first Statute that was made for Burning in the Hand, yet it did not intend that the Burning should be any Part of the Judgment [2y.] but only that the Criminals might be known upon the second Offence. For at the Common Law one might have his Clergy in Infinitum.

By 18 El. ch. 7. An Offender admitted to his Clergy, after Burning in the Hand, shall not be delivered to his Ordinary, but shall be enlarged by the Court, or be detained in Prison at Discretion; but not longer than for one Year. [See 5 An. ch. 6. post.]

So that now Purgation is wholly taken away by this Statute.

If the King pardoneth the Burning of the Hand; * It is within * 5 Rep. 50, the Act, tho' the Words are *after Clergy and Burning of the Hand*; 110. for the Pardon hath discharged the Punishment. And if one obtaineth a Pardon before Conviction, he shall not forfeit his Goods, nor the Profits of his Lands. 3 Wms. 482.

To go on with the Statute:

One admitted to his Clergy shall nevertheless answer for all other Felonies.

But the * Practice is otherwise, as to Felonies within the Benefit * Kely. 41. of the Clergy, and is thought to be according to Law. 42. Contra.

[See 8 Ed. ch. 4. As to Felonies not within the Benefit of the Clergy.] 5 Rep. 50. H. P. C. 213. 249.

By 3 W. & M. ch. 9. If a Woman is convicted of an Offence, for which a Man might have the Benefit of his Clergy, she (upon her Prayer to have the Benefit of this Act) shall be forthwith burn'd in the Hand, and kept in Prison not exceeding a Year. [See 21 Ja. 1. ch. 6.]

Persons indicted of any Offence, for which by Virtue of any former Law they are excluded Clergy, if convicted by Verdict or Confession, shall not be admitted to the Benefit thereof, if they stand Mute, or will not answer directly to the Felony, or shall challenge peremptorily above twenty. [See 1 An. St. 2. ch. 9.]

This Statute extends not to Appeals, nor to Offences made Felonies by subsequent Statutes.

Note, That by the Common Law, where the Clergy was allowable, it was allowed tho' the Party was convicted by Confession or Verdict, or stood mute, or challenged above thirty-five, or was outlawed. So that if a Statute takes away the Benefit of the Clergy only upon Conviction by Confession or Verdict, the Benefit of the Clergy remains to one standing mute, &c. till that also is taken away by Statute, as in the Statute above mentioned.

By 4 & 5 W. & M. ch. 24. If any Woman is convicted of a Felony, and hath once had the Benefit of the Clergy, she shall be excluded upon a Conviction of any other Felony.

By 5 An. ch. 6. If any Person convicted of such Felony, for which he ought to have the Benefit of the Clergy, doth pray the Benefit of this Act, he shall not be required to read, but shall be punished as a Clerk convicted. And Persons burn'd in the Hand for Theft or Larceny, may be sent by the Judges to a House of Correction or Workhouse, for not less than six Months, nor above two Years.

So that Reading at last as well as Purgation is wholly laid aside. The actual Burning is now taken for the Benefit of the Clergy, which hath the same Effect as Purgation had before.

Note, That a Lord of Parliament shall have the Benefit of his Clergy, tho' he cannot read, without Burning; but for the first Time only. [See 1 Ed. 6. ch. 12.]

By 4 Geo. 1. ch. 11. Persons convicted of Larceny or any felonious Taking or Stealing, within the Benefit of the Clergy, (except Receivers or Buyers of stolen Goods) may be sent to the Plantations in America for seven Years, instead of being burn'd in the Hand. [See of Judgment in Felony, B. 4. ch. 5. post.]

RULES concerning the Benefit of the Clergy.

^a 11 Rep. 29.
³ Inst. 114.
H. P. C. 230. **I**N all Felonies (except for robbing Churches) the Offender shall have his Clergy, unless it is expressly taken away by some Statute.

^b 3 Inst. 39.
⁷³ H. P. C. 230.
Kely. 104. ^b Where any Offence is made Felony by a Statute, the Benefit of the Clergy is to be allowed, tho' the Statute says expressly, that the Offender shall suffer Pains of Death. For the Benefit of the Clergy is such a Privilege, that no general Words in an Act of Parliament shall take it away from the Offender.

^c 11 Rep. 37.
H. P. C. 231. ^c Where-ever Clergy is taken away by Statute, the Offence laid in the Indictment must be upon that very Statute, otherwise the Offender shall have his Clergy; as upon 4 & 5 Ph. & Mar. ch. 4. The Indictment must be *Malitiose*; upon 8 El. ch. 4. It must be *Clam et Secretè*, otherwise Clergy allowable.

^d H. P. C. 231.
11 Rep. 37. ^d If a Statute takes away Clergy from the Principal, it is not to be taken away from the Accessory; unless the Accessory also is particularly included.

^e Ld. Ray.
846. So where a Statute takes away Clergy from Aiders and Abettors, yet Accessories shall have their Clergy. [24.]

^f 5 Rep. 110.
H. P. C. 241.
Hob. 292,
293. ^e If one hath his Clergy allowed, he may afterwards purchase Goods, tho' the Goods which he had at the Time of Conviction were forfeited. And he may retain the Profits of his Lands, that shall arise afterwards. For by 24 El. ch. 7. Allowance of Clergy and Burning is in lieu of Purgation or Pardon, by Virtue of the Words *he shall be presently enlarged and delivered*.

^g Hob. 294.
H. P. C. 241.
Kely. 37, 38.
3 Wms. 486,
&c. ^f The Benefit of the Clergy, or actual Burning in the Hand, restores one to his Credit; because it comes into the Place of Purgation at the Common Law, which supposeth he might be Not guilty, though it is contrary to the Verdict.

^h See of Evidence, B. 4.
ch. 4. post. I hinted before, that there were very few Cases, wherein the Common Law denied the Benefit of the Clergy. ^h It was denied only in High Treason against the King, Petit Treason, and Sacrilege. And as to Sacrilege, the Ordinary might have allowed it, if he pleased.

ⁱ 2 Inst. 150.
634, 635, 636.
11 Rep. 29.
H. P. C. 229,
230.
3 Inst. 114. ⁱ By 25 Ed. 3. St. 3. ch. 4. Pro Clero, Every Clerk convict of any Treason or Felony (not touching the King himself) shall be delivered to the Ordinary.

So that after this Statute there was Clergy in all Cases but High Treason and Sacrilege. But now this Privilege is taken away by many subsequent Statutes in several Offences, which I shall set down *Alphabetically*.

Before the Fact maliciously in Petty Treason, Murder, Burglary, Robbery in Dwelling-houses, or in or near the Highway, House-burning, or burning of Barns wherein there is Corn or Grain. 4 & 5 Ph. & M. ch. 4. [See under the proper Heads, *infra*.]

Accessory. — See Naval Stores.

Armour.

- Bail.* { To acknowledge, or procure to be acknowledged, (being accessory before the Fact) any Fine, Recovery, Deed enroll'd, Statute, Recognizance, *BAIL*, or Judgment, in the Name of another, not consenting or privy. 21 *Ja.* 1. *cb.* 26. See p. 391. ante.
- Banks of Rivers.* — See *Sea Banks.*
- Bank of England.* { [Their Officers or Servants imbezilling any Money, Notes, &c. 15 *G.* 2. *cb.* 13.] See p. 374. ante.
- Bankrupts.* { Not surrendering themselves, and submitting to be examined, or concealing to the Value of twenty Pounds. 5 *Geo.* 2. *cb.* 30. See p. 392. ante.
- Bastard Children.* { Where the Mother hath conceal'd the Birth, so that it doth not appear, whether the Child was born alive or dead. 21 *Ja.* 1. *cb.* 27.
- Booth.* { Taking away the Goods in any Booth or Tent in any Fair or Market. 5 & 6 *Ed.* 6. *cb.* 9.
- Buggery.* — 25 *H.* 8. *cb.* 6. and 5 *El.* *cb.* 17.
- Burglary.* { 1 *Ed.* 6. *cb.* 12. 18 *El.* *cb.* 7. 12 *An.* St. 1. *cb.* 7. Accessories before 3 *W.* & *M.* *cb.* 9.
- Burning Houses or Barns with Corn.* { 23 *H.* 8. *cb.* 1. 25 *H.* 8. *cb.* 3. 43 *El.* *cb.* 13. Accessories before, 4 & 5 *Pb.* & *M.* *cb.* 4. [or without Corn, or Outhouses, or to set fire thereto, or to any Cock, &c. of Corn, Hay, Straw, or Wood. 9 *G.* 1. *cb.* 22.] See p. 390. ante.
- Captains.* — See *Mariners.*
- Cattle.* { [Maliciously to kill, wound, or maim any Cattle, by 9 *G.* 1. *cb.* 22.] or to steal or kill any Bull, Cow, Ox, Steer, Bullock, Heifer, Calf, Sheep, or Lamb, with Intent to steal the Carcass or any Part thereof, 14 *G.* 2. *cb.* 6. 15 *Geo.* 2. *cb.* 34.
- Challenge of Fursors.* { Above twenty, if the Indictment be for such an Offence, for which the Clergy is not allowed, if the Party is convicted by Verdict or Confession. 25 *H.* 8. *cb.* 3. 4 & 5 *Pb.* & *M.* *cb.* 4. 3 *W.* & *M.* *cb.* 9. 1 *An.* *cb.* 9. Hawk. P. C. B. 2. p. 344.
- Coal.* { [To set on fire any Delph of Coal. 10 *G.* 2. *cb.* 32.]
- Customs.* { Three or more going arm'd or disguised, in Defiance of the Laws of Customs or Excise. By 19 *Geo.* 2. *cb.* 34. See p. 359. ante.
- Cut-purse.* — See *Pick-pocket.*
- Deeds enroll'd.* { To acknowledge in the Name of another. See *Bail*, ante.
- Deer.* { [Being armed and disguised, to hunt, wound, kill, or steal; or unlawfully to hunt, wound, &c. in any Park or other inclosed Place. 9 *G.* 1. *cb.* 22.]
- Disguise.* { [To appear armed and disguised in any Forest, Road, or other Place. 9 *G.* 1. *cb.* 22. To join in Riot, or oppose Execution of Process in Disguise in the Mint in Southwark. 9 *G.* 1. *cb.* 28.]

*Egyptians.**Bail.*

- Egyptians.* { To remain above a Month in *England* or *Wales*.
 { 1 & 2 *Pb.* & *M.* *ch.* 4. Conforting with them for
 { a Month. 5 *El.* *ch.* 20.
- Excise.* — See *Customs.*
- Fines.* { To acknowledge in the Name of another. See
 { *Bail.*
- Fish and Fish Ponds.* { [To steal Fish, being armed and disguised, out
 { of a River or Pond, or to break down the Head
 { of any Fish Pond, 9 *G.* 1. *ch.* 22.]
- Flood-gates.* — [Maliciously to destroy. 8 *G.* 2. *ch.* 20.]
- Forgery.* { Of *Deeds, Wills, Writings, Bonds, Notes, Receipts,*
 { &c. upon second Conviction. 5 *El.* *ch.* 14. and
 { on the first Conviction, by 2 *Geo.* 2. *ch.* 25. and
 { 7 *G.* 2. *ch.* 22. Of *Bank-Notes, &c.* 8 & 9 *W.* 3.
 { *ch.* 20. §. 36. 11 *G.* 1. *ch.* 9. §. 6. 15 *G.* 2.
 { *ch.* 13. §. 11. Of *Exchequer Bills.* By 1 *G.* 3.
 { *ch.* 2. and the several other Acts which direct the
 { issuing the same. [Of the Hand of the Receiver
 { of the Post Fines. 32 *G.* 2. *ch.* 14. §. 9.] Of
 { *Stamps, &c.* 9 & 10 *W.* 3. *ch.* 25. §. 59. 6 *Geo.* 1.
 { *ch.* 21. §. 60, &c. *South-Sea and East-India Bonds,*
 { &c. 9 *An.* *ch.* 21. 6 *G.* 1. *ch.* 4. §. 56. 6 *G.* 1.
 { *ch.* 11. §. 50. 12 *G.* 1. *ch.* 32. §. 9. *Lottery-*
 { *Orders, Tickets, &c.* By 1 *G.* 3. *ch.* 7. and the
 { several other Lottery Acts: *Policies of Assurance of*
 { *Ships, &c.* 6 *Geo.* 1. *ch.* 18. §. 13. [Marriage
 { Licence or Registry of Marriage, 26 *G.* 2. *ch.* 33.
 { Letter of Attorney to transfer any Stocks, 8 *G.* 1.
 { *ch.* 22. §. 1. 9 *G.* 1. *ch.* 12. §. 4. *Seamen's Wills,*
 { *Powers, &c.* 31 *G.* 2. *ch.* 10. *Mediterranean*
 { *Passes, &c.* 4 *G.* 2. *ch.* 18. Certificate of the Ac-
 { countant General in Chancery, 12 *G.* 1. *ch.* 32.
 { §. 9.] See of *Forgery, p.* 393. *ante.* And 9 *An.*
 { *ch.* 11 & 23. 10 *An.* *ch.* 19. 5 *Geo.* 1. *ch.* 2.
 { 6 *Geo.* 1. *ch.* 21. §. 60. For *Stamps* on Cards,
 { Dice, Linen, Silks, Paper, Leather, &c.
- Game.* — See *Deer, Warren, and Fish.*
- Helping to stolen Goods for Reward.* { Unless he apprehends the Offender, &c. In some
 { Cases oust of Clergy. 4 *Geo.* 1. *ch.* 11.
- Horse-stealing.* { *Principals* by 1 *Ed.* 6. *ch.* 12. 2 & 3 *Ed.* 6.
 { *ch.* 33. And *Accessories* before and after, by
 { 31 *El.* *ch.* 12.
- Hop-binds.* — [Maliciously to cut, 6 *G.* 2. *ch.* 47.]
- House-breaking.* { In the Day-time, and taking to the Value 5s.
 { 39 *El.* *ch.* 15. 3 *W.* & *M.* *ch.* 5.
 { See *Robbery.*
- Houses, &c.* {
 { demolished by Rioters. { See *Rioters.*
- Jesuits.* — See *Priests.*
- Imbezilling.* — See *Naval Stores.*

- Inlisting.* { [Any Subject, or enticing him to enlist as a Soldier in any foreign Service, without Licence. 9 G. 2. ^{See p. 354. ante.}
 { *ch.* 30. 29 G. 2. *ch.* 17.]
- Judgments.* { To acknowledge in the Name of another not
 { Privy. See *Bail*.
- Linen.* { Stealing any Linen, Fustian, or Cotton Goods,
 { to the Value of ten Shillings, laid in any bleaching
 { Ground, &c. is Felony without Clergy; but
 { the Judge may order Offender to be transported
 { for fourteen Years. 18 Geo. 2. *ch.* 27.
- Maiming.* { Any Person maliciously, and by lying in Wait,
 { 22 & 23 Car. 2. *ch.* 1. Counsellors, Aiders, and
 { Abettors, are also Felons without Clergy. *Ibid.*
- Maid.* — See *Woman*.
- Mariners.* { Captains and Mariners belonging to Ships and
 { destroying the same. 1 An. St. 2. *ch.* 9. 4 Geo. 1. ^{See p. 392. ante.}
 { *ch.* 12. and 11 G. 1. *ch.* 29. [See *Wreck*.]
- Munition.* — To Imbezil. See *Naval Stores*.
- Murder.* { Principals, by 23 H. 8. *ch.* 1. 25 H. 8. *ch.* 3. ^{See Hawk. P. C. B. 2. p. 349.}
 { 1 Ed. 6. *ch.* 12. And Accessories before, by 4 &
 { 5 Pb. & M. *ch.* 4.
- Mute standing, or not answering directly.* { 25 H. 8. *ch.* 3. 1 Ed. 6. 12. 4 & 5 Pb. & M. ^{Hawk. P. C. B. 2. p. 344. &c.}
 { *ch.* 4. 3 W. & M. *ch.* 9. 1 An. *ch.* 9.
- Naval Stores.* { To Imbezil to the Value of twenty Shillings. ^{See p. 355. ante.}
 { 22 Car. 2. *ch.* 5.
- Outlawry.* { For an Offence not within the Benefit of the
 { Clergy. 1 Ed. 6. *ch.* 12. 4 & 5 Pb. & M. *ch.* 4.
 { 8 El. *ch.* 4. 18 El. *ch.* 7. 22 Car. 2. *ch.* 5.
 { 3 W. & M. *ch.* 9.
- Perjury.* { [Taking a false Oath to obtain Probate of a
 { Will, or Letters of Administration to one who
 { has served on board a King's Ship, in order to re- ^{See of Per- jury, ch. 3. post.}
 { ceive his Wages, &c. 31 G. 2. *ch.* 10. By In-
 { solvent Debtors seeking Relief under 1 G. 3.
 { *ch.* 17.]
- Pick-pocket.* { Taking above twelve Pence from the Person
 { *Clam et Secretè*. 8 El. *ch.* 4.
 { 11 & 12 W. 3. *ch.* 7. 4 Geo. 1. *ch.* 11. 8
 { G. 1. *ch.* 24. 18 G. 2. *ch.* 30. and the Acces-
 { sory before and after in some Cases to suffer as
 { Principal.
- Plague.* — See *Quarentine*. ^{See p. 386. ante.}
- Poisoning.* — Of Malice prepensed. 1 Ed. 6. *ch.* 12.
- Popish Recusants.* { Not departing the Realm within a Time li-
 { mited, or returning without the King's Licence.
 { 35 El. *ch.* 2.
- Priests and Jesuits.* { Those who receive, relieve, or maintain them
 { knowingly. 27 El. *ch.* 2.
- Private stealing.* — See *Pick-pocket*.
- Privy Counsellors.* { Those who attempt to kill, or do strike or
 { wound him in the Execution of his Office. 9 An.
 { *ch.* 16.
- Quarentine.* — Not performing. 26 G. 2. *ch.* 6.

- Rape.* — 18 *El.* *ch.* 7.
Recognizance. { To acknowledge in the Name of another. See
Bail.
Recovery. { To acknowledge in the Name of another. See
Bail.
Rescuers. { [Of Murderers, 25 *G.* 2. *ch.* 37. Of Offenders
against 9 *G.* 1. *ch.* 22. called the *Black Act*. (See
Disguise and the several other Heads, *supra*) of
felonious Offenders against the Laws of Customs or
Excise, 19 *G.* 2. *ch.* 34.]
Rioters. { 1 *Geo.* 1. *ch.* 5. [In Disguise in the Mint in
Southwark, 9 *G.* 1. *ch.* 28.]
Robbery of { Principals, by 23 *H.* 8. *ch.* 1. 25 *H.* 8. *ch.* 3.
Churches, or { 1 *Ed.* 6. *ch.* 12. 5 & 6 *Ed.* 6. *ch.* 10. Accesso-
Sacrilege. { ries before, by 23 *H.* 8. *ch.* 1. 24.
Robbery in or { Principals, by 23 *H.* 8. *ch.* 1. 25 *H.* 8. *ch.* 3.
near the High- { 1 *Ed.* 6. *ch.* 12. And Accessories before, by 4 &
way. { 5 *Ph.* & *M.* *ch.* 4. [And Robbery of any Person
generally, 3 *W.* & *M.* *ch.* 9.]
Robbery in { Principals, by 23 *H.* 8. *ch.* 1. 25 *H.* 8. *ch.* 3.
Dwelling- { 1 *Ed.* 6. *ch.* 12. 5 & 6 *Ed.* 6. *ch.* 9. 39 *El.*
houses, Shops, { *ch.* 15. 3 *W.* & *M.* *ch.* 9. 10 & 11 *W.* 3. *ch.* 23.
Ware-houses, { 12 *An.* *St.* 1. *ch.* 7. Also the Accessories, by
Coach-houses, { 23 *H.* 8. *ch.* 1. 4 & 5 *Ph.* & *M.* *ch.* 4. 3 *W.*
or *Stables.* { & *M.* *ch.* 9. 10 & 11 *W.* 3. *ch.* 23.
Sacrilege. — See *Robbery of Churches.*
Sea Banks. { [Maliciously to destroy them, or Banks of Ri-
vers, 6 *G.* 2. *ch.* 47.]
Sheep-stealing. — 14 *Geo.* 2. *ch.* 6. 15 *Geo.* 2. *ch.* 34.
Smugglers. — 18 *Geo.* 2. *ch.* 28. 19 *G.* 2. *ch.* 34.
Departing without Licence, 7 *H.* 7. *ch.* 1. 3 *H.* 8.
ch. 5. 2 *Ed.* 6. *ch.* 2. [For seducing Soldiers to de-
part, See 1 *Geo.* 1. *ch.* 47.]
Soldiers. { Wandring without Testimonial of a Justice of
the Peace, or with a forged one. 39 *El.* *ch.* 17.
[Subjects inlisting or agreeing to inlist as Sol-
diers in any foreign Service. 9 *G.* 2. *ch.* 30. 29
G. 2. *ch.* 17. See *Inlisting*.]
South-Sea Com- { [Their Officers or Servants imbezilling Cash,
pany. { Notes, &c. 24 *G.* 2. *ch.* 11.]
Shooting at. — [Any Person maliciously. 9 *G.* 1. *ch.* 22.]
Ships. — Destroying, See *Mariners.*
Stabbing. — 1 *Ja.* 1. *ch.* 8.
Statute. { To acknowledge in the Name of another. See
Bail.

Transported

Transported Felons, &c. Returning within the Time limited, and Persons rescuing them when going to be transported.

4 Geo. 1. ch. 11.

6 Geo. 1. ch. 23. 16 Geo. 2. ch. 15.

Theft.

[To the Value of forty Shillings in a Ship or Boat in a River, or Port, or from any Wharf or Key. 24 G. 2. ch. 45.] See p. 378. or ante.

Treason High.

As to the Coin, Protestant Succession, and Soldiers. See the Statutes, p. 349. ante.

Treason Petit.

The Principal, by 23 H. 8. ch. 1. 25 H. 8. ch. 3. 5 & 6 Ed. 6. ch. 10. And Accessories before, by 4 & 5 Ph. & M. ch. 4. See Hawk. P. C. B. 2. p. 348.

Threatning Letters.

[To send 9 G. 1. ch. 22. 27 G. 2. ch. 15.]

Trees.

[Maliciously to cut down or destroy them, in Avenue, Orchard, Garden, or Plantation. 9 G. 1. ch. 22.]

Turnpikes.

[Maliciously to pull down or destroy. 8 G. 2. ch. 20.]

Warren.

[To rob a Warren, being armed and disguised. 9 G. 1. ch. 22.]

Woollen Cloth.

Cut or stolen from the Tenters in the Night, in the Rack, &c. or to break into a House or Shop with Intent to destroy the same. 12 G. 1. ch. 34. See p. 394. ante.

Wool.

Unlawful Exporters, assembled to the Number of three or more. 19 G. 2. ch. 34. [See 4 G. 1. ch. 11.]

Women.

Stolen, having Lands or Goods, or being Heirs apparent, contrary to 3 H. 7. ch. 2. Offenders shall not have the Benefit of the Clergy. Nor Accessories before the Fact. 39 El. ch. 9. Known carnally under ten Years of Age. 18 El. ch. 7.

Convicted of an Offence that was within Clergy, shall be excluded the Benefit of the Clergy upon Conviction of any other Felony. 4 & 5 W. & M. ch. 24.

Wreck.

Making Holes in any Part of the Ship, or stealing any Pump, or Goods, &c. from any Ship in distress. 12 An. Sess. 2. ch. 18. 26 G. 2. ch. 19. See p. 392. ante.

Thus has the Benefit of the Clergy been taken away by Acts of Parliament in Abridgment of the Common Law.

By 3 W. & M. ch. 9. Persons indicted for stealing any Goods in any County, and thereof convicted, &c. shall not have Clergy, if it appears upon Evidence, that the said Goods were taken in any other County

County, and they should have lost the Benefit of the Clergy, if they had been convicted by a Jury in that County.

A Transcript, certified by the Clerk of the Crown, Clerk of the Assizes, or Clerk of the Peace, of the Tenor of the Indictment, and of the Person's having had the Benefit of the Clergy, or of this Act, to the Judges or Justices in any other County, shall be a sufficient Proof that such Person hath had the Benefit of the Clergy, and of this Act. [See 34 & 35 H. 8. ch. 14.]

CHAP. III.

Of Crimes not Capital. And therein, 1. Of Offences against the Temporal Laws made for the Support of Religion. 2. Of Offences immediately against his Majesty's Crown and Dignity. 3. Of Offences that are hurtful to the King's People, or against the Commonwealth in general, in Respect of Publick Justice, Publick Peace, Publick Trade, the Health and Ease of the King's People.

Of Crimes
not capital.

CRIMES not Capital are those for which (as I said before) the Offender shall not suffer Death, but only Forfeiture of Lands, or Goods, or Fine, or corporal Punishment.

These Offences are against the temporal Laws, made for the Support of Religion; against his Majesty's Crown and Dignity; against the Commonwealth in general, in respect of publick Justice, publick Peace, publick Trade, the Health and Ease of the King's People. This Division includes the remaining Part of the Pleas of the Crown, which shall be treated of in this Chapter.

Of Offences
against Reli-
gion.

I. Of Offences against the Temporal Laws, made for the Support of * Religion. These are *Witchcraft, Blasphemy and Profaneness, Drunkenness, Bawdry, Heresy, Simony*, Offences against the *establish'd Church*.

1. Of *Witchcraft*; [This being in former Times considered as an Offence which might be committed, was punishable at Common Law, or in the Ecclesiastical Courts; and by 1 Ja. 1. c. 12. was in some Instances made Felony. But now by 9 G. 2. ch. 5. That Statute is repealed: And it is enacted, That no Prosecution, Suit, or Proceeding, shall be commenced or carried on against any Person for *Witchcraft, Sorcery, Incantment, or Conjurat[i]on*, or for charging another with any such Offence in any Court whatsoever in Great Britain.

* Summa ratio est, quæ pro religione facit. 5 Rep. 14. 10 Rep. 55. 11 Rep. 70.
1 Inst. 341. a.

And

And for preventing and punishing any Pretences to such Arts or Powers; it is enacted, That if any Person shall pretend to exercise any kind of Witchcraft, Sorcery, Incantment, or Conjurat[i]on, or undertake to tell Fortunes, or pretend by crafty Science to discover stolen Goods, he shall suffer Imprisonment for a Year, without Bail or Mainprize, and stand in the Pillory for an Hour once in every Quarter of the said Year, and if the Court shall think fit, shall also find Sureties for his good Behaviour.

2. Of Blasphemy and Profaneness.

• Blasphemy (from *βλάπτειν τὴν φήμην*, *Lædere Famam*) is an Injury offered to God, by attributing to him what doth not belong to him, or by denying him what doth belong to him; or by attributing to the Creature, that which is only proper to God.

Lyndwood
de Officio
Archipr. c. 1.
Ignorantia Sa-
cerdo. v. Blas-
phemia.
2 Str. 834.

All Blasphemy and Profaneness are Offences by the Common Law, and are punishable by Fine and Imprisonment.

Concerning Blasphemy, as punishable by Statute.

By 9 & 10 W. 3. ch. 32. If any Person educated in, or having made Profession of, the Christian Religion, shall be convicted in any of the Courts at Westminster, or at the Assizes, of denying any one of the Persons of the Holy Trinity to be God, or of maintaining that there are more Gods than one, or of denying the Truth of the Christian Religion, or the Divine Authority of the Holy Scriptures; he shall for the first Offence be adjudged incapable of any Office; and for the second Offence shall be disabled to sue any Action, or to be Guardian, Executor, or Administrator, or to take by any Legacy, or Deed of Gift, or to bear any Office, civil or military, or Benefice Ecclesiastical, for ever, and also shall suffer imprisonment for three Years.

No Prosecution shall be for Words spoken, unless the Information be given upon Oath before some Justice of Peace within four Days, and the Prosecution be within three Months after such Information.

Renouncing such erroneous Opinions in open Court upon the first Offence, within four Months after Conviction, shall discharge all Penalties.

[See 13 El. ch. 12. 29 Car. 2. ch. 9. under the Tit. Heresy, post.]

Concerning Profaneness.

Profaneness (*qu. procul à Fano*) is a Disrespect paid to the Name of God, and to Things and Persons consecrated to him. Or a contemptuous Treating of any Thing, in which God's Name or his Honour are concerned.

Profaneness is punishable by Statutes; for reviling the Sacrament of the Lord's Supper; Profanely using the Name of God, &c. in Plays: Profaning the Lord's Day; Cursing and Swearing.

For Reviling the Sacrament of the Lord's Supper.

By 1 Ed. 6. ch. 1. and 1 El. ch. 1. §. 14. To revile the Sacrament of the Lord's Supper, is Fine and Imprisonment.

For profanely using the Name of God, &c.

By 3 Ja. 1. ch. 21. If any Person shall in any Stage-Play, Interlude, or Shew, jestingly or profanely use the Name of God, or of Jesus

Jesus Christ, or of the Holy Ghost, or of the Trinity, he shall forfeit ten Pounds; the one Moiety to the King, the other to him that will sue for the same.

For profaning the Lord's Day.

By 1 Car. 1. ch. 1. There shall be no Assembly of People out of their own Parishes on the Lord's Day, for any Sports whatsoever; nor any Bull-baiting or Bear-baiting, Interludes or common Plays, or other unlawful Exercises or Pastimes, used by any Persons in their own Parishes; on Pain that every Offender, upon View of a Justice, Confession, or Proof by one Witness, shall forfeit three Shillings and four Pence to the Use of the Poor of the Parish where Offence committed.

By 1 Ja. 1. ch. 21. A Shoe-maker putting Boots or Shoes to sale on the Lord's Day, forfeits three Shillings and four Pence, and the Value.

By 3 Car. 1. ch. 1. No Butcher shall kill or sell any Victual upon the Lord's Day, in pain of six Shillings and eight Pence. And,

By 29 Car. 2. ch. 7. (This Statute being more full, and the Conviction made more easy) No Persons whatsoever shall exercise any worldly Labour, Business or Work of their ordinary Calling, on the Lord's Day (except Works of Necessity and Charity, and the Dressing of Meat in Families, and the Dressing and Selling of Meat in Victualling Houses) but shall exercise themselves in Duties of Piety, publicly and privately; on pain of five Shillings, if the Person is fourteen Years old. And no Person shall publicly cry or expose to sale, any Goods whatsoever on this Day, (except Milk, which may be cried and sold before nine in the Morning, and after four o'Clock in the Afternoon) on pain of Forfeiting the same.

Also no Drover, Horse-Courser, Waggoner, Butcher, or Higler, or his Servant, shall travel, or come to his Inn or Lodging on this Day, on pain of twenty Shillings.

And no Person shall use or travel with any Boat, Lighter, or Barge, on this Day, except upon extraordinary Occasion, with the Allowance of some Justice of Peace, on pain of five Shillings.

The Penalties and Forfeitures to go to the Poor of the Parish; and the Conviction may be on View of one Justice, Confession, or Oath of one Witness; and in Default of Distress, or in Case of Inability, to pay the Penalty, the Offender shall be set in the Stocks two Hours, and the Prosecution must be within ten Days after the Offence. [But see 11 & 12 W. 3. ch. 21. For the Allowance of forty Watermen to ply on the Thames, &c. 9 An. ch. 23. For the Allowance of Hackney-Coach-Men and Chair-Men to ply on Sundays within the Bills of Mortality.]

See p. 383.
ante.

If any Person travelling on the Lord's Day is robbed, the Hundred shall not be charged.

No Person on the Lord's Day shall serve any Writ, Process, Warrant, (Escape Warrants may be executed on Sunday, by 13 An. ch. 9.) Order, Judgment, or Decree, except in Cases of Treason, Felony, or Breach of the Peace. The Service of all such Processes shall be void; and the Person serving the same, shall answer Damages, as if he had done the same without Warrant.

For Cursing and Swearing.

By 22 G. 2. ch. 33. *All Persons in the King's Pay at Sea shall be punished for profane Oaths or Curses, as a Court Martial shall think fit.*

By 19 Geo. 2. ch. 21. *Every Person convicted by Confession, or by the Oath of one Witness, before any one Justice of the Peace, of profanely Cursing or Swearing, shall forfeit, if a Day-Labourer, common Soldier, or common Sailor, one Shilling. Every other Person, under the Degree of a Gentleman, two Shillings. Every Person of or above the Degree of a Gentleman, five Shillings. For a second Offence, after Conviction, double, and every other Offence, after a second Conviction, treble.*

Any Person profanely Cursing or Swearing, in the Hearing of a Justice of Peace, may be convicted by him without further Proof.

A Constable shall apprehend every Person (if unknown to him) who shall curse or swear in his Hearing, and carry him before a Justice of Peace; if the Party be known to the Constable, he is speedily to make Information before a Justice of Peace.

Offender, on Default of Paying the Penalty, is to be committed to the House of Correction, and kept to hard Labour for ten Days; if a common Soldier or common Sailor, he is to be set in the Stocks.

Justices not doing their Duty forfeit five Pounds.

Constables not doing their Duty forfeit forty Shillings.

Convictions not removeable by Certiorari, but to be final.

Penalties to go to the Poor. Charges of the Conviction to be paid by the Offender, or he to be committed to the House of Correction for six Days extraordinary.

Prosecution to be within eight Days after the Offence.

This Act to be read by the Minister in all Churches and Chapels after Morning or Evening Prayer, on the Sundays after March 25. June 24. September 29. and December 25. in every Year, on pain of five Pounds.

3. Concerning Drunkenness.

By 4 Ja. 1. ch. 5. *If any Person shall be drunk, and convicted thereof, he shall forfeit for every Offence five Shillings, to be paid within one Week after Conviction, to the Churchwardens, for the Use of the Poor of the Parish: Upon Refusal or Neglect to pay the Forfeiture, it is to be levied by Warrant from the same Court, before whom the Conviction shall be. If the Offender is not able to pay, he shall be committed to the Stocks by the Space of six Hours.*

One convicted a second Time of Drunkenness, shall be bound in ten Pounds, with two Sureties, to the good Behaviour.

Constables, Churchwardens, &c. shall be charged on their Oaths, to prevent the said Offences.

This Offence shall be enquired of, heard, and determined, at the Assizes, Quarter-Sessions, and in Leets, but it must be within six Months after Offence.

This Act shall not restrain Ecclesiastical Jurisdiction, nor the two Universities.

By 21 Ja. 1. ch. 7. *One Witness, or the Party's own Confession, shall be sufficient Proof of the Breach of 4 Ja. 1. ch. 5. and the Oath*

of

of the Party that made the voluntary Confession against himself, shall be sufficient to convict any other. And any Justice of Peace, within his Limits, hath Power upon his own View, Confession of the Party, or Proof of one Witness upon Oath before him, to convict a Drunkard, as well for the Penalty of five Shillings, as for the Binding of him to the good Behaviour, according to 4 Ja. 1. ch. 5.

[See 5 & 6 Ed. 6. ch. 25. 3 Car. 1. ch. 3. 2 G. 2. ch. 28. and 26 G. 2. ch. 31. Concerning the Licencing of Alehouses, and Punishment of those that keep Alehouses without Licence.]

See 1 Ja. 1. ch. 9. 21 Ja. 1. ch. 7. 1 Car. 1. ch. 4. Concerning the Punishment of Alehouse-keepers, Inn-keepers, Vintners, or Victuallers, that suffer any of the same Parish, or any Person whatsoever, to sit tippling in their Houses. And for the Punishment of those that do sit tippling at such Houses. [And see Offences against the Health and Ease of the People, *post*.]

By 21 Ja. 1. ch. 7. An Alehouse-keeper offending against 1 Ja. 1. ch. 9. or 4 Ja. 1. ch. 5. is disabled to keep an Alehouse within three Years after.

By 22 G. 2. ch. 33. All Persons in his Majesty's Pay at Sea shall be punished for Drunkenness, as the Court Martial shall think fit.

Note, That Profanation of the Lord's Day, Swearing, Curfing, and Drunkenness, and other lewd and disorderly Practices, are usually punished by a Justice of the Peace. But they may be presented in the Sessions.

4. Concerning Bawdry.

^a 3 Inst. 205.
^b Salk. 382.
^c Ld. Ray.
^d 197. S. C.

^a Though Adultery and Fornication are punishable by the Ecclesiastical Law; yet the keeping of a House of Bawdry, Stews, or Brothel-house, being as it were a common Nuisance, is punishable by the Common Law upon an Indictment, by Fine and Imprisonment.

^e Dalt. ch.
124. p. 292,
293.

^f Poph. 208.

And those, that are vehemently suspected of resorting to Houses of Bawdry, may be bound to their good Behaviour, as well as common Whoremongers and common Whores. For Adultery and Fornication are Offences temporal as well as spiritual, being Offences prejudicial to Mens Bodies and Estates, as well as to their Souls, and highly destructive of the publick Government. ^e But if one is indicted for frequenting a Bawdy-house, or for enticing an Apprentice to a Bawdy-house, and causing him to spend his Master's Money, it must appear, that he did know it to be such a House, and it must be expressly alledged, that it is a Bawdy-house, and not that it is suspected to be such a House.

^g 3 Inst. 206.

^g By the Custom of London a Constable may enter a House, and arrest a common Strumpet, and carry her to Prison; and by the Custom also she may be carted.

^h 1 Sid. 168.

^h All open Lewdness, as was that of a Person, who exposed himself naked to the People from a Balcony in Covent-Garden, &c. is indictable at Common Law. One was fined for this Offence 2000 Marks, committed for a Week without Bail, and to be of the good Behaviour for three Years.

[See, for punishing Persons keeping disorderly Houses, 25 Geo. 2. ch. 36.]

5. Of Heresy.

Heresy (*Aigau*, *Optio* or *Electio*) is an Opinion repugnant to the Doctrine of the Christian Faith, obstinately maintained and persisted in, by such as profess the Name of Christ. There is no express Statute, that does determine what shall be called Heresy. Yet ^{3 Inst. 40.} because 1 *El. ch. 1.* directed the *High Commission* Court (which is now abolished) to restrain it, to what hath been adjudged so by the Authority of the canonical Scriptures, or by one of the first four general Councils, or by any other general Council, wherein the same was declared Heresy by express Words of Scripture, or as shall hereafter be determined to be Heresy by Parliament, with the Assent of the Convocation, this may serve for a Direction to other Judges; but it is not obligatory.

The temporal Judge cannot have Cognizance of any Person for Heresy, by Indictment or otherwise. Some say positively, that an Heretick may be convicted before an Archbishop and Bishops and the Clergy at a general Synod or Convocation. (*Qu.*) But it is allowed, that they may declare what Opinions are heretical. And that the Archbishop or the Bishop of every Diocese may convict any for Heresy. This is by the *Common Law*. And, ^{3 Inst. 39.} ^{40.} ^{12 Rep. 56.} ^{57.} ^{H. P. C. 4. 5.} ^{Finch, ch. 25.} ^{P. 219.} ^{1 Salk. 135.}

By 23 H. 8. ch. 9. Every Archbishop may cite any Person dwelling in any Bishop's Diocese within his Province for Heresy, if the Bishop or other immediate Ordinary consents; or if that same Bishop, or other immediate Ordinary, or Judge do not his Duty, in punishing the same.

But yet the temporal Courts may incidently adjudge, whether any Tenet be Heresy or not; as in a *Quare Impedit*, if a Bishop pleads that he refused the Clerk for Heresy, he must set forth the particular Heresy, that the temporal Court may judge of it, after a Consultation with Divines. Upon this Account I thought it not improper, to mention this Offence. ^{5 Rep. 58.}

By 13 El. ch. 12. If any Person Ecclesiastical, or which hath an Ecclesiastical Living, shall advisedly maintain any Doctrine, directly contrary or repugnant to any of the thirty-nine Articles of Religion, and being convened before the Bishop or Ordinary, shall persist therein, or after Revocation thereof shall again affirm the same, it shall be lawful for the Bishop or Ordinary, to deprive him.

The Punishment for Heresy was Burning by Force of the Writ *De Hæretico Comburendo*, grantable out of *CHANCERY*, upon Certificate of such Conviction. But, ^{F. N. B.} ^{269.} ^{3 Inst. 43.} ^{H. P. C. 5.}

By 29 Car. 2. ch. 9. The Writ *De Hæretico Comburendo*, with all Proceedings thereon, and all Punishments by Death in pursuance of any Ecclesiastical Censures, are utterly abolished.

Yet by the Canon Law an obstinate Heretick may be excommunicated; and is still liable to be imprisoned upon the Writ *de Excommunicato Capiendo*, till he makes Satisfaction to the Church. [See 9 & 10 W. 3. ch. 32, *supra*, Tit. *Blasphemy*.]

6: *Simony* is a Promise, or actual Payment, or receiving of some temporal Thing for that which is spiritual, or annexed to a Thing that is spiritual. Thus it is defined by the *Canonists*; but by our Statute Law it is thus described and punished. For,

5 N

By

By 31 El. ch. 6. If any Person, or Body Politick or Corporate, for any Reward, or for any Promise or Assurance thereof, directly or indirectly, do present or collate any Person to a Benefice, Dignity, or Living Ecclesiastical; every such Presentation, &c. and every Admission thereunto, shall be void, and the King shall present or collate for that Turn. And every Person that shall give or take such Reward, or take or make such Promise or Assurance, shall forfeit the double Value of one Year's Profit of such Benefice or Dignity; and the Person so corruptly taking such Benefice or Dignity, shall be incapable to enjoy the same.

* 3 Inst. 153,
154.

Note, * That the Statute doth not make the Promise or Assurance void, but the Presentment, &c. And that if an Usurper presents or collates for Reward, &c. the King shall not present, but the rightful Patron. If the Patron only is corrupt, and the Presentee not privy or consenting, he is not incapable of the same Living, though the Presentation and Benefice is void; for the Person so corruptly taking is only disabled.

The double Value shall be reckoned according to the true Value, and not according to the King's Books.

There is more in this Statute concerning corrupt Ordaining or Making of a Minister, corrupt Institution and Induction, corrupt Resignations or Exchanges of Benefices, and corrupt Election or Resignations of Scholars, Fellows, &c. in any Church Collegiate or Cathedral, College, School, Hospital, Hall, or other Society; but I have taken Notice of these Clauses in other Places^b; though Sir Edward Coke comments upon all these Clauses in his Chapter Of Simony and corrupt Presentations, 3 Inst. 153.

^b See p. 33,
116, 158, &
159. ante.

4. Offences against the established Church are by not using the publick Liturgy, or by ridiculing it, by not receiving the Sacrament, by Absence or Non-conformity to the established Church.

1. By not using the publick Liturgy, or by ridiculing it.

By 1 El. ch. 2. If any Parson or other Minister whatsoever, that ought to say the Common Prayer, or to minister the Sacrament, shall refuse to do the same in such Church, or other Place, where he should use the same, or (wilfully or obstinately standing in the same) shall use any other Form, or speak any Thing in Derogation of the said Book, or any Thing therein contained; he shall forfeit for his first Offence one Year's Profit of all his Spiritual Promotions, and be six Months imprisoned; and for the second Offence shall be deprived of all his Spiritual Promotions, and imprisoned for a Year; and for the third Offence shall be deprived and imprisoned for Life, and if he has no Spiritual Promotion, he shall for the first Offence be imprisoned for a Year, and for the second Offence during Life.

The Jurisdiction of the Ecclesiastical Court is saved.

If any Person shall in Plays, Songs, or other open Words, speak any Thing in Derogation of the said Book, or by open Fact or Threatnings compel or procure any Minister to say any Common Prayer openly, or to administer any Sacrament in other Form, or shall interrupt or let any Minister to say the Common Prayer, he shall forfeit an hundred Marks for the first Offence, and four hundred for the second (which, if he pay not in six Weeks after Conviction, he shall suffer six Months Imprisonment for the first Offence, and twelve Months for the second,) and

and for the third Offence he shall forfeit all his Goods and Chattels, and suffer Imprisonment for Life.

The Offender must be indicted at the next Assizes after the Offence.

2. By not receiving the Sacrament of the Lord's Supper.

By 13 Car. 2. St. 2. ch. 1. §. 10 & 12. No Person shall be chosen to a *Ld. Ray.*
any Office of Magistracy, Place of Trust, or other Employment, relating ^{1354.}
to the Government of any City, Corporation, Borough, Cinque Port, or ^{1 Str. 585.}
Port Town, who shall not have received the Sacrament of the Lord's Sup-
per, according to the Rites of the Church of England, within one Year next
before his Election. In Default thereof, every such Election or Place
shall be void. Moreover, upon the like Penalty every Person so elected
and placed shall take the Oaths of Allegiance and Supremacy at the
same Time, to be administered by the same Person, when the Oath for
the due Execution of the said Office shall be administered. [See 5 Geo. 1.
ch. 6. For the Repeal of the other Oath and the Declaration; and
that the Prosecution or Removal for not having taken the Sacrament
must be within six Months after the Election, and Prosecution carried
on without wilful Delay.]

By 25 Car. 2. ch. 2. All Officers civil and military (except those
that have Offices of Inheritance, where sufficient Deputies are ap-
pointed) and all who have any Salary or Wages by Reason of any
Grant from the King (except such as shall be granted for valuable
Consideration for Life or Years, and relate not to any Office or Place
of Trust) or have any Employment in the King's Household, shall take
the Oaths of Allegiance and Supremacy, and Test or Declaration in
the said Act mentioned, the next Term after their Admittance, in
the King's Bench, or Chancery, or at the next Quarter-Sessions; and
all and every Person, so to be admitted, shall also receive the Sacra-
ment of the Lord's Supper, according to the Usage of the Church of
England, within three Months after his Admittance, in some publick
Church upon the Lord's Day immediately after Divine Service and
Sermon; and in the Court where he shall take the said Oaths he shall
deliver a Certificate of his receiving the said Sacrament, under the Hand
of the Minister and Church-warden, and make Proof thereof by two cre-
dible Witnesses, upon Penalty of being ipso Facto adjudged incapable to
have the said Office, and every such Place shall be void; and if he shall
execute his Office after the said Times are expired, and Neglect or Re-
fusal to qualify as aforesaid, he shall, upon Conviction, be disabled
to sue, or to be Guardian, Executor, or Administrator, or to take any
Legacy or Deed of Gift, or to bear any Office, and shall forfeit 500 l.
except Peme Coverts, Infants under the Age of eighteen Years, Persons
of Non-sane Memory, or on the Seas, or beyond Sea, qualifying within
four Months after Disability removed, or Return (within six Months
after Return, by 9 Geo. 2. ch. 26.) and except High Constables,
Petty Constables, Church-wardens, Overseers of the Poor, and other
like inferior civil Officers, and Keepers of Parks, and other like pri-
vate Officers. [But see as to the Form of the Oaths and the Time
of taking them, 1 Geo. 1. St. 2. ch. 13. and 9 Geo. 2. ch. 26. &
p. 208. ante.]

It is made a Question, whether a Parochial Minister may refuse
to administer the Sacrament, to one that comes to be qualified for
an Office, though an ill Liver, Heretick, Schismatick, &c. But
by

by 1 Ed. 6. ch. 1. and the Rubrick before the Communion-Service in our Liturgy, an absolute Right of Admission to the Sacrament seems to be denied to such Persons; and that an Action of the Case will not lie against the Minister, who refuses upon good Cause, when he has inquired into the Fitness of the Person, and finds that he comes only to serve a Turn. [See 1 W. & M. St. 1. ch. 18.]

a 2 Lev. 184.
242.
Hawk. P. C.
B. 1. ch. 10.

Qu. Whether the Places of those that have Jurisdiction being void, the Acts of one under such Disability, while he was in the Office may be valid? Many innocent Persons might suffer, if they were not valid. Therefore by Reason of the Inconveniencies that would follow, the Rule, *Quod fieri non Debit, Factum Valet*, may here take Place. [But there is commonly an indemnifying Act or Clause for Persons having omitted to qualify themselves (if their Place is not filled up) provided they qualify by a particular limited Time, passed every Year or two. And see 1 Ed. 6. ch. 1. §. 7. and also 5 Geo. 1. ch. 6. For quieting Corporations.]

3. By Absence or Non-conformity to the established Church.

By 1 El. ch. 2. Every Person, having no lawful or reasonable Excuse to be absent, shall resort to his Parish-Church or Chapel upon every Sunday and Holiday, or upon reasonable Let thereof, to some usual Place where the Common Prayer shall be used, and then and there abide orderly and soberly, during the Time of Common Prayer, Preaching, or other Service, upon Pain of Punishment by the Censures of the Church, and upon Forfeiture of Twelve-pence for every such Offence, to be levied by the Church-wardens for the Use of the Poor by Distress. [See 3 Ja. 1. ch. 4. §. 27.]

Hawk. P. C.
B. 1. p. 12,
&c.

Here are three Offences in this Clause, 1. Absenting from Church. 2. Not abiding there till Divine Service and Sermon is ended. 3. Not behaving themselves orderly and soberly while there.

b Dalt. ch. 81.
p. 183, 184.

He that misses either Morning or Evening Prayer is within the Statute; for it ought to be an entire Day and entire Service.

By 23 El. ch. 1. Every Person, above the Age of sixteen Years, not repairing to Church, according to 1 El. ch. 2. shall forfeit 20 l. upon Conviction, to the King, for every Month they so make Default.

c 11 Rep. 63.

This Act is consistent with 1 El. ch. 2. and the Forfeiture of Twelve-pence and twenty Pounds may stand together; for the Twelve-pence is immediately forfeited upon the Absence of each particular Day.

d See p. 160.
ante.
12 Rep. 42.

The Month shall be computed, not by the Calendar, but by twenty-eight Days^d; for the Statute speaks generally of a Month. [See 29 El. ch. 6. §. 4. 3 Ja. 1. ch. 4. Concerning the Forfeiture of twenty Pounds for every Month after such Conviction, until he shall conform and come to Church. Where if the Offender makes Default of Payment, the King shall seize and enjoy his Goods, and two third Parts of his Hereditaments, Leases, and Farms, &c. But by 3 Ja. 1. ch. 4. The King may refuse the Penalty of

^a *Quod fieri non debet, factum valet.* 5 Rep. 38.

twenty Pounds a Month tho' it be tendered, and seize two third Parts of the Offender's Lands.

Copyhold Lands are not within 29 *El.* nor 3 *Ja.* 1. because it would be prejudicial to the Lord in respect of his Services, &c.

Ey 3 *Ja.* 1. ch. 4. *He that shall retain in his Service, or keep in his House, any Servant, Sojourner, or Stranger, (except his Father, Mother, Ward, or Person committed to him by Authority) who shall not go to some Church, but shall forbear for a Month together, not having some reasonable Excuse, shall for every Month, that he shall keep such Person, forfeit ten Pounds.*

The Statutes concerning *Popish Recusants*, shewing what Forfeitures, Disabilities, and Inconveniences they are liable to above all others, are 23 *El.* ch. 1. 35 *El.* ch. 2. 1 *Ja.* 1. ch. 4. 3 *Ja.* 1. ch. 4 & 5. 7 *Ja.* 1. ch. 6. 3 *Car.* 1. ch. 2. 25 *Car.* 2. ch. 2. 30 *Car.* 2. St. 2. ch. 1. 1 *W. & M.* ch. 9, 15, and 26. 11 & 12 *W.* 3. ch. 4. 12 *An.* ch. 14. 1 *Geo.* 1. St. 2. ch. 13 and 55. 3 *Geo.* 1. ch. 18. And the Statutes shewing by what means they may be discharged from the Forfeitures, are 23 *El.* ch. 1. 29 *El.* ch. 6. 1 *Ja.* 1. ch. 4. 1 *W. & M.* ch. 18. 3 *Geo.* 2. ch. 29. 6 *Geo.* 2. ch. 5. 11 *G.* 2. ch. 17. and the other Acts or Clauses of Indemnity, which are now usually passed every Year or two. [See *Nelson's Office of J. P. Title Recusancy, Burn's Justice, Title Popery, Hawkins's Pleas of the Crown, B.* 1. ch. 12, 13, 14, 15. and of *Præmunire, post.*]

But as to *PROTESTANT DISSENTERS* from the established Church, 1 *W. & M.* ch. 18. hath repealed 23 *El.* ch. 1. 29 *El.* ch. 6. and that Clause of 1 *El.* ch. 2. whereby all Persons are required to resort to their Parish-Church, or some usual Place of Common Prayer, &c. and also 3 *Ja.* 1. ch. 4 & 5. and all other Statutes made against *Papists* (except 25 *Car.* 2. ch. 2. 30 *Car.* 2. St. 2.)

This Act is commonly called the *Act of Toleration*, and is to this Effect, (*viz.*)

*That neither the Acts of 23 & 29 El. nor the Clause in 1 El. whereby all Persons are required to resort to their Parish-Church, &c. nor 3 Ja. 1. ch. 4 & 5. nor any Statutes made against Papists or Popish Recusants, (except 25 Car. 2. ch. 2. and 30 Car. 2. St. 2. ch. 1.) shall be construed to extend to any Person dissenting from the Church of England, that shall take the Oaths of Allegiance and Supremacy, [See 1 *W. & M.* Sess. 1. ch. 1 & 8. and 1 *Geo.* 1. ch. 13.] and make and subscribe the Declaration mentioned in 30 *Car.* 2. St. 2. ch. 1. at the Quarter-Sessions.*

Provided, That if any Assembly of Protestant Dissenters shall be had in any Place for Religious Worship, or any Preaching be there, with the Doors locked, barred, or bolted, they shall have no Benefit of this Law. Nor if the Place of Meeting is not certified to the Bishop or Archdeacon, or to the Justices of Peace in Sessions.

Dissenting Teachers, that shall make and subscribe the Declaration, and take the Oaths aforesaid at the Quarter Sessions, and subscribe the Articles of Religion, except the 34th, 35th, and 36th, Articles, and Part of the 20th, shall not be liable to any Penalties mentioned in 17 Car. 2. ch. 2. 22 Car. 2. ch. 1. nor 13 & 14 Car. 2. ch. 4.

Anabaptist Teachers must subscribe the Articles of Religion, except as before excepted, and also except Part of the 27th Article touching Infant Baptism.

Quakers that scruple the taking any Oath must make and subscribe the Declaration aforesaid, and the Declaration of Fidelity, and the Form of Profession of the Christian Faith, in the Statute set forth. [See 8 G. 1. ch. 6.]

All the Laws made for frequenting Divine Service on the Lord's Day, shall be still in Force against all Persons, except they come to some Assembly of Religious Worship allowed by this Act, and against all Papists, and against those that in Preaching or Writing deny the Trinity.

By 10 An. ch. 2. If any Dissenter (not being in Orders, or pretended Orders, nor Preacher, or Teacher) who, if he had qualified himself, would have been intitled to the Benefit of the Toleration Act, is prosecuted on any penal Statute from which Dissenters are exempted by that Act; if at any Time during such Prosecution he makes and subscribes the said Oaths and Declaration, or being a Quaker, makes the Declaration, &c. as directed by that Act, or before two Justices, he shall have the full Benefit of that Act, as if he had qualified within the Time prescribed, and shall be discharged of all Penalties incurred by Force of any of such penal Statutes. And any Preacher or Teacher, if he be once duly qualified, may officiate in any Congregation in another County, so as the Place be certified, &c. But, if required, he must produce a Certificate of his having qualified, and also make and take the Declaration and Oaths before one Justice of the County or Place where he officiates.

By 5 Geo. 1. ch. 4. Magistrates must not be present at any Dissenting Meeting in their peculiar Habits, or attended with their Ensigns belonging to their Offices, on Pain of Disability to hold the same or any other Office.

By 23 El. ch. 1. §. 6. No Corporation, or other Person, shall keep or maintain a Schoolmaster, which does not constantly repair to Church, or is not allowed by the ordinary; in pain of 10 l. a Month; and such Schoolmaster shall be disabled for ever to teach Youth, and suffer a Year's Imprisonment.

By 1 Ja. 1. ch. 4. §. 9. No Person shall keep any School, or be a Schoolmaster in any Place out of the Universities, except it be in some publick or free Grammar School, or some Nobleman or Gentleman's House that is no Recusant, or except the Person be specially licensed thereto by the Ordinary, on Pain, that as well the Schoolmaster, as the Party that retains him, shall each of them for every Day forfeit forty Shillings.

By 13 & 14 Car. 2. ch. 4. §. 11. Every Schoolmaster keeping any publick or private School, and every Tutor in any private Family, shall subscribe the Declaration, That he will conform to the Liturgy of the Church of England, as it is by Law established; and unless he be licensed by the Ordinary, and hath subscribed the said Declaration, he shall for the first Offence suffer three Months Imprisonment, and for the second suffer the like Imprisonment, and forfeit five Pounds. [See Can. 77, 79.]

By 11 & 12 W. 3. ch. 4. §. 3. If any Papist shall be convicted of keeping School, or of taking upon himself the Education, or Government, or Boarding of Youth, he shall be adjudged to perpetual Imprisonment.

If any Popish Parent, in order to compel a Protestant Child to change his Religion, shall refuse to allow such Child a sufficient Maintenance, the Lord Chancellor upon Complaint may make Order therein. [See 1 An. St. 1. ch. 30. Concerning Jewish Parents refusing Maintenance to a Protestant Child, &c.]

By 12 W. 3. ch. 2. Whosoever shall come to the Crown of England shall join in Communion with the Church of England.

By 5 An. ch. 5. The Statutes of 13 El. ch. 12. For the Ministers of the Church of England to be of sound Religion; 13 & 14 Car. 2. ch. 4. For the Uniformity of publick Prayers, &c. (other than such Clauses as have been repealed) and all other Statutes for the Preservation of the Church of England, are made perpetual, and to be in Force for ever.

And every King and Queen hereafter at their Coronation shall take and subscribe an Oath, to preserve the Settlement of the Church of England, and the Doctrine, Discipline, and Government thereof within the Kingdoms of England and Ireland, and the Territories thereunto belonging. And this Act shall be held a fundamental and essential Part of the Union betwixt the two Kingdoms of England and Scotland.

II. Offences immediately against his Majesty's Crown and Dignity (that are Not capital) are *Misprision* and *Praemunire*.

1. *Misprision* (from *Mespris*, Neglect or Contempt) signifies in our Law a Neglect, Oversight, or Contempt. *Misprision* is included in every Treason or Felony; and where any one hath committed Treason or Felony, the King may order, that he shall be indicted for *Misprision* only. But in legal Understanding *Misprision* is, when one knoweth of any Treason or Felony, and concealeth it. In a larger Sense, it is taken for many great Offences, which are neither Treason nor Felony, or that are Not capital, but come very near to it.

A *Misprision* may be either by *Omission* or *Commission*.

1. By *Omission*, in the Case of *Treason* or *Felony*. In the Case of *Treason*, when one doth know, that another hath committed any sort of Treason, and doth not reveal it to the King, or his Privy Council, or to some Magistrate, That the Offender may be secured and brought to Justice. This bare Knowledge and Concealment was High Treason at Common Law. To know and assist with any outward Act, that shews an Approbation of it, makes it High Treason; as where one, having Notice of a Meeting of Conspirators against the Government, goes into their Company, and hears their treasonable Consultation, and conceals it. One that is only told in general, that there will be a Rising without knowing the Persons, or the Place where, may conceal it.

By 1 & 2 Ph. & M. ch. 10. A Concealment of any High Treason shall be only *Misprision* of Treason.

This then is to be understood of a bare Knowledge only and Concealment.

If High Treason is discover'd to a Clergyman in Confession, he is bound to reveal it: But not in Case of Felony.

By

By 13 El. ch. 2. Concealers of Bulls of Absolution from Rome are guilty of a Misprison of High Treason,

By 14 El. ch. 3. Those who forge foreign Coin, not current here, shall suffer (with their Procurers, Aiders, and Abettors) as in Case of Misprison of Treason.

^a 3 Inst. 139. ^b Misprison of Felony is a Concealment of a Felony or a Procuring of the Concealment thereof, whether Felony by Common Law, or by Statute, [See *West.* 1. or 3 *Ed.* 1. ch. 9. Concerning the Concealment of Felonies by Sheriffs, Coroners, and Bailiffs, within their Liberties, &c. 3 *H.* 7. ch. 1. 33 *H.* 8. ch. 6. For Concealments of Jurors. And see of *Theftbote*, *infra*, and of Judgment, B. 4. ch. 5. *post.*]

^b 3 Inst. 139. 2. By ^c Commission; which Misprisions arise from some contemptuous and undutiful Behaviour with regard to the King; being some heinous Offences under the Degree of Felony. This is a Misprison in a large Sense. More particularly, these may be committed, by contemning the King's Prerogative, (*viz.*) by refusing to ^c 3 Inst. 144. assist the King according to Law, by receiving a ^e Pension from a foreign Prince without his Leave; by Speaking or Writing against his Person and Government. [See 4 *An.* ch. 8. and 6 *An.* ch. 7.] Denying his Title to the Crown; refusing to take the Oaths of Allegiance and Supremacy, required by Law. [See 1 *W. & M.* ch. 8. 13 & 14 *W.* 3. ch. 6. 1 *An.* St. 2. ch. 17. 1 *Geo.* 1. St. 2. ch. 13.] By Contempt against the King's Palace or Courts of Justice.

By 33 *H.* 8. ch. 12. Malicious Striking in the King's Palace to Bloodshed (*where the King's Royal Person resideth*) is punishable with the Loss of the Offenders Right Hand, perpetual Imprisonment, and Fine at the King's pleasure.

^a *Haw. P. C.* A Striking in a Palace ^d where the King is not resident at the Time, is not within the Intent of the Act, as may be gathered from the Preamble.

² *Ld. Ray.* ^e Blood must be drawn; for a Striking without Bloodshed is not to be punished in this Manner.

² *Inst.* 549. ^f But drawing a Weapon only without Striking in *Westminster-Hall*, or in any other Place, sitting the Courts of Chancery, the Exchequer, the King's Bench, the Common Pleas, or before Justices of Assize, or Justices of Oyer and Terminer, [See 25 *Ed.* 3. ch. 2.] upon any Judge or Justice, the Offender shall lose his Right Hand, and forfeit his Goods, and Profits of his Lands during Life, and be perpetually imprisoned. So if one doth strike a Juror, or any other Person ^g within the View of the said Courts, with Weapon or without, he shall have the like Punishment ^h. But not if he only maketh an Assault.

The Law makes a great Difference betwixt a Stroke in or before any of the said Courts of Justice, where the King is representatively present, and his Palaces where his Royal Person resideth. In the King's Palaces Blood must be drawn; but drawing a Weapon only upon a Judge, or Striking only of another Person in the King's Courts, is sufficient to take away the Right Hand, &c. and moreover to forfeit as above; ⁱ even though the other made the first Assault.

¹ 2 *Cro.* 367.

¹ *Lev.* 106.

If any do rescue a Prisoner in or before any of the said Courts, who was committed by the said Justices, without striking a Blow, he and the Prisoner assenting to it, shall forfeit as above, and be perpetually imprisoned. But the Rescuer shall not lose a Hand, because no Stroke was given.

Reproachful or threatening Words to a Judge, a Threatning of a Counsellor or Attorney for being employed against one, or of a Juror for giving his Verdict against one, &c. are punishable by Fine and Imprisonment.

He that speaks reproachful Words to a Judge of any inferior Court of Justice, while sitting on the Bench, is immediately fineable by the Judge himself, or as some say, the Offender may be indicted. But one cannot be indicted, for any scandalous or reproachful Words spoken of or to a Judge or other Officer, not being in a publick Place of Justice, or in the Execution of his Office; tho' he may be committed to Prison, till he finds Sureties for his good Behaviour.

There is in this large Sense great Variety of Misprisions by Commission; for every considerable Misdemeanor, which hath not a certain Name in the Law, is sometimes so called.

2. *A Præmunire* (from the Words in the Writ *Præmunire facias*, or *Præmonere facias*, signifying the Writ, and the Offence, on which the Writ is grounded) is an Offence, whereby one shall incur the same punishment, which is inflicted upon those that transgress 16 Ri. 2. ch. 5. commonly called the Statute of *Præmunire*, and the other Statutes made before that Time. These Statutes were made against the intolerable Incroachments of the See of Rome, as well as other Statutes since that which is especially called the Statute of *Præmunire*.

These Statutes are chiefly concerning Papal Processes, or Instruments, and Encroachments, upon the King's Courts; Election or Consecration of Bishops; the Popish Religion; the Oaths of Allegiance and Supremacy; the Authority of the King and Parliament, and Liberty of the Subject; unwarrantable Undertakings by publick Subscriptions, &c.

1. Concerning Papal Processes, or Instruments, and Encroachments upon the King's Courts.

By 27 Ed. 3. ch. 1. and 38 Ed. 3. ch. 3. If any Subject draw any out of the Realm in Plea, or sue in any other Court, to defeat the Judgments given in the King's Courts, &c. he incurs a *Præmunire*.

By 16 Ri. 2. ch. 5. If any purchase, or pursue, or cause to be purchased or pursued in the Court of Rome, or Elsewhere, any Translation, Processes, Sentences of Excommunication, Bulls, Instruments, &c. which touch the King, or if any do bring them within this Realm, or receive them, they shall be put out of the King's Protection, and their Lands, Tenements, Goods, and Chattels, forfeited to the King. [See 28 H. 8. ch. 16. which is a general Law, and strictly penn'd against pleading any Bull, Dispensation, &c. from Rome, which is not warranted by the Act.]

A Bull (from Βελλῆ, *Consilium*) is an Instrument granted by the Pope, containing his Processess, Decrees, &c. sealed with a Seal of Lead.

By the Word *elsewhere* it hath been said that Suits in *Equity*, to relieve against a Judgment at Law, and Suits in the *Admiralty*, Suits in the Courts of the *Constable* and *Marshal*, and *Ecclesiastical* Courts, for Matters belonging to the Cognizance of the Common Law, are within the Statute. [See 4 H. 4. ch. 23.] [* But it seems to be generally agreed at this Day, that such Suits in Equity are not within the Intention of the Statute; and that as to suits in the Admiralty and Ecclesiastical Courts, if it does not appear by the *Libel* itself that the Matter is of temporal Cognizance, it is not within the Statute.]

^a 2 Inst. 601, &c.
³ Inst. 120, 121, 122, 123, 124.
¹ Danv. Abr. 764.
 See of the Chancery, B. 4. ch. 1. post.
² Hawk. P.C. B. 1. p. 51.

^b Out of the King's Protection. So that he cannot bring an *Action*; yet he cannot be slain by any one, as the King's Enemy, as was anciently held. [See 5 El. ch. 1.]

^b Lit. 119.
¹ Inst. 129. b.
¹³⁰ a.
³ Inst. 126.

[See 25 Ed. 3. ch. 22. 25 Ed. 3. St. 5. ch. 22. *De Provisoribus*. 38 Ed. 3. ch. 1, 2, 3, 4. 12 Ri. 2. ch. 15. 13 Ri. 2. St. 2. ch. 2 & 3. 2 H. 4. ch. 3 & 4. (which Statute concerns Religious or Seculars, who put any Bulls in Execution for Discharge of Tithes of their Lands in the Hands of their Farmers) 6 H. 4. ch. 1. 7 H. 4. ch. 6 & 8. 9 H. 4. ch. 8. 3 H. 5. ch. 4. 23 H. 8. ch. 21. 28 H. 8. ch. 16.] Many of these Statutes were made against *Provisions*, or the *Providing* of a Bishop of a Bishoprick, or other Person of an Ecclesiastical Living, by the Pope, before the Incumbent was dead. Which, tho' out of Use since the Supremacy is acknowledged to be in the King, yet may not be improperly here hinted at.

By 24 H. 8. ch. 12. and 25 H. 8. ch. 19. To appeal to Rome from any of the King's Courts, is made a *Præmunire*. All Appeals from henceforth shall be made to the High Court of Chancery.

By 26 H. 8. ch. 14. Suffragans shall not exercise any greater Authority, than what is limited to them by Commission from the Bishop of the Diocese, on Penalty of *Præmunire*.

By 5 El. ch. 1. To defend the pretended Jurisdiction of the Pope in this Realm is a *Præmunire* for the first Offence, and High Treason for the second.

2. Concerning Election and Consecration of Bishops.

By 25 H. 8. ch. 20. If any Dean and Chapter refuse to elect the Person named in the King's Letters for a Bishoprick, and to certify the Election within twenty Days after the Licence shall come to their Hands: Or if any Archbishop or Bishop (after such Election, or the King's Nomination in the Default thereof) refuse to confirm or consecrate the Person so signified to them, within twenty Days after the Signification thereof, they incur a *Præmunire*.

3. Concerning the Popish Religion.

By 13 El. ch. 2. To bring any *Agnus Dei*, *Crosses*, *Beads*, or such like superstitious Things, pretended to be hallowed by the Bishop of Rome, &c. and to deliver, or offer the same, to be worn or used, or if any one shall receive the same, to such Intent, and not clear himself by discovering the Offender, &c. it is a *Præmunire*. And a Justice of Peace shall incur the same Penalty, who being informed

informed thereof, shall not within fourteen Days declare it to a Privy Counsellor.

By 27 El. ch. 2. To contribute to the Maintenance of a Popish Seminary, is a Præmunire.

4. Concerning the Oaths of Supremacy, Allegiance, &c.

By 1 El. ch. 1. 5 El. ch. 1. To refuse the Oath of Supremacy is a Præmunire, &c.

By 3 Ja. 1. ch. 4. To refuse the Oath of Allegiance upon Tender, is a Præmunire. [See 7 Ja. 1. ch. 6.]

By 1 W. & M. Sess. 1. ch. 8. The Oaths of Supremacy and Allegiance, prescribed in former Acts are abrogated, and new Oaths and a new Declaration substituted in their room; which to refuse upon Tender, makes one liable to the like Penalty of Præmunire. [And the Forms of these Oaths are again altered by 1 G. 1. St. 2. ch. 13. See p. 208. ante.]

By 7 & 8 W. 3. ch. 24. Serjeants at Law, Counsellors, Attornies, Solicitors, Proctors, Clerks, or Notaries, practising as such in any Court, without taking the Oaths of Allegiance and Supremacy, and subscribing the Declaration, incur a Præmunire. [See 9 G. 2. ch. 36. in p. 208. ante.]

5. Concerning the Authority of King and Parliament.

By 13 Car. 2. ch. 1. To affirm maliciously or advisedly by Speaking or Writing, that both or either Houses of Parliament have a legislative Power without the King, is a Præmunire.

By 6 An. ch. 7. If any shall maliciously and directly, by Preaching or advised Speaking, affirm that the pretended Prince of Wales hath any Title to the Crown, or any other Person, than according to 1 W. & M. ch. 2. and 12 W. 3. ch. 2. &c. or that the Kings or Queens of this Realm with Authority of Parliament, cannot make Laws to limit the Crown and the Descent thereof, they shall incur a Præmunire.

Information must be given to some Justice within three Days after the Words spoken; and Prosecution within three Months after Information, and Conviction on the Oaths of two credible Witnesses at least.

6. Concerning the Liberty of the Subject.

By 31 Car. 2. ch. 2. No Subject inhabiting within this Realm, shall be sent Prisoner out of it into any other Parts, (except in Cases mentioned in the Act) in Penalty of treble Costs, 500 l. Damages, and Præmunire.

7. Of unwarrantable Undertakings by publick Subscriptions, &c.

By 6 Geo. 1. ch. 18. All unwarrantable Undertakings by publick Subscriptions, Receipts, Payments, Assignments, or Transfers, &c. are deemed publick Nuisances; and Offenders therein being convicted in any of the Courts at Westminster shall incur a Præmunire.

Most of these later Statutes refer the Punishment to 16 Ri. 2.

ch. 5. But the Forfeiture of Lands to the King therein mentioned must be understood only of Lands in Fee for ever, and of Lands in Tail but during Life, or of such Estate as one may lawfully

*a Ld. Ray.
1361.
1 Str. 472.
S. C.*

*1 Inst. 130. a
3 Inst. 125,
126.*

fully forfeit. A *Præmunire* lieth as well for the Party grieved as for the King, and both may join in one Writ. But because these Laws, making the Offences to be *Præmunire*, are so very severe, they are seldom put in Execution. * For it has been always observed, that too severe Laws are never duly Executed. [See of Judgment and Forfeiture B. 4. ch. 5. post.]

* 3 Inst. 23, 24, 163.

These are the great Offences (*Not capital*) which are immediately and directly levelled against his Majesty's Crown and Dignity, known by the Name of *Misprison* and *Præmunire*. [See 21 Ja. 1. ch. 3. 16 Car 1. ch. 21. Of Monopoly.]

Of Offences that are hurtful to the King's People, &c.

III. Offences that are hurtful to the King's People, or against the Commonwealth in general, are the Offences, 1. Against publick Justice. 2. Against the publick Peace. 3. Against publick Trade. 4. Against the Health and Ease of the King's People.

1. Of Offences against publick Justice.

These are *Theft-bote*, *Perjury*, *Forgery*, *Bribery*, *Extortion*, *Barrettry*, *Maintenance*, *Vexatious Informations*, *Conspiracies*, *Negligence of Officers* intrusted with a particular Administration of Justice.

* 1 Inst. 127. a. 3 Inst. 134, 218. H. P. C. 130.

1. *Theft-bote* (*Bote*, *Amends*) is where one not only knows of the Felony, but takes his Goods again, or other Amends, not to prosecute the Felon, to the Intent that the Thief may escape. Had he received the Thief himself, he had been Accessory to the Felony. But if he had taken his own Goods again that were stolen, without favouring the Thief, it had been no Offence.

The Punishment of Theft-Bote is Fine and Imprisonment.

* 3 Inst. 164. Hawk. P. C. B. 1. ch. 69.

2. *Perjury* by Common and Statute Law is a Crime committed by wilful and false Swearing, absolutely, in any judicial Proceedings, in a Matter material to the Issue or Point in Question, (when a lawful Oath is administered by one that hath Authority to do it) by the Subornation of others, or by his own Act.

* 3 Inst. 165.

An Oath (*Sacramentum*, *Juramentum*, *Jusjurandum*) is an Affirmation or Denial by any Christian of any Thing lawful and honest, before one that hath Authority to give the same for Advancement of Truth, calling God to witness that his Testimony is true. It is called a *corporal* Oath, because at the same Time he toucheth the Scriptures with his Hand.

* 2 Str. 821, 1113.

* 2 Str. 1104.

* Omichund

v. Barker,

in Chanc.

23 Feb. 1744.

[But this Definition of an Oath seems to be too narrow; for a Jew^e may be sworn on the Old Testament; a *Mahomedan*^e on the *Koran*; or a *Pagan*^e according to the particular Form prescribed by the Religion he professes; and therefore it seems to follow of Course, that these may be convicted of Perjury, on Oaths taken according to their own Forms, as well as a *Christian* swearing on the New Testament.]

* 3 Inst. 167.

Now then let us peruse the Parts of the Description of Perjury. Perjury must be^e wilful and deliberate, not committed through Surprise, Inadvertency, or Mistake of the Question.

* *Mitius imperanti melius paratur.*

Non minus principi turpia sunt multa supplicia, quam medico multa funera.

Eo saepe committuntur, quæ saepe vindicantur.

It must be a *false* either in express Words or Intention. For a 3 Inst. 166. Falshood in Intention may be punished by the *Common Law*, tho' 2 Roll. Abr. the Words happen to be true: If one knows not what he swears, it 77. is a false oath in him. So that one may swear the Truth and yet be perjured.

Absolutely and directly, not as one thinks, believes, or remem- 3 Inst. 166, bers, or to the best of his Remembrance. For if he remembered nothing, he cannot be punished for Perjury.

In any judicial Proceedings. * For if it is not in a judicial Pro- 3 Inst. 166. ceeding, but in a private Affair, as in Trading, it is not punish- 2 Roll. Abr. able as perjury, either by the *Common Law* or by Statute. The 257. Perjury may be committed, not only in a Court of Record, but 11 Rep. 98. in any other lawful Court; and in any Matter judicially depending there; or in a Court of Equity, or Ecclesiastical Court. And not only in open Court, but before Persons in the Country authorized by the Court, [See 29 Car. 2. ch. 5.] or before any that have Administration of Justice. It may be committed by taking a false Oath as a *Witness* in an Answer to Questions put in a Court of Law or Equity; in an Answer as *Defendant* in a Court of Equity, or in the Spiritual Court, or by making a false Affidavit. This is to be understood of *assertory* Oaths, or where some Matter of Fact is falsely affirmed or denied. Therefore if *promissory* Oaths of Officers are broken, they are not punishable as Perjuries; tho' their Offences ought to be punished with a severe Fine, in respect of the Breach of their Oaths. The Breach of Oath shall aggravate the Offence. If one calleth another a *perjured Man*, 3 Inst. 166. he shall have his Action on the Case, because it shall be in- 4 Rep. 15. tended contrary to his Oath in a judicial Proceeding; not for 1 Roll. Abr. calling one a *forsworn Man*, because the Forswearing may be 39, 40. extrajudicially; unless he says, that he was forsworn in a Court of Record.

In a Matter material to the Issue or Point in Question. * For if 3 Inst. 167. it is not of any Consequence in the Decision of the Cause, tho' it is 1 Roll. Abr. a false Oath, it is not to be punished as Perjury, there being no ma- 41, 78. licious Design to be presumed. But if a false Oath is in Circum- 1 Cro. 428, stances, aggravating or extenuating the Damages, and the Party 500. pretends to give a particular and distinct Account of the Circum- Hawk P. C. stances, and makes them Reasons of his Remembrance, to strengthen B. 1. p. 175. the substantial Parts of his Evidence or Answer, or gains the more 1 Ld. Ray. Credit by such a particular Account of the Circumstances, he may 257, &c. be guilty of Perjury. (2y.) 2 Ld. Ray. 88.

When a LAWFUL Oath is administered by one that hath HARVARD LAW SCHOOL LIBRARY. 3 Inst. 165. *AUTHORITY.* * The Oath must be *lawful*, allowed by the 1 Roll. Abr. Common Law, or some Act of Parliament. And it must be taken 257. before one that hath *Authority*, not before a Person acting in a private Capacity, or pretending to have Authority, where he hath none; or by one that goes beyond the Authority which was granted. For such false Oaths cannot amount to Perjury in Law, because such Oaths are of no Validity or Force, being *Coram non Judice*. Besides, it is a high Contempt to administer an Oath without Warrant of Law, and punishable by Fine and Imprisonment. [See 13 Car. 2. St. 1. ch. 12.]

There is also a *Subornation* (*Subornare*, * to prepare underhand) 3 Inst. 167. of Perjury in the *Common Law*, which is an Offence in procuring 1 Roll. Abr. one to take a false Oath amounting to Perjury. * But if he doth 79. not 2 Cro. 158.

not take it, the Person who encouraged him to do it, is not guilty of Subornation of Perjury, tho' he is punishable by Fine, &c.

Thus of Perjury and Subornation of Perjury at Common Law, which may be ^a punished with Fine, Imprisonment, Pillory, &c. the Offender being ever after incapable to be a Witness.

Let us see now what is Perjury by Statute-Law, and how punished.

By 5 El. ch. 9. If any Person shall unlawfully and corruptly procure any Witness, to commit any wilful and corrupt Perjury, in any Matter or Cause depending by any Writ, Action, Bill, Complaint, or Information, concerning Lands, Tenements, or Hereditaments, or Goods, Debts, or Damages, in any of the King's Courts of Chancery, or in any of his Courts of Record, or in any Leet, View of Frankpledge or Law Day, Antient Demesne-Court, Hundred Court, Court-Baron, or of the Stannary, or shall unlawfully or corruptly procure any Witness to testify in perpetuam Rei Memoriam, every such Offender shall forfeit forty Pounds. And if any such Offender so attainted shall not have any Lands or Goods to the Value of forty Pounds, he shall suffer Imprisonment for half a Year, and stand upon the Pillory an Hour in some Market-Town, and shall not be received as a Witness in any Court of Record, till such Judgment be reversed, &c.

And if any Person, either by Subornation, or by his own Act, shall wilfully and corruptly commit Perjury by his Deposition in any of the Courts above-mentioned, or being examined ad perpetuam Rei Memoriam; then every such Person shall lose twenty Pounds, and be imprisoned by the Space of six Months, and his Oath shall not be received in any Court of Record until the Judgment shall be reversed. And if such Offender shall not have Goods or Chattels to the Value of twenty Pounds, he shall be set on the Pillory in some Market-Place within the County, City, or Borough, where, &c. and there have both Ears nailed, and be disabled to be sworn as aforesaid. The one Moiety of the said Forfeitures to the King, the other Moiety to such Person as shall be grieved.

This Act shall not extend to any Ecclesiastical Court, but such Offender shall be punished by the Laws used in the said Courts; nor shall it restrain the Authority of any Judge, having absolute Power to punish Perjury before the making this Act.

Observe, that the first Part of this Act extends only to the Person that procures and suborns, and the second Part to him that swears falsely by Subornation, or of his own Accord; ^b so that you must declare in Certainty within which Clause the Defendant was perjured. (24.) [But it seems to be the better Opinion that it is not necessary to set out whether the Party took the false Oath of his own Head, or through the Subornation of another.]

The Words ^c wilfully and corruptly must be expressly set down in a Prosecution for Perjury, or Action upon the Statute.

Falshood in ^d express Words is only within this Statute, not Falshood in Knowledge or Intention, which is only punishable by Common Law.

As that Part of the Statute, which concerns the Subornation of Perjury, extends only to Matters depending in Suit by Writ, Action, Bill, Plaint, or Information, in any wise concerning Lands, Tenements, or Hereditaments, or Goods, Chattels, Debts, or Damages, &c. ^e So the Clause concerning Perjury itself must be restrained to the same Meaning. Therefore Subornation of Perjury, or Perjury upon an ^f Indictment, is not within the Statute; but it is punishable

^b 3 Inst. 167.
^c Bull. 147.
Contra.

^c 3 Inst. 167.
^d Cro. 147.

^e 3 Inst. 166.

^e 5 Rep. 99.
^f 3 Inst. 167.

^f 3 Inst. 164.

nishable by Indictment at Common Law. Hence it appears that Perjury committed in an Information [*Qu.* in a criminal Informa-^{a 2 Cro. 120.} tion] exhibited by the King's Attorney General, or any other, for the King, by any Witness produced on the Behalf of the King (tho' it is the King's own Witness) is punishable by this Act, or at Common Law.^{212. Contra.}

This Statute also extends to no other Perjury than that of a Witness; not if a Defendant commits Perjury in his Answer in the Chancery, Exchequer-Chamber, &c. in an Affidavit [*Qu.*] See 29 Car. 2. ch. 5. by Swearing the Peace against another, &c. but he may be punished for that Perjury at Common Law; which, after all that hath been said, is the safest Way to prosecute for Perjury, or Subornation of Perjury.^{b 3 Inst. 166. a Roll. Abr. 77.}

No false Oath is within the Meaning of the Statute, that is not prejudicial to some Person in his Cause, and gives him a just Cause of Complaint, that he was grieved and molested by the Deposition of the Witness.

A greater Penalty is inflicted on Subornation of Perjury, than on the Perjury itself. For the Author sins more than the Actor.^{c 5 Rep. 99. 3 Inst. 167.}

As the Act does not extend to any Ecclesiastical Court; so such Offenders may be punished by the Ecclesiastical Law by the Words of the Act, if the Matter is spiritual, and not temporal; or they may be prosecuted for false Oaths, either in an Answer or Deposition, at Common Law.^{d 3 Inst. 164.} [*Qu.*]

By 7 & 8 W. 3. ch. 34. and 8 G. 1. ch. 6. If any Quaker shall be lawfully convicted, to have wilfully, falsely, and corruptly made his solemn Affirmation and Declaration allowed by these Acts, he shall incur the same Penalty as Persons convicted of wilful Perjury. [See 22 G. 2. ch. 46.]^{e 451.}

[By 2 Geo. 2. ch. 25. Persons convicted of Perjury or Subornation, (besides the Punishment already inflicted by Law) may be sent to the House of Correction, there to be kept to hard Labour, for any Term not exceeding seven Years, or may be transported for seven Years, and returning is Felony without Clergy. And by 2 Geo. 2. ch. 24. are rendered incapable of voting at any Election of Members of Parliament.]

By 23 Geo. 2. ch. 11. In an Information or Indictment for Perjury it shall be sufficient to set forth the Substance of the Offence, and by what Court, and before whom, the Oath was taken, (averring the Court or Person to have competent Authority to administer the same) together with proper Averment to falsify the Matter wherein the Perjury is assigned, without setting forth the Bill, Answer, &c. or any Part of the Record or Proceedings, other than as aforesaid, and without setting forth the Commission or Authority of the Court, or Person before whom the Perjury was committed: And for Subornation of Perjury, it shall be sufficient to set forth the Substance of the Offence, without setting forth the Bill, &c.

Justices of Assize, Nisi Prius, Gaol Delivery, of the great Sessions in Wales, or of the Counties Palatine, may (sitting the Court, or within twenty-four Hours after) direct any Person, examined as a Witness upon any Tryal before them, to be prosecuted for Perjury, in Case

* Plus peccat auctor quam actor. 5 Rep. 99. 3 Inst. 167.

there shall appear a reasonable Cause, and to assign the Party injured, or Person undertaking the Prosecution, Counsel to do their Duty without Fee; such Prosecution to be carried on without Payment of any Tax, Duty, or Fees in Court, or to any Officer; and the proper Officer of the Court shall, without Fee, give the Party injured, or Person undertaking the Prosecution, a Certificate of the same being directed with the Names of the Counsel assigned; which Certificate shall in all Cases be deemed a sufficient Proof of such Prosecution having been directed; provided that such Direction or Certificate shall not be given in Evidence upon any Tryal to be had against any Person upon a Prosecution so directed as aforesaid.

Deut. xix.
v. 21.

Perjury is so odious, that by the Law of God it is not to be pardoned.

[There are some Species of Perjury which are made Capital by Statute. As,

By 31 G. 2. ch. 10. Wilfully and knowingly taking a false Oath to obtain Probate of any Will or Letter of Administration, in order to receive the Wages, Money, or Prize Money of any Officer, Seaman, or other, who had or is supposed to have any due to him on account of his Service on board any of the King's Ships. And,

By 1 G. 3. ch. 17. and the former Acts for Relief of Insolvent Debtors, wilful Perjury by any Prisoner or other Person enabled to take the Benefit of those Acts.]

^a Terms of
the Law, v.
Forger, &c.
³ Inst. 169.
¹ Roll. Abr.
65, 66.
¹ Hawk. P.C.
B. 1. ch. 70.
^b 1 Ld. Ray.
ch. 14.
530, 737.
^c 2 Str. 901.

3. ^a Forgery (from Forger, to beat on an Anvil like a Smith) by the Common Law is a fraudulent Making or Altering of a Writing to the Prejudice of another Man's Right, whether it be Matter of Record, or any publick Writing Deed or Will.

^b But if a Man alters a Writing to his own Damage only, it is no Offence. But on an Indictment at Common Law, or on ^c 5 El. ch. 14. [See *infra*.] it need not be shewn, that the third Party was prejudiced.

By a publick Writing, I mean a Probate of a Will, Certificate of Holy Orders, a Protection from a Member of Parliament, or the like. As for Writings of an inferior Nature (as private Letters,) the Counterfeiting of them is not properly Forgery. Therefore in some Cases it may be more safe to prosecute such Offenders for a Misdemeanor as Cheats. For by Reason of the Uncertainty of Opinions concerning proper Forgeries at Common Law, Indictments are generally brought upon the following Statute, and very few at Common Law. But if the Indictment is at Common Law, and the Offender is convicted, he may be ordered to stand in the Pillory, to pay a Fine, and to be imprison'd. The Latin Word to Forge is *Falsare* or *Fabricare*. [Forging any Voucher, that is not under Seal, is an Offence at Common Law ^d.]

^d 5 Mod. 137.
¹ Salk. 342.
² Str. 747.
² Ld. Ray.
1461.
² Str. 1144.

I come to shew what is Forgery by Statute-Law.

By 5 El. ch. 14. If any one alone, or with others, shall falsely forge or make, or cause to be forged and made, or assent to the Forging or Making of any false Deed, Charter, or Writing sealed, Court-Roll, or Will in Writing, to the Intent, that the Freehold, or Inheritance of Lands or Tenements, Freehold, or Copyhold, or the Right, Title, or Interest of any Person therein may be molested, troubled, defeated, recovered, or charged; or shall pronounce, or publish, or shew forth in Evidence, any such forged Deed, &c. as true, knowing the same to be

be forged, to the Intent above, (except being an Attorney, Lawyer, or Counsellor, he shall for his Client plead, shew forth, or give in Evidence such forged Deed, &c. to the Forging whereof he was not Party or Privy) and shall be convicted thereof upon an Action founded upon this Statute, or otherwise by Bill in the King's Bench or Exchequer; he shall pay to the Party grieved his double Costs and Damages, and also shall be set upon the Pillory in some open Place, and have both his Ears cut off, his Nostrils slit, and shall forfeit to the King the Issues and Profits of his Lands and Tenements for Life, and suffer perpetual Imprisonment.

If any one (prout supra) shall forge, or make, cause or assent to be made and forged, any Charter, Deed, or Writing, that one may claim a Lease for Years of Lands or Tenements (not Copyhold) or an Annuity, or shall forge, &c. any Obligation or Bill obligatory, Acquittance, Release, or other Discharge of any Debt, Account, Action, Suit, Demand, or other Things personal; or publish or give in Evidence the same as true, knowing it to be forged (except as above) the Offender shall, upon Conviction as aforesaid, pay double Costs and Damages to the Party grieved; and also shall be set upon the Pillory, lose one of his Ears, and suffer a Year's Imprisonment. The second Offence is Felony, but without Corruption of Blood, Loss of Dower, or Disheirison of the Heir.

By this Statute all other Statutes made against Forgery are repealed.

To 'make, &c. are larger Words than to forge. For one may '3 Inst. 169, make a false Writing within this Act, tho' it be not forged in the '70. Name of another, nor his Seal or Hand counterfeited, as by altering a true Deed. [But it should seem that 'Altering is Forging' '1 Str. 19: according to the above Definition of Forgery.] The Deed, Charter, or Writing, must be sealed (*i. e.*) there must be some Impression on the Wax. A Court-Roll or Will need not be sealed.

It is Forgery to put more in a Will than is directed.

' This Act mentions four Kinds of Offences, 1. A Molestation of '3 Inst. 172. a Freehold or Inheritance. 2. A Publication of the same to other Persons, by Words or Writing, that it is true. 3. A Molestation by Claim of a forged Term for Years, Annuity, or Release of Demands personal. 4. A Publication of the same knowingly.

Where there is a Penalty in a Bond or Recognizance, the Party grieved by a forged Release, &c. shall recover double the Penalty, not of the Debt appearing in the Condition.

' The King may pardon the corporal Punishment which '3 Inst. 171. tendeth to common Example; but the Plaintiff cannot re-5 Rep. 50. lease it.

Forging an Assignment of a Lease is not within the Statute; because it does not charge the Lands, but only transfers an Interest in Being: [' But this seems to be a Mistake, for if it is '3 Inst. 170. not within the first Branch of the Statute, it comes within the Hawk. P. C. second.] B. 1. p. 186.

' If one acknowledges a Statute-Merchant, or Recognizance in '2 Roll. Abr. the Nature of a Statute-Staple, in the Name of another; These are 466. Obligations within the Act, for each of them hath the Seal of the Contra, Party. But it is otherwise of a Statute-Staple, because it hath not 3 Inst. 171. the Seal of the Party.

^a Pult. de Pace,
&c. 46. b.

* One sealeth a Deed for another by his Commandment and Direction, it is no Forgery.

A Forgery of a Deed of Gift of mere personal Chattels is not within the Words of the Statute; the Words are *Obligation, Bill obligatory, Acquittance, Release, or other Discharge.*

[See 33 H. 8. ch. 1. Concerning counterfeit Letters and false Tokens, &c. 5 El. ch. 7. Concerning Servants with false or forged Testimonials. 9 & 10 W. 3. ch. 51. Of Personating the Wives, Relations, or Creditors of Seamen, and concerning forged Letters of Attorney, Bills of Sale, Assignments, and last Wills, for the Receipt of Wages due to Seamen; and of Forgeries made Capital by Statutes in ch. 1. ante.]

[By 12 Geo. 1. ch. 29. *If any Person convicted of Forgery, Perjury, Subornation, or Barrettry, practice as an Attorney, the Judges shall cause him to be transported.*]

The Quarter-Sessions have no Authority to take an Indictment of Forgery.

^b Fortescue,
&c. 51.
³ Inst. 145,
223, 224.
Deut. xvi. 19.

4. ^b *Bribery* (from *Briber*, to devour) is when one in judicial Place takes any Gift or Reward of any Person (who hath Business before him) for doing his Office, or by Colour of his Office, except of the King only, unless it be of Meat and Drink, and that of small Value. This is Bribery in a strict Sense. But largely taken, it may relate to the Receiving any undue Reward, by any Person concerned in the Administration of publick Justice, to act contrary to his Duty. And sometimes it signifies the Taking or Giving a Reward for publick Offices.

^c 3 Inst. 147.

* *In a judicial Place*, either Ecclesiastical or Temporal. This makes Bribery different from Extortion; for Extortion may be committed by one that hath a judicial or ministerial Office.

Takes any Gift. If a Judge refuses a Gift offered to him, yet he that offers the Bribe is punishable.

^d 3 Inst. 147,
148.

^d *Who hath Business before him.* Not only when a Suit dependeth before him, but also when it is by Virtue of his Office, when there is no Suit at all.

Unless it be of Meat and Drink. But if it is in Money, though the Bribe be small, yet the Fault is great and punishable.

This Offence is punishable by Fine and Imprisonment; whether in a judicial or ministerial Officer, if we take Bribery in the largest Sense.

^e 3 Inst. 147.

A Judge's, &c. * *Servant* may be punished for receiving a Bribe.

[By 9 G. 2. ch. 35. §. 2. *If any Person shall offer any Bribe to any Officer of the Customs or Excise, to connive at the Running or false Entry of any Goods, or to do any other Act whereby his Majesty may be defrauded in the said Revenues, he shall forfeit fifty Pounds.*]

[See 20 Ed. 3. ch. 1. and 12 Ri. 2. ch. 2. 5 & 6 Ed. 6. ch. 16. 1 W. & M. Sess. 1. ch. 21. Concerning the Sale of Offices, and see of Offices, B. 2. ch. 2. ante, and see 2 G. 2. ch. 24. For preventing Bribery in Elections of Members of Parliament, under Title Parliament, in B. 4. ch. 1. post.]

5. ^a *Extortion* (from *Extorqueo*, to wrest away) is an unlawful Taking by any Officer, by Colour of his Office, any Money, or valuable Thing, of or from any Man, either that is not due, or more than is due, or before it is due. In a large Sense it is taken for any Oppression by Power or Pretence of Right^b. To take by Colour of an Office, implies an ill Action; but to take by *Virtue* of an Office, implies the Act to be lawful. ^c If the taking is for *Expedition*, it is Extortion by Colour of one's Office. Extortion is more odious than Robbery, because it carries an Appearance of Truth. But if such reasonable Fees are taken, as have been allowed by the Courts of Justice in antient Time to inferior Ministers and Attendants, it is no Extortion. ^d A Promise to pay Money to an Officer for the doing of a Thing, for which the Law will not suffer him to take any Thing, is merely void. ^e

This Offence at Common Law is punishable by Fine and Imprisonment.

It is often accompanied with Perjury, in breaking the Oath which an Officer takes upon his Admission into his Office.

By 25 Ed. 3. St. 3. ch. 9. Ordinaries or their Ministers are not to be impeach'd upon Indictments of general Extortion. ^f Str. 74.

By 21 H. 8. ch. 5. If Ordinaries, or their Registers or Ministers take more than their due Fees, they shall forfeit the Excess to the Party grieved, and ten Pounds to the King and the Party grieved. [See 9 & 10 W. 3. ch. 41.]

The 23 H. 6. ch. 9. Concerns the Fees of Sheriffs, Under-Sheriffs, Bailiffs, Gaolers, &c. [See West. 1. ch. 26. West. 2. ch. 44. 29 El. ch. 4. 3 G. 1. ch. 15.] ^g The Statute of West. 1. still stands in Force. And therefore such like Officers cannot take any Thing but what is allowed by subsequent Acts. ^h

The 3 Ja. 1. ch. 7. 2 G. 2. ch. 23. Relate to the Fees of Attorneys, Solicitors, &c. and it is said, ⁱ that they are within all the Statutes of Extortion. ^j Mod. 5.]

The 10 & 11 W. 3. ch. 23. Restrains the Fees of the Clerk of Assize, Clerk of the Peace, &c. See 2 H. 4. ch. 8. and 10. 33 H. 8. ch. 39.

6. ^k *Barretry* (from *Barret*, a wrangling Suit or Quarrel) is an Offence at Common Law, and is committed by one that is a Common Mover, Exciter, or Maintainer of Suits or Quarrels, either in Courts or in the Country. ^l

Common Mover. Therefore no one can be a Barretor in respect of one or two Acts only. The Indictment must charge that he is *Communis Barretator*, a common Barretor. ^m

In Courts. Whether of Record or not.

Or in the Country. Which may be in three Manners. 1. In Disturbance of the Peace. 2. By spreading false Rumours and Calumnies, to raise Discord among Neighbours. 3. In taking or keeping of the Possession of Lands in Controversy by Force, or Subtlety and Deceit, and most commonly in Suppression of Truth and Right. ⁿ

One may be a Barretor by bringing many groundless and vexatious Actions to oppress others, as well as by stirring up others to bring them.

5 Mod. 18.
Hawk. P. C.
B. 1. p. 244.
1 Ld. Ray.
490. Upon Indictment, the Prosecutor ought to give the Defendant a Note of the particular Matters, which he intends to insist on, and prove against him. This may be order'd upon Motion by Rule of Court.

The Punishment for this Offence is Fine and Imprisonment, and to be bound to the good Behaviour. [See 34 Ed. 3. ch. 1.]

11 Inst. 368 b.
2 Inst. 212,
213.
2 Roll. Abr.
115. 7. Maintenance (*Manutentio*, from *Manu Tenere*, a Taking in Hand or Upholding) in general is an unlawful Upholding of Quarrels against Justice. It may be committed in the Country by taking or keeping Possession of Lands for others, or by maintaining Quarrels or Suits in the Country. This is punishable only at the Suit of the King. It is committed in Courts by upholding the Plaintiff or Defendant in a Cause or Suit depending in Court, which no way belongs to one, either by assisting the Party by Words, Writing, Countenance, or Deed.

This Maintenance in Court is *threefold*.

Hawk. P. C.
B. 1. ch. 83. 1. When one maintaineth a Side without any Contract to have Part of the Thing in Suit; as by assisting one with Money to carry on his Cause, by endeavouring to persuade an Attorney or Counsel to manage it for him *gratis*. But if a Man hath an Interest in the Thing in Dispute, though only a contingent or possible or equitable Interest, he may lawfully maintain an Action relating to it. So by Reason of *Consanguinity* or *Affinity* some Acts of this kind are justifiable; as also by Reason of *other Relation*. Thus the Lord may maintain the Action of his Tenant with Money in respect of the Lands holden of him; a Master may go along with his Servant to retain Counsel, and stand by him and assist him, while his Cause is tried. A Servant may Solicit in his Master's Cause; but he cannot lay out his Money to assist his Master. One Neighbour may lawfully go with another to his Counsel. And one may lawfully, out of Charity, give Money to a poor Man, to carry on his Suit. An Attorney may lay out his own Money in Behalf of his Client, to be repaid again. But he cannot carry on a Cause for another at his own Expence, with a Promise that he never will expect a Repayment unless he carries the Cause, or upon no Purchase no Pay.

A Counsellor, or a Solicitor (*Qu.*) who is no Attorney, cannot lay out Money to carry on another Man's Suit. [See the Statutes for Regulation of Attorneys and Solicitors, B. 4. ch. 1. *post*.]

2 Inst. 208,
212.
2 Roll. Abr.
114. Offenders of this Kind are liable to an Action of Maintenance at the Suit of the Party grieved, and they may be indicted at Common Law as Offenders against publick Justice, and may be fined and imprisoned.

For Statutes restraining it, See *West.* 1. or 3 Ed. 1. ch. 28. 1 Ed. 3. ch. 14. 20 Ed. 3. ch. 4. 1 Ri. 2. ch. 4 & 9.

* *Culpa est immiscere se rei ad se non pertinenti.* 1 Inst. 368. b. 2 Inst. 208. 3 Inst. 91.

By

By 32 H. 8. ch. 9. None shall obtain or buy any pretended Right or Title to any Land, unless the Giver or Seller or his Ancestor hath been in Possession of the same, or of the Reversion or Remainder thereof, or hath taken the Profits thereof, for one Year next before such Bargain; upon Forfeit of the Value of the same Land, to be divided betwixt the King and the Prosecutor, &c. Howbeit, purchasing a pretended Title by him that is already lawfully possessed of the Thing whereunto Title is made, is lawful.

1 Inf. 369. a.
& b.
Hawk. P. C. 1.
B. 1. ch. 86.

None shall unlawfully maintain any Suit or Action concerning Lands in any of the King's Courts, where any Person shall have Authority to hold Plea of Lands. Neither shall any Person unlawfully retain, for Maintenance of any Suit, any Person, or embrace any Jurors, or suborn any Witnesses, to the Hindrance of Justice, or Procurement of Perjury; in Pain of ten Pounds, to be divided betwixt the King and Prosecutor.

The Offenders against this Act shall be prosecuted within a Year.

Maintenance of a Suit in the Spiritual Court is not within the Statutes concerning Maintenance. Neither doth any Action lie at Common Law.

1 Cro. 594.

The Law will not suffer any Thing in Action, Entry, or Re-entry, to be granted over; that pretended Titles might not be granted to great Men, to oppress the meaner Sort.

1 Inf. 214. a.

2. The second Species of Maintenance is *Champerty*, from *Cam-* pus, a Field, and *Partio* a Dividing; because the Parties agreed to divide the Thing in dispute. *Champerty* therefore is a Bargain with the Plaintiff or Defendant, to have Part of the Land, or any Thing out of the Land, or Part of a Debt or other Thing in Suit carried on at his own proper Cost, if he prevails. A Grant made to have Part of a Thing in Demand when recovered, to satisfy a just Debt, &c. is not *Champerty*.

1 Inf. 208.

Hawk. P. C. 1.

B. 1. ch. 84.

1 Inf. 368. b.

1 Inf. 208.

217. 218.

All *Champerty* is Maintenance, but all Maintenance is not *Champerty*. But as Maintenance in general is punishable by Common Law, so is *Champerty* too.

Champerty also is particularly restrained by Statutes. [See *West. 1. 1. ch. 25. West. 2. 1. ch. 49. and for the Exposition thereof, 2 Inf. 207, 208, 209, 484, 485. Articuli super chartas, or 28 Ed. 1. ch. 11. and 2 Inf. 563. 33 Ed. 3. St. 3. 1 Ri. 2. ch. 9.*]

3. The third Kind of Maintenance is *Embracery*. Now *Embracery* is an Attempt to influence a Juror to appear, or to instruct a Jury, or any way to incline them to be more favourable to the one Side than the other, by Promises, Threatnings, Letters, Money, Treats, &c. Whether the Jurors on whom any such Attempt is made, give any Verdict or no, or whether the Verdict pass on his Side, such a one is called an *Embracery*, and he is subject to an Action or Indictment at Common Law, as for other Kinds of unlawful Maintenance. The Party himself may labour a Juror to appear, and discharge his Conscience; but if a Stranger does it, he is an *Embracery*. Juries may be allowed their Expences for Travelling, &c. by him that prevails in the Suit.

Terms of

the Law, v.

Embracery.

1 Inf. 369. a.

Hob. 294.

Hawk. P. C.

B. 1. ch. 85.

1 Inf. 214. a.

217. 218.

1 Inf. 208.

Hawk. P. C. 1.

B. 1. ch. 84.

1 Inf. 368. b.

1 Inf. 208.

All indirect Practices to procure one's self, or others, to be sworn on the *Tales*, in order to serve one Side, is punishable in like Manner.

For Statutes that restrain this Offence, [See 5 Ed. 3. ch. 10. 34 Ed. 3. ch. 8. 38 Ed. 3. ch. 12. and see again 32 H. 8. ch. 9. And see of the Verdict, B. 4. ch. 4. post.]

8. *Vexatious Informations* upon penal Statutes are Offences against publick Justice, such Informers being restrained by several Statutes, (viz.) by 18 Ed. 3. ch. 3. 29 El. ch. 5. 31 El. ch. 5. 21 Ja. 1. ch. 4. 4 & 5 W. & M. ch. 18. [See of Informations, B. 4. ch. 5. post.]

9. A *Conspiracy* (strictly taken) is an Agreement betwixt two or more, to appeal or indict an innocent Man of Felony, falsely and maliciously, who is accordingly appealed or indicted, and afterwards lawfully acquitted by twelve Men, or by Verdict. [See the Definition of such Conspirators in 21 or 33 of Ed. 1. Stat. 2.] Here the Party grieved hath two Ways to punish the Offenders, 1. By *Writ of Conspiracy* (which is a civil Action) at his own Suit, where the Judgment shall be Fine and Imprisonment; and Damages to the Party. But a general Action on the Case, in the Nature of a *Writ of Conspiracy*, doth lie against one Person, where, if there were two or more joined with him, a *Writ of Conspiracy* would lie according to its strict Form. But an Action will not lie for the greatest Conspiracy imaginable, if nothing be put in Execution [So that the Party be not damaged.] But in such Case a Conspiracy, without further Act, is indictable. Yet an Action of the Case will lie for a false and malicious Accusation of any Crime, whether Capital or not, Capital (even of High Treason) tho' the Bill of Indictment is found *Ignoramus*, or tho' it does not go so far as an actual Appeal or Indictment; and the same Damages may be recovered in such an Action of the Case, as in a *Writ of Conspiracy*, where the Party is lawfully acquitted by Verdict. If one does falsely and maliciously prosecute another in the Ecclesiastical Court, or procure another to be arrested and brought before a Justice of the Peace, to be examined concerning a Felony or Misdemeanor, on purpose to vex and disgrace him, and to put him to Charge and Trouble, tho' he is not indicted for the same, yet he may have an Action of the Case; in which he need not aver, that he was lawfully acquitted, as he ought to do in a *Writ of Conspiracy*. But he must aver, that the Accusation or Prosecution was false and malicious; and it must appear that there was no Ground for it. This Action of the Case is more frequently brought. 2. By *Indictment* at the Suit of the King. If the Parties are found guilty of the Conspiracy, the Judgment is very terrible, being called a villanous Judgment. I suppose that there are but few Precedents of such Judgments, therefore I need not repeat it.

But at Common Law one may prefer an *Indictment* against Conspirators, tho' they do nothing but conspire together, and tho' nothing is put in Execution. The Common Law punisheth the Confederacy. But the Confederacy ought to be declared by some Manner of Prosecution; as by Promises to stand by one another, Right

or

or Wrong, by entering into Bonds for that Purpose, or the like. And as the Conspiracy ought to be declared by some Act, it ought to be laid, that the Matter of the Confederacy was *false*, and the Conspiracy *malicious*, and must be made out to be so by the Innocency of the Party, and Purpose of the Conspirators.

But, if the Defendants can shew any Foundation or probable Cause of Suspicion, they shall be discharged. The Confederacy ought also to be voluntary out of Court; for if upon Trial it doth appear, that the Prosecution was ordered in a Course of Justice, as that the Witnesses were forced to appear, there ought to be no Punishment. If the Defendants acted only as *Jurors* in a criminal Matter, or as *Judges* in open Court, there is no Ground for Prosecution. Judges of Courts of Record are exempted from all Prosecutions whatsoever, as *Judges*, except in the Parliament. [But see *Habeas Corpus Act*, 31 Car. 2. ch. 2. §. 12.]

A bare Conspiracy will not maintain a *Writ* of Conspiracy at the Suit of the Party grieved, because he is not damaged by it; tho' it is a Ground for an *Indictment*.

One Person alone cannot be indicted for a Conspiracy; so that if all the Defendants are acquitted but one, that one must be acquitted too: [2y.] Otherwise in an Action of the Case, Husband and Wife are but one Person, and therefore they cannot be indicted for a Conspiracy. [See 4 Ed. 3. ch. 11.]

The Punishment upon such an Indictment is Fine and Imprisonment.

10. Officers intrusted with a particular Administration of Justice, (as Sheriffs, Coroners, Gaolers, Keepers of Houses of Correction, Constables, Overseers of the Poor, Surveyors of the Highways, &c.) neglecting any Part of their Duty, may be fined and imprisoned.

These are Offences in respect of *publick Justice*.

2. Of Offences against the *publick Peace*.

Before I come to the several Kinds of Offences against the *publick Peace*, it may not be improper to shew how the Breach of the *publick Peace* may be prevented. This may be done, 1. By Security for keeping the *Peace*. 2. By Security for the good *Behaviour*. For those who are of ill Fame, or do any Thing tending to the Breach of the *Peace*, or of their good *Behaviour*, may be required to enter into a Recognizance, with Sureties or without them, according to the Discretion of the Judge or Justice, to keep the *Peace*, or to be of good Behaviour. Therefore,

1. A Surety for the *Peace* is the Acknowledging of a Recognizance (or Bond) to the King, taken by a competent Judge of Record, for the Keeping of the *Peace*.

A Justice of the Peace may demand it *ex Officio*, according to his Discretion, where he sees Cause, or at the Request of any Subject or Person under the King's Protection. His Warrant also may be granted when he is commanded to do it by *Writ* of *Supplicavit* out of Chancery or the King's Bench. Here the Justice is to act as a Minister, and must make a Return to the *Writ* under his Hand and Seal. But this *Writ* is seldom made use of. It may be granted against any Person whatsoever, whether he be a *Magistrate*, even

S. P. C.

173. a. 12 Augh. 135.

S. P. C.

173. a.

12 Rep. 24.

J. d. Ray.

1767.

S. P. C.

173. 174.

Roll. Abr.

108.

Roll. Abr.

112. 113.

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against a Fellow-Justice of the Peace, or a *private* Person, under Age, or of full Age. But it may be the safest Way to proceed against a *Peer*,^a Dutcheffs, Countess, or Baroness, in the Court of *Chancery* or *King's Bench*; and they may be bound there to keep the Peace. The Warrant of the Justice to keep the Peace may be granted against Infants, Feme Coverts, against the Wife at the Request of the Husband^b, against the Husband at the Request of the Wife^c.

^a See p. 8. ante.

^b 2 Str. 1207.

^c 2 Str. 1202, 1231.

But *Ecclesiastical Persons* that are performing Divine Service in the Church, Church-yard, or other Place dedicated to God, may not be arrested. If Surety of the Peace is demanded against a *juror* at the Sessions, it is grantable after the Sessions is ended. Surety shall not be granted against a *Non Compos*, nor to him upon his Request; otherwise concerning a Lunatick that has sometimes lucid Intervals. The Surety of the Peace may be granted to or against one *attainted* of Treason or Felony; and, in a Word,^a against all Persons that are suspected to break the Peace, or that do break the Peace by Affrays, Assaults, Battery, Wounding, hot Words in the Presence of a Justice, Fighting, Quarrelling, Threatning to beat or kill another, or to burn his House, Barretors, Rioters, &c. and in all Cases where there is a present Danger, or Fear of future Danger.^e Now Security for the Peace being given to the King by Recognizance, with Sureties or without, in a Penalty of a Sum of Money, according to the Nature of the Case; then if the Peace is broken afterwards by such Act, before the Recognizance is released or discharged, as by Affray, Assault, Battery, &c. The Recognizance being brought to the next Sessions of Peace by the Justice, [See 3 H. 7. ch. 1.]^e the Justices in Sessions may certify the Recognizance, with the Cause of the *Forfeiture* into the Chancery, King's Bench, or Exchequer, from whence Process of *Scire Facias* shall go out against the Party.

^a Dalt. ch. 116. p. 263, 264, 265.

^e Dalt. ch.

119. p. 275,

276.

^f Dalt. ch.

121. p. 281,

282, 283.

^g Inst. 180.

^h Dalt. ch.

119. p. 277,

278.

ⁱ Dalt. ch.

121. p. 285,

286.

^j Inst. 180,

181.

^k Dalt. ch.

123. p. 290.

^l Inst. 180,

181.

Hawk. P. C.

B. 1. ch. 61.

2. ¹ Surety for the *good Behaviour* or good Abearing is granted, taken, &c. as Surety for the Peace; and by some Opinions it differeth little or nothing from it. But the Party bound to the good Behaviour may sooner fall into the Danger of forfeiting his Recognizance. Surety for the good Behaviour doth include Surety for the Peace. For Surety of the good Behaviour consisteth chiefly in this, that one shall demean himself quietly, doing nothing that shall be the Cause of the Breach of the Peace, or of putting the People in Fear or Trouble.

² Inst. 181.

By 34 Ed. 3. ch. 1. *Justices of the Peace* are impowered to arrest and chastise Rioters, Barretors, and to cause them to be imprisoned and punished, and to take of all Persons, that be not of good Fame, sufficient Surety for their good Behaviour towards the King and his People.

³ Dalt. ch.

124. p. 292,

293.

⁴ Cro. 78.

Justices of the Peace have also this Power by their Commission. One may be bound to his good Behaviour for a scandalous way of Living; as for keeping Houses suspected to be Houses of Bawdry, for

for haunting such Houses, or Taverns, Ale-houses, Gaming-houses, for speaking Words of Contempt of a Justice of Peace; abusing his Warrant. It is said that the *Statute* does not extend to Misbehaviours that do not relate to the publick Peace. Certainly it ought not to be demanded for calling one Rogue, Knave, Fool, Drunkard, Bankrupt: But it is generally allowed, that the Justice hath a discretionary Power, to take Surety of all those that are suspected to be dangerous, quarrellsome, or scandalous; and of Night-walkers, Eaves-droppers, common Drunkards, common Whoremongers, putative Fathers of Bastard Children, common Whores, of those that live idly and fare well, having nothing to live upon, of Cheats, or Libellers, of those that take Gates off the Hinges, or cast them into Ditches.

One Justice alone out of Sessions may demand this Security, either by his own Discretion, or upon the Complaint of others: And may commit the Person to Gaol, if he refuses to be bound. He is also empowered to bind several Offenders to the good Behaviour by several *Statutes*, as well as by the *Common Law*.

If one enters into Recognizance for his good Behaviour, he may forfeit his Recognizance by being drunk, (*2y.*) by going armed in an unusual Manner, and above his Degree, by using threatening Words, immediately tending or inciting to the Breach of the Peace; as to threaten to beat one, challenge one to fight; or by doing any other Thing, which shall immediately tend to the Breach of the Peace, or put the People in fear, although there be no actual Breach of the Peace. Not for abusive Language, as calling one Lye, Rogue, Rascal, (for this is only a Motive or distant Provocation to the Breach of the Peace) nor for a Trespass on Land. It must relate to the Person of a Man.

The Surety of the Peace or good Behaviour may be released, either by the Justice himself that took it, or by the Party upon whose Complaint it was granted, (*2y.*)

[See 21 *Ja. 1. ch. 8.* To prevent Abuses in procuring *Process* and *Superfedeas* of the Peace and good Behaviour out of his Majesty's Courts at *Westminster*, by forbidding them to be granted but upon Motion in open Court.]

Having now shewn how Breaches of the Peace may be in a great Measure prevented; I come now to speak of actual Disturbances of the publick Peace, and how they may be punished when committed.

Offences against the publick Peace are *Assaults*, *Batteries*, *Affrays*, taking away *Maidens*, *Kidnapping*, forcible *Entries* and forcible *Detainers*, unlawful *Assemblies*, *Routs*, *Riots*, *Riding* or going armed, *Libels*, false and slanderous *Tales*, false *Prophecies*.

1. An *Assault* (*Assultus*, *Insultus*.) is an Attempt or Offer to do a Hurt to one's Person; as by an Offer to strike one, holding up the Fist in a threatening Manner, or by presenting a Pistol towards and near one, tho' no Hurt actually done. Words cannot amount to an Assault, tho' there are some Opinions to the contrary.

The Offender is liable to an *Action*, at the Suit of the Party assaulted, for Damages, and to an *Indictment*, upon which he shall be fined, and imprisoned till paid. [See 5 & 6 *Ed. 6. ch. 4. infra.*]

^a Finch, ch.
11. p. 203.
Pult. 3, 5.
Dalt. ch. 121.
p. 282.

^b Lutw. 929.

^c 2 Inst. 236.
² Ld. Ray.
1208.

^d Terms of
the Law, v.
Battery.

^e Terms of
the Law, v.
Battery.
² Roll. Abr.
546, 547.
548, 549.
Dalt. ch. 121.
p. 283, 284.
285, 308.
Kely. 64.
¹ Ld. Ray. 62.
See p. 53.
ante.
^f 1 Ld. Ray.
62.

^g 2 Str. 1049.
¹ Ld. Ray.
231.

2. A ^a *Battery* (from *Battre*, to strike) is an Injury done to the Person of another in a rude or angry Manner; as by striking, pushing, jostling, catching by the Arm, fillipping upon the Nose, spitting in the Face, pulling of a Button in a rude and insolent Manner, &c. But it is ^b no Battery to lay one's Hands gently upon another that is going to strike one.

This Offence is punishable by *Action* and *Indictment* in the same Manner as an Assault. ^c If the Husband and Wife bring an Action of Battery for the Beating of himself and his Wife, the Writ shall abate, because the Wife cannot join for the Battery of the Husband, and the Husband cannot have Judgment alone, because his Wife is joined with him in the Original. And so it is in like Cases.

A Man may *justify* the Beating of another who first assaults him, in his own Defence, by a special *Pleading* in an *Action*, *De Son Assault Demesne*, or that the Battery was occasioned by his own Assault; or he may give that in *Evidence* upon *Not guilty* to an *Indictment*.

^d And the Record of the Conviction of the Party by Indictment may serve afterwards for Evidence in the Action of Trespas for the same Assault and Battery. [*2y.*]

^e One may also *justify* the Beating of another, who assaults his Wife, Father, or Mother, or his Child, or Servant [*2y.*]; and so on the contrary, the Wife, Father, Mother, Child, Servant may justify a Beating, where those, that are so nearly related to them, are assaulted. Also the Law doth allow a Man, to beat another in the necessary Defence of his *Goods*; but if he kills him, it is Felony. Thus one may beat another in Defence of his Possession of his Estate, if upon a Disturbance one pretends to assault or beat him. [But in this Case it seems to be rather in Defence of his Person; for *merely* ^f in Defence of his Possession an Assault is not justifiable.] Those that have a *natural* or *civil* Authority over others, may chastise them for their Offences. And therefore a Husband may correct his Wife, [*2y.*] a Parent may justify the Chastising of his Child within Age with Moderation; a Master his Servant, or Apprentice, [See 33 H. 8. ch. 12.] A Schoolmaster his Scholars, a Gaoler or his Servant, his unruly Prisoners, an Officer ^g those that *resist* his Arrest. So one may chastise his Kinsman that is mad, chain him up and beat him with Rods, to keep him from doing hurt.

If the Life of any one is in Danger by beating, or otherwise, any Person may beat him that offereth the Violence, to make him quiet.

See 5 H. 4. ch. 6. For the Penalty for Assaulting of a *Servant* of a Knight or Burgefs in Parliament. The 11 H. 6. ch. 11. For the Punishment of those as do make an Assault upon any that come to *Parliament*, or to the King's *Council*. The 9 An. ch. 16. concerning an Assault on a *Privy Counsellor* in the Execution of his Office. 9 An. ch. 14. concerning an Assault, Beating, or Challenging to fight, upon Account of Money won by Gaming. 6 Geo. 1. ch. 21. §. 34. For the Punishment of Assaulting, Beating, or Wounding an Officer of the Customs in the Execution of his Office, &c. 6 G. 1. ch. 23. §. 11. For Assaulting any Person in the Streets or Highways with Intent to tear his Cloaths, and 7 G. 2. ch. 21. For assaulting with Intent to rob.

Affault and Battery are often confounded, though in Law distinct Offences; for in Trespafs for Affault and Battery, one may be found guilty of the Affault and not guilty of the Battery. See p. 372. ante.

By 5 & 6 Ed. 6. ch. 4. *None shall use any chiding Words in a Church, or Church-yard, in pain of Suspension of a Layman, ab Ingressu Ecclesiæ, and of a Clerk from the Ministration of his Office. He that shall smite or lay violent Hands there upon any other, is thereby excommunicated ipso facto. He that is convicted of maliciously Striking with a Weapon in any Church or Church-yard, or of drawing any Weapon there, with Intent to strike another with the same Weapon, by Verdict, Confession, or two lawful Witnesses, at the Assizes or Sessions, shall have one of his Ears cut off, &c. and shall stand excommunicate ipso facto.* Hawk. P. C. B. 1. p. 139.

* Church-wardens, &c. who whip or strike Boys for playing in the Church, or pull of the Hats of those who sit there with their Hats on, or gently lay their Hands on one that is excommunicated, to turn him out of the Church, are not within the Statute. 1 Saund. 13. 14. Sid. 301.

3. An *Affray* (from *Effrayer*, to terrify) is a Fighting of two or more to the Terror of the King's Subjects. There must be a Stroke given, or offered, or a Weapon drawn. If the Stroke is offered on one Side only, or in a private Place out of the Hearing of any, it is an Affault, though Affault and Affray are sometimes confounded. 3 Inst. 258. Dalt. ch. 8. p. 35. H. P. C. 135. Hawk. P. C. B. 1. ch. 63.

A *Menace* to beat or kill is no Affray. To challenge another either by Word or Letter to fight a Duel, or to be a Messenger of such a Challenge, is an high Offence, and the Combat, though no Blood is drawn, is an Affray. Any private Person who sees others fighting, may lawfully part them till the Heat is over, and deliver them to the Constable; and the Law doth encourage him to it. For if he receives any Harm by the Affrayers, he is allowed his Remedy by Action against them. † And if any private Person is commanded by the Sheriff, Justice of the Peace, or Constable, to assist in parting the Affrayers, and he refuses or neglects to do it, he is punishable by Fine and Imprisonment. And so is the Constable, or other Conservator of the Peace, if he neglects his Duty. See p. 86. ante.

All Affrays are punishable by Fine and Imprisonment.

4. *The Taking away Maidens or Women Children under the Age of sixteen Years without Consent of their Parents, is against the publick Peace.* Therefore, 3 Inst. 62. 2 Str. 1162.

By 4 & 5 Ph. & M. ch. 8. *None shall take away or cause to be taken away, any Maid, or Woman Child, unmarried, within the Age of sixteen Years (though it be not against her Will) from the Possession and against the Will of the Father or Mother of such Maid, or of the Person appointed to be Governor or Guardian by the Father*

† Qui non prohibet, cum prohibere potest, in culpa est. 3 Inst. 158.

Idem est facere, et nolle prohibere, cum possis. Ibid.

Qui non prohibet, quod prohibere potest, assentire videtur. 2 Inst. 305.

Qui non obstat, quod obstaré potest, facere videtur. 2 Inst. 146.

in his Life-time, or by Will after his Death, upon Penalty of two Years Imprisonment. And if any such Maid is so taken away and deflowered, or married against the Will of the Father, if he is living, or against the Will of the Mother, having the Custody of such Maiden, if the Father is dead, the Offender shall suffer five Years Imprisonment.

And if any such Child above the Age of twelve Years, and under the Age of sixteen, do consent to such Marriage, the next of Kin of the said Woman Child, to whom the Inheritance should descend or come after the Decease of the said Woman Child, shall from the Time of such Assent or Agreement enjoy all such Lands, Tenements, and Hereditaments, as the said Woman Child had in Possession, Reversion, or Remainder, at the Time of the Assent, during the Life of such Woman Child.

Provided this Act shall not be prejudicial to any Custom concerning Orphans in London, or other City or Town.

It is required here, that the Maid should have Lands or Goods, &c. as by 3 H. 7. ch. 2^a. Concerning forcible Marriage or Defilement of Women of Estate. [See 3 Ja. 1. ch. 5. §. 13. Concerning Forfeiture for a Popish Marriage.]

^b Raym. 474. 5. ^b Kidnapping is a stealing away of a Man, Woman, or Child. It is an Offence at Common Law, and punishable by Fine, Pillory, &c.

By 11 & 12 W. 3. ch. 7. If a Master of a Merchant Ship shall, during his being abroad, force any Man ashore, or wilfully leave him behind, &c. he shall suffer three Months Imprisonment. [See 4 Geo. 1. ch. 11. Concerning Transportation upon Contract, &c.]

^a Dalt. ch. 126. p. 299, 300. ^b H. P. C. 138. 6. A forcible Entry is, when one or more Persons furnished with unusual Weapons, do violently enter the House or Land of another, or do use violent and threatening Words to the Terror of another, and by that Means gain the Possession; or if one or more do enter peaceably, and then forcibly put another out of his Possession.

^a Dalt. ch. 126. p. 300, 301. ^b H. P. C. 139. A forcible Detainer is when one or more have entered peaceably, and detain the Possession with Force, with Arms, or with an unusual Number of People, or with Threatnings to defend it.

This was no Crime at Common Law where one had a Title, and Entry was lawful. But now this is made an Offence by Statutes. For,

By 5 Ri. 2. St. 1. ch. 7. None shall enter into Lands or Tenements, but where Entry is given by Law, and in a peaceable Manner; upon pain of Imprisonment and Ransom at the King's Will.

^a Dalt. ch. 126. p. 297. Here was no Remedy but upon a general Enquiry in the Quarter-Sessions, or by Indictment, or Action. Therefore,

By 15 Ri. 2. ch. 2. When a forcible Entry is made into any Lands, Tenements, or other Possessions, or into Benefices or Offices of the Church, one or more Justices of the County, taking sufficient Power, and going to the Place so kept by Force, and finding any that hold such Place forcibly, after such Entry made, may commit the Offender to the

the next Gaol, there to remain Convict by the Record of the Justice, till he hath made Fine and Ransom to the King. And all People of the County shall be assisting to the Justice, to arrest such Offender, upon Pain of Fine and Imprisonment.

The same Justice may [must] assess the Fine for this Offence. ^{a 2 Ld. Ray.}

But neither of these Statutes extended to those that entered peaceably and detained with force, nor gave any Remedy if the Parties, who made the Entry with Force, removed before the Coming of the Justices; nor did they give the Justices any Power to restore the Party ejected; nor ordain'd any Penalty against the Sheriff, if he did not obey the Precepts of the Justices, in the Execution of the said Statutes. Wherefore,

By 8 H. 6. ch. 9. Upon Complaint made to the Justices of the County, or one of them, of a forcible Entry or Detainer, by the Party grieved, they or one of them shall cause the Statute of 15 Ri. 2. ch. 2. to be duly executed at the Costs of the Party grieved.

And when Complaint is made of any such Entry or Detainer to any Justice or Justices, he or they, by Warrant or Precept, shall command the Sheriff to summon a sufficient Jury, to enquire of the Force committed. And upon Force found, the Justice or Justices shall cause the Lands, &c. to be re-seised, and shall put the Party disseised in Possession; in the Absence as well as Presence of the Party offending. ^{1 Ld. Ray. 440, 482.}

The Justices are to restore the Possession, and not to enquire into the Title of either of the Parties. ^{Dalt. ch. 130. p. 312.}

Provided that this Statute shall not endamage any, where they or their Ancestors have continued their Possessions of the same for three Years.

But if the Disseisee within the three Years makes lawful Claim, this is an Interruption of the Possession. ^{H. P. C. 139.}

By 31 El. ch. 11. There shall be no Restitution upon an Indictment of forcible Entry or forcible Detainer, where the Defendant hath been in quiet Possession for three whole Years together next before the Day of such Indictment so found, and his Estate therein not ended; which the Party indicted may alledge for Stay of Restitution; and Restitution is to stay, till that be tried, if the other will traverse the same; and if upon Trial it be found against him, he shall pay Costs and Damages. ^{2 Ld. Ray. 1011, 1036.}

By 21 Ja. 1. ch. 15. Upon forcible Entry or Detainer, a Justice, &c. hath like Power, upon Indictment found, to give Restitution of Possession to Tenants for Years, by Elegit, Statute-Merchant or Staple, Tenant by Copy of Court-Roll, as to those that claim Freehold, by Virtue of former Statutes.

So that now a complete Remedy is given against those who enter with Force, and continue the Possession peaceably; against those who enter peaceably, and detain or hold out with Force; and against those who both enter by Force, and detain by Force. ^{Dalt. ch. 125. p. 298.}

The Indictment must set forth, that the Entry was *Manu Forti*. Those are peculiar Words for this Offence, to distinguish it from all other Trespasses *Vi & Armis*. There are many Niceties to be observed in drawing the Indictment. ^{1 Cro. 461. Dalt. ch. 126. p. 298. Hawk. P. C. B. 1. ch. 64.}

To remove a Force out of a Parish-Church, or Parsonage-house, there is another Remedy by a Writ *De Vi Laicâ Removenda*.

There is a Force implied in Law, as in every Trespass, *Vi & Armis*. [But this is not a Force within the Meaning of the above Statutes.]

7. ^b An *unlawful Assembly* is, where three or more assemble themselves together, to do an unlawful Act, and part without doing the same, or without making any Motion towards the Execution of it. The Meeting only to do an unlawful Act is punishable. If there was no ill Intent, and the Meeting was for Sport and Merriment, it is not punishable.

One for Safeguard of his *House*, and for the Defence of the Possession thereof, may assemble his Friends against those that threaten to make an unlawful Entry into it; but he cannot assemble his Friends for the Defence of his *Person*, against those that threaten to beat him, while he is out of his House.

8. A *Rout* (*Rout, Turba*) is when three or more do any unlawful Act upon a common Quarrel; as when the Inhabitants of a Town break down Inclosures, pretending to have Right of Common or a Way there. But others say, that a Rout is, where three or more have met to do an unlawful Act, and have moved forward in Order to do it, put part without doing it. This is punishable tho' the Act is not executed. The first Description of a Rout agrees almost with the Notion of a Riot. For,

9. A *Riot* (from *Rioter, Rixari*) is where three Persons at least do an unlawful Act, of a private Nature, with Force; as when they beat a Man, hunt in his Park, Chase, or Warren, cut or destroy his Corn, Grass, or other Profit, enter or take Possession of Land, &c. all who are concerned therein are Rioters. And if one seeing others engaged in a Riot, do assist them therein, he is as much a Rioter, as if he had first assembled with them for that Intent.

In every Riot there must be some Intention of Force or Violence. Therefore Assemblies for Wrestling, playing at Cudgels, Cards and Dice, Drinking, Dancing, &c. are not Riots. And this Force must relate to some *private* Quarrel only. For if the Intention of such Assemblies is to redress publick Grievances, and such Intention is executed, this is Levying War against the King, and amounts to *High Treason*.

In Riots, Routs, and unlawful Assemblies, we must consider the Number of the Persons, which must be three at least; The Intent and Purpose of their Meeting, which must be to do some unlawful Act with Violence or Force, and must not be a falling out upon a sudden Quarrel after a lawful Meeting; the Lawfulness or Unlawfulness of the Act; the Manner and Circumstances of doing it; for the Manner of doing a lawful Thing may make it unlawful; as if a Nuisance is removed in a violent and tumultuous Manner, &c.

By the Common Law Offences of this Nature are punishable by Fine and Imprisonment, and, if enormous, by Pillory.

^a *Multitudinem decem faciunt.* (2u.) 1 Inst. 257. a.

* If a Mayor and Aldermen, &c. are guilty of a Riot, they are punishable only in their natural Capacities. Yet the Liberties of Corporations have been seised, or the Corporation fined, where the Governors have countenanced a dangerous Riot within their Precincts. 3 Cro. 252. Dalt. ch. 82. p. 204. ch. 139. p. 326.

^b Women are punishable as Rioters, but Infants under the Age of Discretion, or fourteen, are not punishable. Dalt. ch. 139. p. 325.

These Offences are also punishable by Statute. For,

By 34 Ed. 3. ch. 1. *The Justices of the Peace have Power to restrain Offenders, Rioters, &c. and to arrest and chastise them according to their Offence; and to cause them to be imprisoned, and duly punished.*

By 17 R. 2. ch. 8. *As soon as the Sheriff and other the King's Ministers shall hear of a Riot, Rout, or other Assembly against the Peace, they, with the Power of the County, shall apprehend such Offenders, and put them in Prison, until delivered by Law.*

By 13 H. 4. ch. 7. *Two Justices of the Peace, dwelling near the Place, where such Offences shall be committed, together with the Sheriff or Under-Sheriff, shall, by the Power of the County (if need be) suppress Riots, Routs, and unlawful Assemblies, arrest the Offenders, and record what shall be done; by which Record the Offenders shall stand Convicted, as by the Statute of 15 Ri. 2. ch. 2. in Case of forcible Entries. And if the Offenders are departed, the said Justices, &c. shall, within a Month after, make enquiry thereof, and hear and determine the same, in Pain of 100 l.*

When a Riot is suppressed by the Justices together with the Sheriff, and they convict the Rioters by a Record of the Force upon their proper View, the Sheriff ought to be Party to such Inquisition; and so he ought by 19 H. 7. ch. 13. But if the Rioters disperse of themselves, and after they are parted, an Inquisition is made of it by two Justices of the Peace; there is no need that it appear by the Inquisition that the Sheriff was Party to the Inquiry; because the Justices may make the Inquisition without him. 1 Ld. Ray. 215.

^c These Statutes are to be understood to speak of great and notorious Riots, in the Nature of Insurrections and Rebellions. The Justices by their Commission may enquire of small Riots at any Time afterwards. [But it seems that the Act does not restrain their Authority to one Month after the Riot, so as that it cannot be executed afterwards; the Lapse of the Month only making them liable to the Penalty.] Dalt. ch. 83. p. 201. 1 Ld. Ray. 215.

The Record of the Riot within the View of the Justices, by whom it is recorded, is such a Conviction, as cannot be traversed, the Parties being concluded thereby. Yet the Parties may take Advantage of the Insufficiency of the Record, and except against it, if the Justices have not pursued the Statute. Dalt. ch. 82. p. 199, 200.

^d It is said, that the Offenders, being arrested by the said Justices, and convicted upon the Record of their Offence in their Presence, ought to be sent immediately to Gaol, till they pay the Fine assessed by the same Justices, who drew up the Record; which Fine shall be estreated into the Exchequer to the King's Use; or else the Justices may record such Riot by them viewed, and commit the Offender; and after certify the Record into the King's Bench, or to the Assizes, or Sessions. Dalt. ch. 82. p. 199, 200, 201, 202.

If the Offenders are gone, then the Justices shall enquire by a Jury; and if the Riot is found, the Justices must make a Record of

of it, and fine them, or receive their Traverse, to be sent by the Justices to the next Quarter-Sessions, or into the King's Bench, or to be tried according to Law. [See 2 H. 5. ch. 8. and 8 & 9 H. 6. ch. 14.]

By 19 H. 7. ch. 13. *The Sheriff having a Precept directed to him to return a Jury, according to 13 H. 4. ch. 7. shall return twenty-four Persons, &c. to enquire of the Riot, Rout, or unlawful Assembly.*

[See 13 Car. 2. St. 1. ch. 5. An Act against Tumults and Disorders upon Pretence of preparing or presenting publick Petitions, &c. to his Majesty or the Parliament.]

But 1 Geo. 1. ch. 5. which see p. 355. ante. is a more severe Statute against Rioters, if they meet to the Number of twelve, adjudging them to be Felons without Clergy. But that Statute, being wholly in the Affirmative, does not take away any Authority in the Suppressing of a Riot by Common Law or by Statute. [See 1 Geo. 1. St. 2. ch. 25. For preventing Disturbances by Seamen and other.]

See p. 360.
ante.

[Opposing Officers of the Customs, to the Number of eight Persons armed, is to be punished with Transportation, by 6 Geo. 1. ch. 21.]

10. *Riding or going armed with dangerous and unusual Weapons to the Terror of the People, is an Offence at Common Law and prohibited by Statute.*

By the Statute of Northampton, or 2 Ed. 3. ch. 3. None (except the King's Servants in his Presence, and his Ministers in executing his Precepts or their Office, and such as be in their Company assisting them, and also upon a Cry made for Arms to keep the Peace in the Place where such Acts happen) shall come with Force and Arms before the King's Justices, or other of the King's Ministers, doing their Office, or executing his Commands; nor go or ride armed by Night or Day in Affray of the People in any other Place; upon Pain to forfeit their Armour, and to suffer Imprisonment at the King's Pleasure.

Justices of the Peace, &c. have Power to put this Act in Execution. And the Justices of Assize have Power to punish them that have not done their Duty.

[See 25 Ed. 3. St. 5. ch. 2. 7 Ri. 2. ch. 13. 20 Ri. 2. ch. 1. By the last of which Acts a Fine is added to the other Penalties, for riding or going armed, to be set by the Justices.]

These Statutes are seldom put in Execution.

* No Person can excuse the Wearing such Armour in publick, by alledging that he wears it for his Safety against an Assault, which one has threatned. But he may assemble his Friends, and arm them, against those that threaten to do him Violence in his House, as before observed. Men may use common Arms according to their Quality and according to the Fashion, and have such Attendants with them armed as is agreeable to their Characters. And Men may arm themselves, to take Felons, suppress Rioters, to execute the King's Process, &c. as is excepted in the Statute of Northampton.

* Terms of
the Law, v.
Libel.

5 Rep. 125.
Hawk. P. C.
B. 1. ch. 75.
2 Str. 788.

11. * A Libel (*Libellus Famosus*) is a malicious Defamation of any Person, expressed either in Printing or Writing, Signs or Pictures, to asperse the Reputation of one that is alive, or the Memory of one that is dead. If it be made against a private Man, it may excite the Libelled, or his Friends, to revenge, and be the Cause of Bloodshedding.

shedding. If it be against a *Magistrate*, it is not only a Breach of the Peace, but a Scandal to the Government. A Libel is punishable, tho' the private Man or Magistrate is dead at the Time of making the Libel; for others of the same Family are also provoked to a Breach of the Peace; and in the Case of a Magistrate deceased, the Government is also traduced, which never dieth. It is not material, whether the Matter of the Libel be true or false, if the Prosecution is by Information or Indictment. But in an Action of the Case one may justify, that it is true. [2y.]

The Printing or Writing may be libellous, tho' the Scandal is not charged in direct Terms, but obliquely or ironically; or tho' there is but one or two Letters of the Name express'd, or the first and last Letter of the Name; if the Jury will understand it, to point at a particular Person.

False or scandalous Matter in a legal Proceeding in a Course of Justice (as by Bill of Complaint, Petition, Articles, &c.) will not amount to a Libel; if the Court, or the Person applied to, hath Jurisdiction in the Cause. Therefore no Presentment of a Grand Jury can be a Libel.

If one finds a Libel, he ought to burn it, or deliver it to a Magistrate. For not only the Contriver, but the Procurer, or Publisher of it, knowing it to be a Libel, is punishable. If one readeth a Libel, or hears it read, and laughs at it, it is not a Publishing of it, for before he reads it, or hears it, he cannot know it to be a Libel. But if after he hath read it, or heard it read, he repeats or sings it, or any Part of it, in the Hearing of others; or if after he knoweth it to be a Libel, he reads it to others; it is an unlawful Publishing of it. But if one writes a Copy of it, and does not deliver it to others, the Writing of a Copy is no Publication. [2y.]; but it is a great Evidence that he published it, if it is published, when he, knowing it to be a Libel, writeth a Copy of it, if he does not afterwards deliver it to a Magistrate, to examine it. For (then the subsequent Act doth explain the precedent Intent. If a Libel is found in a House, the Master of the House cannot be punished on an Information or Indictment, for framing, printing, and publishing of it. But he may be indicted for having it, and not delivering it to a Magistrate. [2y.] It is said, That if Booksellers or Hawkers publish or sell Libels, tho' they know not the Contents of them, yet they are punishable; the publick Peace being to be more regarded than a private Interest.

To send an abusive Letter to one, without publishing of it to others, is an High Offence; because it directly tends to the Disturbance of the Peace; but no Action will lie, because it is no Publication. To scatter and disperse a libellous Letter in the Fields, without sending any to the Person himself, is a Publication of the Libel.

I said that a Libel may be by Signs and Pictures, as well as by Printing or Writing. For to fix a Gallows at one's Door, or to paint it upon one's Door, or to paint one in a Fool's Coat, or to draw one's Picture with Asses Ears, is very provoking, and direct stirring up a Quarrel, causing a Disturbance of the Peace.

A Libeller or a Publisher of a Libel, or those that procured the making or publishing of it, may be punished upon Indictment at Common Law by Fine and Imprisonment, and by the Pillory,

by wearing Papers signifying the Fault, or other Corporal Punishment, if the Offence deserves it.

^a 2 Inst. 226,
227, 228.
See p. 43.
ante.

12. *False and Scandalous Tales and News*, whereupon Discord may arise betwixt the King and Great Men of the Realm, may be punished at Common Law by Fine and Imprisonment.

^b 3 Inst. 128,
129.

13. *False Prophecies*, (where Persons pretend extraordinary Commissions from God) to raise Jealousies in the People, or to terrify them with impending Judgments, are punishable at Common Law as Impostors. Predictions, either of the Time of the End of the World, or that it is at Hand, are not lawful.

By 5 El. ch. 15. *None shall publish or set forth any Phantastical or False Prophecy, with an Intent to make Rebellion, Loss of Life, or Disturbance, in pain of 10l. for the first Offence, and a Year's Imprisonment. And for the second Offence, to forfeit all his Goods and Chattles, Real and Personal, and to incur Imprisonment during Life.*

The Prosecution is to be within six Months.

These are the chief Offences against the *Publick Peace*. But to this Head all kind of *Misdemeanors*, and *Trespases Vi et Armis*, may be referred; which are innumerable.

III. Offences against *Publick Trade* are *Usury*, *Forestalling*, *Ingratting* and *Regrating*, *Monopolies*, *Deceit* and *Cofinage*, *Destroying of the Game*, *Destroying of Corn, Wood, &c.*

^c 3 Inst. 151,
152.

² Str. 816,
1243.

Hawk. P. C.
B. 1. ch. 82.

Exod. xxii. v.
25.

Levit. xxv. v.
36, 37.

Deut. xxiii. v.
19, 20.

See Hawk. P.
C. B. 1. p. 245.

Comy. 583.

1. *Usury*, (*Ufus Aëris*) is the Gain of any Thing by Contract above the Principal or Thing lent, exacted only in Consideration of the Loan of it, or for the Forbearance of the Demand of it. It may be of Money, Wares, &c.

All Usury was anciently held to be against the *Common Law*, and punishable by it. [But now it is generally agreed, that the taking of reasonable Interest for the Use of Money is in itself lawful. But to restrain the excessive Rate of it:] It is enacted,

By 12 Ann. ch. 16. *That no Person shall take directly or indirectly for the Loan of any Money, Wares, or Commodities whatsoever, above the Value of Five Pounds for the Forbearance of a Hundred Pounds for a Year, and so after that Rate for a greater or lesser Sum, or for a shorter or a longer Time; in pain that all Bonds and Contracts to the contrary shall be void; and the Receiver to forfeit for every such Offence the treble Value of the Money, Wares, and Things so lent and bargained.*

Every *Scrivener*, *Broker*, or *Solicitor*, taking for *Procuracion* above Five Skillings for the Loan of 100l. for a Year, and so rateably; or above 12d. over and above the Stamp Duties, for making the Bond or Bill, shall forfeit 20l. for every Offence, with Costs of Suit, and suffer Imprisonment for Half a Year.

A Contract for Six per Cent. made before this Statute, is not within the Meaning of it. [See the old Statutes concerning Usury, 37 H. 8. ch. 9. 13 El. ch. 8. 21 Ja. 1. ch. 17. 12 Car. 2. ch. 13. And see 1 Ja. 1. ch. 21. and 30 G. 2. ch. 24. concerning Pawn-brokers; 8 & 9 W. 3. ch. 20 and 32. 6 Ann. ch. 16. and 7 G. 2. ch. 8.

ch. 8. to restrain the Number and ill Practice of Brokers and Stock-jobbers.]

* A Special Agreement to pay double the Sum borrow'd, &c. by way of *Penalty* for Non-payment of the principal Debt at a certain Day, is not within the Statutes; for this is only a *Penalty* for Damages; and the Borrower might repay the Principal at the Time agreed, to avoid the *Penalty*. * Neither is it excessive *Usury*, if the Interest doth exceed *Five per Cent.* when possibly the Principal and Interest are in Hazard upon Contingencies or Casualties; or where there is a Hazard, that one may have less than his Principal. As upon a Bond with Condition of Payment of a large Sum, which depends upon the Return of a Ship from the *Indies*, &c. [But the taking more than legal Interest for discounting a Note or Bill seems to be *Usury* 'within 12 Ann. ch. 16.] * Nor upon a Grant of an Annuity for Life beyond legal Interest. If the Agreement is to pay Fifty Shillings at the End of Six Months, the Computation must be by *Kalendar Months*; because if the Computation was by *Lunar Months*, the Interest would exceed the Rate allowed by the Statute. But where the Agreement is for Interest allowed by the Statute, the Mistake of the Scrivener shall not avoid a fair Agreement, if he draws a Bond, &c. in such Manner as brings it within the Statute. Neither shall the Receipt of the Interest before the Time for the Conveniency of the Creditor, &c. without any corrupt Agreement, make the Receiver liable to the Forfeiture of the treble Value; or if the Lender accepts of a voluntary *Gratuity* from the Borrower upon Payment of Principal and Interest; if there was no Agreement made for it, though the Lender might expect it. [But in all these Cases the Contract must appear to be fair, and not elusive, or intended to evade the Statutes.]

[Note, That the above Determinations, tho' made upon the old Statutes, yet seem to be equally applicable to 12 Ann. ch. 16. which is penned in nearly the very same Words.]

[See 9 & 10 W. 3. ch. 17. Where *Inland Bills of Exchange* of Five Pounds or upwards (in which Bills the Value shall be express'd to be received) shall be repaid with Interest and Charges from the Protest; and in Default of such Protest, and due Notice thereof, the Person failing thereof shall be liable to all Costs, Damages, and Interest. See also 3 & 4 Ann. ch. 9. For giving like Remedy upon *Promissory Notes*, as is used upon Bills of Exchange; and for the better Payment of *Inland Bills of Exchange*.]

2. Of *Forestalling*, *Regrating*, and *Ingrossing*.

A *Forestalling* (from the Saxon Word *Far* or *Fare*, the *Way* or *Passage*, and *Stall*, a *Hindrance*) is described in the following Statute. For,

By 5 & 6 Ed. 6. ch. 14. *A Buying or Contracting for any Merchandize, Victual, or any other Thing whatsoever, coming by Land or Water to any Fair or Market, to be sold in the same, or coming from beyond Sea to any Port or Haven to be sold; or causing the same to be bought; or a dissuading People by Word, Letter, Message or otherwise, from bringing such Things to Market, or persuading them to enhance the Price, after they are brought thither, is Forestalling. And the Party guilty in any of these Instances shall be adjudged a Forestaller.*

It

^a 3 Inst. 197. It is against the Common Law, to sell Corn in Sheafs, before it is threshed and measured; for by such Sale the Market is in effect forestalled.

^b 3 Inst. 196. To discourage People with false Reports, to sell their Wool, or by false Reports to lower the Price of our Native Commodities, is fineable. For all Attempts of this Kind are prejudicial to Trade.

^c 5 Inst. 195. 3. *Regrating* (from *Regratament*, *Huckstry*) is described by the same Statute. For,

By 5 & 6 Ed. 6. ch. 14. *A Regrating is a buying, or obtaining in any Fair or Market any Corn, Wine, Fish, Butter, Cheese, Candles, Tallow, Sheep, Lambs, Calves, Swine, Pigs, Geese, Capons, Hens, Chickens, Pigeons, Conies, or other Dead Victual whatsoever, brought to a Fair or Market to be sold there, and a selling the same again in the same Fair, or Market, or Place, or in some other Fair or Market within four Miles thereof.*

By Regrating the Goods are made dearer, for every Seller will gain something.

^d 3 Inst. 195. 4. *An Ingrossing*, (from *Grosse*, Great or Whole) is also described by the same Act. For,

By 5 & 6 Ed. 6. ch. 14. *An Ingrossing is a getting into one's Possession, by Buying, Contract, or Promise (other than by Grant or Lease of Land or Fishes) any Corn growing in the Fields, or any other Corn or Grain, (except Barley and Oats to make Malt and Oatmeal, in his own House) Butter, Cheese, Fish, or other Dead Victual whatsoever (of like necessary and common Use) with Intent to sell them again.*

^e 3 Inst. 195. Salt is within the Statute (See 13 El. ch. 25. §. 21.) but not Apples, Plums, Cherries, for they are no Victual; nor Hops, nor

^f H. P. C. 152. Malt, nor the buying of Corn to make Starch of it, and then to sell it, or to make Meal, and then to sell it; nor the buying of Barley, with Intent to make it into Malt, and then to sell it.

^g 3 Inst. 196. A Stranger or Subject bringing Victuals, or other Merchandize, into the Realm, may sell the same in Gross; but he that buys them, cannot do the like; neither may any Merchant buy in Gross within the Realm, and sell in Gross; for then a rich Man might ingross a whole Commodity, and sell it at what Price he thought fit. [See 5 El. ch. 5. §. 13.]

By the said Statute, *The Party Guilty of any of the Offences aforesaid, (i. e. Forestalling, Regrating, or Ingrossing) upon Conviction at the Quarter-Sessions by two Witnesses, upon Bill, Information, or Presentment, lose for the First Offence, the Value of the Goods so bought or had, and shall suffer two Months Imprisonment; for the Second Offence double the Value, and six Months Imprisonment; and for the Third Offence he shall forfeit all his Goods, be set upon the Pillory, and be imprisoned at the King's Pleasure.*

The Forfeitures are to the King's Use only, if there are no Informers; otherwise a Moiety to the King, and a Moiety to the Informer.

The Information must be within two Years after the Offence. [See 31 El. ch. 5.]

This Act shall not restrain the Buying of any such Barley or Oats, as any Person (not forestalling) shall buy, to convert into Malt or Oatmeal in his own House.

Or the Buying of any such Things by any Fishmonger, Butcher, or Poulterer, Innholder, or Victualler, (not forestalling) as concern his Trade, be retailing the same at reasonable Prices.

Or the Taking of any of the Things above-mentioned reserved upon a Lease.

Or the Buying of any dried or salted Fish, Herring, or Sprats (not forestalled) and sold for reasonable Prices.

Or any Badger, Lader, Kidder, or Carrier, assigned to that Office by three Justices of the Peace, and selling and delivering the Commodity in open Fair or Market, or out of his Hand within one Month after he buys it.

Or to a Common Drover licensed by three Justices, buying and selling Cattle, &c.

[See 5 El. ch. 12. An Act touching Badgers of Corn and Drovers of Cattle to be licensed. See also 13 El. ch. 25. §. 20, 21.]

Or the Provision made for any Town-Corporate, Ship, Castle, Port, &c.

[See 23 Ed. 3. ch. 6. 25 H. 8. ch. 2. How and by whom the Prices of Victuals shall be assessed. 5 El. ch. 5. Concerning Sea-Fish, Wine, Oil, Sugar, Salt, &c. 21 Ja. 1. ch. 22. Concerning Traders in Butter and Cheese. 1 W. & M. Sess. 1. ch. 12. and 2 G. 2. ch. 18. and 5 G. 2. ch. 12. For Exportation of Corn. 1 W. & M. Sess. 1. ch. 22. For the Exportation of Beer, Ale, Cider, and Mumm. 3 W. & M. ch. 8. To permit the Exportation of Beef, Pork, Butter, Cheese, and Candles. 9 & 10 W. 3. ch. 27. 3 & 4 Ann. ch. 4. 4 G. 1. ch. 6. For licensing Hawkers and Pedlars. And 31 G. 2. c. 46. To prevent Common Salesmen of Hay and Straw, or Salesmen, Brokers, or Factors in Cattle, from buying and selling on their own Account.]

5. A Monopoly, (from *Monopolium*, alone, and *πωλίσω* to sell) is an Allowance by the King, by his Grant, Commission, or otherwise, to any Person or Persons, for the sole buying, selling, making, working, or using of any Thing, whereby any Person, or Persons are sought to be restrained of any Freedom that they had before, or to be hinder'd in their lawful Trade.

The procuring or making use of any unlawful Monopoly, is punishable at Common Law by Fine and Imprisonment. And

By 21 Ja. 1. ch. 3. All Persons are made incapable to have or put in Ure any Monopoly, or any Commission, Grant, or Licence, or other Matter or Thing tending to institute, strengthen, or countenance the same. And any Person grieved thereby, or disturbed by Reason thereof, shall recover treble Damages and double Costs.

This Statute not to extend to any Letters Patent granted for the sole making or working of any New Manufacture to the Inventors thereof, for the Term of 14 Years, being not contrary to Law, or prejudicial to the Commonwealth; nor to Grants heretofore confirmed by Act of Parliament; nor to any Warrant or Privy Seal granted or to be granted to the Justices of the K. B. or Common Pleas, Barons of the Exchequer, Justices of Assize or Peace, to compound for the Forfeitures of any Penal Statutes; nor to any Corporation, concerning any

Grants to them made, or concerning any of their Customs; nor to any Corporation, Company, or Fellowship of any Trade or Mystery; or to any Company or Society of Merchants; nor to any Grant for Printing; for digging or making Salt-Petre or Gunpowder, Ordnance or Shot for Ordnance; nor to any Grant of any Office in being, and put in Execution before the making this Statute; nor to the Liberties of Newcastle concerning Sea-Coals; nor to licensing of Taverns, so the King receives the Benefit; nor to Commissions concerning Allum or Allum-Mines. By 16 Car. 1. ch. 21. The putting in Execution any Patent or Inhibition whatsoever to restrain the Importation of Gunpowder, or Salt-Petre, Brimstone, or other Materials for making Gunpowder, incurs a Premunire.^a

^a See p. 431. ante.

^b 3 Inst. 182, 183.

All Matters of this Nature ought to be tried at Common Law only, and not at the Council-Table, &c.

^c Finch Book

3. ch. 2. p. 188.

^d Cro. 497, 498.

^e Cro. 235. 3 Roll. Abr. 78.

Hawk. P. C. 16 Car. 2. ch. 7.

B. 1. ch. 71. ^f 2 Str. 866.

^g 2 Ld. Ray. 1013.

6. ^e Deceit and Cofnage are Offences at Common Law, and are all Practices of defrauding, or of endeavouring to defraud another by some artful Device, of his known Right, contrary to common Honesty. ^a A mere Lye is not punishable. The Punishment at Common Law for Fraud or Cheating, is Fine and Imprisonment; and sometimes Pillory, as for Cheating with False Dice, &c. [See 16 Car. 2. ch. 7. 9 An. ch. 14. 12 G. 2. ch. 28. 13 G. 2. ch. 19. and 18 G. 2. ch. 34. Of Gamesters and Gaming. And 30 G. 2. ch. 24. As to Persons obtaining Money or Goods by false Pretences; for preventing the unlawful Pawning of Goods; for the easy Redemption of Goods pawned; and for preventing Gaming in Publick Houses by Journeymen, Labourers, Servants, and Apprentices.]

Deceit and Cofnage may be committed by one or more; but ^a ⁱ Inst. 357. ^d Covin is a secret Assent determined in the Heart, of two at least, to defraud and prejudice another. a. & b.

The Kinds of Frauds and Deceits of Tradesmen and others are infinite; but many of them are restrained and punishable by Statutes. Therefore there are Statutes concerning the Frauds of Alehouse-keepers, Bakers, Bankrupts, Brasiers, Brewers, Butchers; concerning Brandy, Butter, Buttons, Chandlers, Cheese, Cider, Coffee, Mead, Metheglin, &c. concerning Coals and Colliers, Cloth, Carders, Spinsters, Weavers and Fullers, Conspiracies amongst Tradesmen, and concerning Artificers in our Manufactures exercising their Trades beyond Sea, Coopers, Curriers, Diers, Distillers, Felt-Makers, Fuel, Fustian and Cotton, Gaming, Goldsmiths, Hatters, Hemp, Hops, Innholders, Iron, Gold and Silver Lace, Leather, Linnen, Maltsters, Millers, Mohair, Paper and Parchment stamp, Pewterers, Pawn-Brokers, Taylors, Salt, Seamens Wages, Serges, Shoemakers, Silk, Snuff, Soap, Stockings, Tanners, Tile-Makers, Tobacco, Tokens false or counterfeit Letters, Victuallers, Vinegar-Makers, Vintners, Upholsterers, Wax-Chandlers, Weights and Measures, Woodmongers, Wool, Yarn, &c.

All these Offenders shall pay their Fines and suffer Imprisonment, as the several Statutes direct. But where a Statute creates a new Offence, and inflicts a particular Punishment, there the Statute must be pursued, and the Offender punished only by the Statute.

[See

[See 6 Geo. 1. ch. 21. For preventing Frauds and Abuses in the publick Revenues of Excise, Customs, Stamp-Duties, Post-Office, and House-Money.]

Amongst these Ways of Deceit and Coſinage, Frauds by falſe *Weights and Measures* are moſt common; a crying Sin and a Shame to a Chriſtian Nation. Therefore I ſhall enlarge a little upon that Head, and touch upon the Statutes relating to them. Beſides, the Learning about *Weights and Measures* is very curious, and of great Uſe.

By *Magna Charta*, or 9 H. 3. ch. 25. 14 Ed. 3. ch. 12. 25 Ed. 3. ch. 10. 27 Ed. 3. St. 2. ch. 10, &c. There is to be but one *Weight and Measure*, and one *Yard* throughout England, according to the Standard in the *Exchequer*. [See 17 Car. 1. ch. 19. *infra*.]

By 8 H. 6. ch. 5. Every City, Borough, and Town, ſhall have a common Balance ſealed, with common weights ſealed, according to the Standard in the *Exchequer*, upon the common Coſt, and in the Keeping of the head Officer; in Pain that every City for ſuch Default ſhall forfeit 10l. a Borough 5l. and every other Town where a Conſtable is 40s.

By 11 H. 6. ch. 8. In every City, Borough, and Town, there ſhall be a common Buſhel ſealed according to the Standard, in like manner to be bought and kept, and upon like Pain for Default as in 8 H. 6. ch. 5. is ſpecified for a common Balance.

And all Juſtices of the Peace, Mayors, and head Officers may bear and determine the Offences committed againſt the ſaid Statutes.

By 11 H. 7. ch. 4. Measures and Weights of Braſs ſhall be ſent to the Cities and Boroughs in this Act named, by which every Market-Town in the ſame Shire ought to have their Common Weights and Measures, to be marked by him that hath the Standard.

The Penalties in former Acts for not having common Weights and Measures ſealed, to extend only to Cities, Boroughs, and Market-Towns.

None ſhall buy or ſell with any other Weights and Measures in any City, Borough, or Market-Town, but ſuch as are marked by the chief Officer, nor in any other Place, unleſs it be equal with the Standard, nor either within or without Cities, Boroughs, or Market-Towns with a Buſhel that is not marked.

Mayors and chief Officers of Cities, Boroughs, and Market Towns, ſhall at leaſt twice in the Year, view all Weights and Measures within their Jurifdictions, and break and burn them which they find defective; and alſo ſet a Fine of 6s. 8d. payable to the Mayor, &c. for the firſt Offence, for the ſecond 13s. 4d. and for the third 20s. and adjudge the Offender to the Pillory.

And two Juſtices of the Peace (one Quorum) have Authority to bear and determine the Defaults of Mayors and other head Officers, and alſo of Buyers and Sellers, contrary to this Act, and to ſet Fines at Diſcretion on Offenders, and to burn defective Weights and Measures.

By 16 Car. 1. ch. 19. There ſhall be but one Weight, one Measure, and one Yard, according to the Standard of the *Exchequer*. And whoſoever ſhall ſell by, or keep any other Weight, Measure, or Yard, whereby any Thing is bought or ſold, ſhall forfeit for every ſuch Offence

Offence: 5s. being thereof lawfully convicted by the Oath of one Witness before a Justice of Peace, or head Officer in Cities, &c. to be levied by Distress for the Use of the Poor; and in Default of Distress they may commit the Offender to Prison till Payment.

By 22 Car. 2. ch. 8. Water-Measure, as to Corn or Grain, ground or unground, or Salt, is declared to be within the Statute of 16 Car. 1. ch. 19. And if any sell any Grain or any kind of Salt, usually sold by the Bushel, by any other Bushel or Measure, than what is agreeable to the Standard in the Exchequer, commonly called Winchester-Measure, he shall forfeit for every such Offence 40s. to be levied by Distress, as in the former Act.

Mayors and all other Officers permitting the Use of any other Measure, or who upon Complaint shall not punish according to the Statute, shall, upon Conviction by Presentment or Indictment, at the Quarter-Sessions, forfeit 5l.

He that hath the Toll, or Profit of the Market where no Toll is, ought to provide one Measure of Brass, and chain it in the publick Market-Place, on Penalty of 5l.

Constables may search and examine, if any use other Measures, &c. and present the Offender at the next Sessions.

By 22 & 23 Car. 2. ch. 12. They that sell or buy Corn or Salt without Measuring, (if required) or in other Manner than by 22 Car. 2. ch. 8. shall forfeit, besides the Penalty of 40s. all the Corn or Salt, or the Value thereof, to the Persons complaining. The Proof to lie upon the Person accused, and to be by the Oath of one Witness, that he did buy or sell the same according to this and the said former Act, or else to forfeit as by this Act is directed.

[See 1 An. ch. 15. Concerning Water Measure. 5 & 6 W. & M. ch. 7. 7 & 8 W. 3. ch. 31. 9 & 10 W. 3. ch. 6. &c. Concerning the Measure of Salt. 2 W. & M. Sess. 2. ch. 14. Concerning the Measure of Wine and other Liquors. 11 & 12 W. 3. ch. 15. Concerning the Measure of Ale and Beer by Retailers of it. 31 G. 2. ch. 29. Concerning the Assise of Bread. 7 Ed. 6. ch. 7. 43 El. ch. 14. Concerning the Assise of Fuel. 9 An. ch. 15. 10 An. ch. 6. Concerning the Assise of Billet. 12 An. St. 2. ch. 17. and 3 G. 2. ch. 26. Concerning the Measure of Coals. 6 Geo. 2. ch. 29. Concerning the Measure of Ballast; and 31 G. 2. ch. 40. As to the Weight and Soundness of Trusses of Hay and Straw within London and thirty Miles thereof. For the Measure of other Things, See Dalton, Nelson, and Burn, Tit. *Weights and Measures*.]

But notwithstanding the Statute of *Magna Charta*, &c. there are two Kinds of Weights used in England, and both warrantable by Custom, (*viz.*) Troy Weight and Averdupois. Troy Weight contains twelve Ounces to the Pound, and no more; by which are weighed Gold, Silver, Pearl, precious Stones, Silks, Electuaries, Wheat and Grain, and all Liquors. [See 51 H. 3. St. 1 & 6. 31 Ed. 1. 12 H. 7. ch. 5.] Averdupois (*Aver du pois*, to have Weight) hath sixteen Ounces to the Pound, and is confirmed by 27 Ed. 3. ch. 10. By which are weighed all Grocery Wares, and all Commodities whereof comes a Refuse, as also Copper, Tin, Iron, Lead, Flesh, Cheese. Here twelve Pounds over are allowed to every Hundred. So as one hundred and twelve Pounds make a hundred Weight, fifty-six Pounds make half a Hundred, and twenty-eight Pounds make a Quarter. And

^a Dalt. ch. 112. p. 248, 249.

^b Dalt. ch. 112. p. 250.

so in many Places and Counties there are different Measures of Corn and Grain; and the Bushel in one Place is larger than in another. I cannot well account for the Lawfulness of it, since Custom or Prescription is not allowed to be good against a Statute. But it is generally practis'd without Restraint. From this and the Statutes before-mentioned, you may infer, that we have three different Measures, (*viz*) One for Wine, one for Ale and Beer, one for Corn. In London there is a Difference betwixt Ale and Beer Measure. [24.]

The Punishment for selling by false Weights and Measures may be by Fine, &c. upon Indictment; notwithstanding a Punishment is appointed by the Statutes above-mentioned; because it is an Offence at Common Law.

7. *Destroying the Game* is an Offence against publick Trade, as it promotes Idleness in the ordinary Sort of People, taking them away from their proper Professions and Callings.

By 3 & 4 W. & M. ch. 10. If any Person shall unlawfully course, hunt, take in Toyls, kill, wound, or take away any Deer in any Forest, Chase, Purlieu, Paddock, Wood, Park, or other Ground inclosed, where Deer are usually kept, without the Consent of the Owner, or Person chiefly intrusted with the Custody thereof, or be aiding therein; and shall be convicted by Confession, or the Oath of one Witness, before a Justice of the Peace, where the Offence shall be committed, or the Party apprehended, within a Twelvemonth [within three Years by 9 G. 1. ch. 22. §. 13.] after the Offence done, he shall forfeit for hunting or coursing only, without taking, killing, or wounding, 20l. and for every Deer wounded, taken, or killed, 30l. to be levied by Distress, or for want thereof, the Offender is to be imprisoned for a Year, and set in the Pillory for an Hour. [And by 5 G. 1. ch. 15. §. 4. before Discharge, to become bound in fifty Pounds to be of good Behaviour, and not offend in like Manner. And by 10 G. 2. ch. 32. the second Offence, in any open Forest or Chase, if convicted on Indictment or Information, is Transportation for seven Years.]

Constables, Headboroughs, or Tythingmen, by a Justice's Warrant, may enter and search the Houses, or other Places, of suspected Persons; and if any Venison or Skins of Deer, or Toyls be found, they shall carry the Offender before a Justice of Peace; and if he do not give a good Account, how he came by them, or in convenient Time produce sufficient Evidence of his having bought the same, (or by 9 G. 1. ch. 22. §. 17. if it shall appear that such Venison or Skin was bought of any one who might be justly suspected of having come by it unlawfully, and he does not produce, or prove upon Oath the Name and Place of Abode of, the Party of whom he bought it) he shall be subject to the Penalties as for killing any one Deer.

[And by 5 Geo. 1. ch. 15. No Writ of Certiorari shall issue to remove Convictions or Proceedings under the above Act, unless the Party convicted give sufficient Security, in the Penalty of sixty Pounds, to the Justice, to prosecute the Writ with effect, and to pay the Forfeitures, or render the Offender, within one Month after the Conviction confirmed, or Procedendo granted, as well as Security in fifty Pounds to the Prosecutor, for Payment of full Costs and Damages within the like Time.

Persons sued for any Thing done in Pursuance of this or the above Act, may plead the general Issue, and give the special Matter in Evidence, and recover treble Costs.

A Keeper or other Officer of any Forest, &c. convicted of killing or taking any Deer, or assisting therein, without the Owner's Consent, shall forfeit fifty Pounds for each Deer, to be levied by Distress, and for want thereof, be imprisoned for three Years, and set in the Pillory for two Hours.

Persons convicted on Confession, or the Oath of one Witness before a Justice, of pulling down or destroying, or causing so to be, the Pales or Walls of any Park or Ground inclosed, where any Deer are then kept, without the Consent of the Owner, or Person chiefly intrusted with the Custody thereof, shall be subject to the Forfeitures and Penalties inflicted by the above Act for killing any one Deer.]

[And by 5 G. 1. ch. 28. Any Person convicted by Verdict or Confession, upon Indictment before Justices of Gaol Delivery, of entering into any Park or other inclosed Ground where Deer are usually kept, and wilfully wounding or killing any Deer there, without the Consent of the Owner, or Person intrusted with the Care of such Park or inclosed Ground, shall be transported for seven Years. See 9 G. 1. ch. 22. in p. 391. ante.]

[By 10 G. 2. ch. 32. If any Person armed shall come into any Forest, Chase, or Park, where Deer are usually kept, whether inclosed or not, with Intent to course, hunt, kill, wound, or take, any Deer, and shall there unlawfully beat or wound any Keeper or Page of such Forest, Chase, or Park, his Servants, or Assistants, in the Execution of their Office, and be thereof lawfully convicted, he shall be transported for seven Years. [See the old Statutes concerning Deer, of 3 Ed. 1. ch. 20. 21 Ed. 1. St. 2. 1 H. 7. ch. 7. 19 H. 7. ch. 11. 1 Ja. 1. ch. 27. 3 Ja. 1. ch. 13. 7 Ja. 1. ch. 13. and 13 Car. 2. ch. 10.]

[See 28 G. 2. ch. 19. §. 3. whereby to burn or destroy Goss, Furze, or Fern, in any Forest or Chase, without the Owner or Keeper's Consent, incurs a Forfeiture, not more than five Pounds, nor less than forty Shillings.]

By 1 Ja. 1. ch. 27. Every Person convicted on Confession, or by two Witnesses upon Oath before two or more Justices of the Peace, to have shot at, killed, taken, or destroyed, any Pheasant, Partridge, Pigeon, Mallard, Duck, Heron, Moorgame, or any such Fowl, or any Hare, with any Gun or Bow, or any Pheasant, Partridge, House-dove, or Pigeon, with Setting-Dogs and Nets, or other Engines whatsoever, or to have taken the Eggs of any Pheasant, Partridge, or Swan, out of the Nest, or to have broke or destroyed the same in the Nest, or to have traced or coursed any Hare in the Snow; or to have taken or destroyed any Hare with Hare-pipes or other Engines, shall be committed to Prison without Bail for three Months, unless he immediately pays to the Use of the Poor, where the Offence was committed, or he was apprehended, 20s. for every Fowl, Hare, or Egg, so taken, killed, or destroyed. [See 7 Ja. 1. ch. 11. whereby one Witness is sufficient to convict of taking or killing Pheasants or Partridges with Setting-Dogs, Nets, or Snares.]

By 22 & 23 Car. 2. ch. 25. Lords of Manors or other Royalties, not under the Degree of an Esquire, may by Writing under their Hands and Seals authorize Game-keepers within their Manors, &c.

to seize Guns, Dogs, and Engines for taking of the Game. And such Game-keepers, and others, may by Warrant from a Justice of Peace, in the Day-time, search the Houses of Persons prohibited to keep or use, and suspected to keep, such Guns, Dogs, or Engines, and seize them to the Use of the Lord of the Manor, or destroy them.

Persons not having an Estate of Inheritance, in their own or their Wives Right, of 100l. per Annum, or for Life, Lease, or Leases, for Ninety-nine Years or longer of 150l. per Annum clear (other than the Son and Heir apparent of an Esquire, or other of higher Degree, or Owners and Keepers of Forests, Parks, Chases, or Warrens, being stocked with Deer or Conies for their necessary Use, in respect of such Forests, &c.) are declared to be Persons not allowed to keep any Guns, Dogs, or Engines, &c.

By 4 & 5 W. & M. ch. 23. Constables, &c. by a Justice of Peace's Warrant, may, and are required, to enter and search Houses of suspected Persons not qualified; and if any Game shall be found there, the Offender shall be carried before a Justice of Peace, and if he do not give a good Account, how he came by the same, or in convenient Time produce sufficient Evidence of his having bought the same, he shall be convicted of such Offence by the said Justice, and forfeit for every Hare, Partridge, or other Game, not under 5s. nor above 20s. the one Moiety to the Informer, the other to the Poor of the Parish where, &c. (See 2 Geo. 3. ch. 19. *infra*.) and to be levied by Distress and Sale of Goods; and for want of Distress, to be committed to the House of Correction, for any Time not exceeding a Month, nor less than ten Days, there to be whipped and kept to Labour.

If any Person, not qualified by Law, do keep or use any Bows, Graybonds, Setting-Dogs, Lurchers, Ferrets, Coney-Dogs, Hays, Nets, Tunnels, Low-Bells, Hare-pipes, Snares or other Instruments for Destruction of the Game, and shall be convicted as aforesaid, he shall be subject to the Pains and Penalties aforesaid. [See 5 An. ch. 14. *infra*.]

No Persons whatsoever shall keep any Net, Angle, or other Engine for taking Fish, other than the Makers and Sellers thereof, or the Owner or Occupier of a River or Fishery. And the Owners of Rivers and Fisheries, and such as they shall authorize, may seize and keep to their own Use any such Engine, which shall be used by or in the Possession of any Person whatsoever, fishing in any River or Fishery without the Consent of the Owner or Occupier. And any Person whatsoever, authorized by a Warrant from a Justice of the Peace, may, in the Day-time, search the Houses and other Places of Persons prohibited, and suspected to have in their Custody any such Engines, and seize, and keep, or destroy the same. [See 22 Car. 2. ch. 25. For the Punishment for taking Fish in several Waters; and of Common of Piscary, B. 2. ch. 2. *ante*.]

No Certiorari shall be allowed to remove any Conviction or other Proceedings concerning any Matter in this Act, unless the Party convicted shall become bound to the Prosecutor in the Sum of 50l. with Sureties to Pay to the Prosecutor, within a Month after Conviction confirmed, full Costs and Charges, to be ascertained upon Oath.

Persons prosecuted for any Thing done in pursuance of this Act may plead the general Issue, and may recover treble Costs.

By 5 An. ch. 14. If any Higler, Chapman, Carrier, Innkeeper, Victualler, or Alehouse-keeper, (or by 28 G. 2. ch. 12. any Poulterer, Salesman, Fishmonger, Cook, or Pastry-Cook) hath in his Custody, (or by 28 G. 2. ch. 12. if any other Person, whether qualified or not, sells, exposes, or offers to Sale) any Pheasant, Partridge, Hare, Moor, Heath-Game, or Grouse, (unless such Game, in the Hands of a Carrier, be sent by some Person qualified to kill the Game) he shall be carried before some Justice for the County or Place where the Offence was committed, and upon View, or Oath of one Witness, shall forfeit for every Pheasant, &c. 5l. Half to the Informer, and Half to the Poor of the Parish where the Offence was committed, [See 2 G. 3. ch. 19. infra.] to be levied by Distress and Sale, and for want thereof to be committed to the House of Correction for three Months for the first Offence, and four Months for every other Offence.

The Conviction is to be within three Months after the Offence.

No Certiorari is to be allowed to remove the Proceedings, unless the Offender shall be bound to the Prosecutor in the Sum of 50l. with sufficient Security, on Condition to pay the Prosecutor full Costs, within 14 Days after Conviction confirmed, or Procedendo granted.

Any Person that shall destroy, sell, or buy any Pheasant, &c. and within three Months make Discovery of any such Higler, &c. so as that he be convicted of the Offence, the Discoverer shall be discharged of the Penalties in this Act for killing or selling Game, and have the Benefits given to other Informers by this Act.

If any Person not qualified shall keep or use any Dogs or Engine to kill or destroy the Game, and shall thereof be convicted by the Oath of one credible Witness by a Justice of Peace, where the Offence is committed, he shall forfeit 5l. one Half to the Informer, the other to the Poor of the Parish, [See 2 G. 3. ch. 19. infra.] to be levied by Distress and Sale, and for want thereof to be sent to the House of Correction for three Months for the first Offence, and four Months for every other Offence.

Justices and Lords of Manors within their respective Liberties may take away any such Pheasant, &c. from Higlrs or Persons not qualified, and may take away such Dogs and Engines to their own Use.

And such Lords of Manors may by Writing under their Hand and Seal empower their Game-keepers to kill any Game. But if they sell or dispose thereof without Consent of their Lord, and shall be convicted, upon Complaint of such Lord, and upon the Oath of one credible Witness, before a Justice of Peace, they shall be committed to the House of Correction for three Months to be kept to hard Labour.

By 9 An. ch. 25. The Statute of 5 An. ch. 14. is made perpetual: But

No Lord of a Manor shall appoint more than one Game-keeper in one Manor with Power to kill Game. His Name must be entered with the Clerk of the Peace; if not entered, or not otherwise qualified by Law to kill Game, and yet shall destroy any Pheasant, Partridge, Hare, &c. or if any Game-keeper or other Person, not qualified in his own Right, shall sell or expose to Sale any Pheasant, &c. he shall incur such Forfeitures and Penalties, as are inflicted by 5 Ann. on Higlrs, Carriers, &c. for buying or selling Game; such Forfeitures to be recovered as by that Act.

If

If any Pbeasant, &c. shall be found in the Possession of any Person, not qualified in his own Right to kill Game, or intitled thereto under some Person so qualify'd, the same shall be adjudged an Exposing to Sale.

Destroying such Game in the Night-Time, is made subject to the like Forfeitures and Penalties.

Driving and taking by Hays, Tunnels, or Nets, any Water-Fowl, betwixt the 1st of July and the 1st of September, [between the 1st of June and 1st of October by 10 G. 2. ch. 32. §. 10.] is a Forfeiture of 5s. for every Fowl, on Conviction, upon the Oath of one credible Witness before a Justice of Peace; one Moiety to the Informer, the other to the Poor of the Parish, [See 2 G. 3. ch. 19. infra.] to be levied by Distress and Sale, and for want of Distress, to be committed to the House of Correction for any Time not exceeding a Month, nor less than 14 Days; there to be whipped, and kept to hard Labour; and the Justice shall cause the Hays, Tunnels, and Nets to be destroyed in his Presence.

By 3 Geo. 1. ch. 11. No Lord of a Manor shall appoint any Person to be a Game-keeper, with Power to kill or take any Game, unless such Person is qualify'd according to Law, or be truly a Servant to such Lord, or be immediately employed to kill the Game for the sole Use of such Lord, and not otherwise: And no Lord shall authorize any Person not qualify'd by Law, to take or kill Game, or to keep any Dogs, or any Engine to kill Game; and any Person not qualify'd, or not truly a Servant, or not immediately employed to take or kill the Game as aforesaid, who, under Colour or Pretence of a Deputation granted to him, shall take or kill Game, or keep or use any Dog or Engine to kill or destroy Game, shall incur such Forfeitures and Penalties, as are inflicted by 5 Ann. ch. 14. and 9 Ann. ch. 25.

[By 8 G. 1. ch. 19. Persons liable to any pecuniary Penalties, for Offences against the Laws for the Preservation of the Game, may be sued for the same by any other Person, by Information before a Justice, or by Action or Information in any of the Courts at Westminster, wherein the Plaintiff shall have double Costs. And

By 26 G. 2. ch. 2. Such Actions, &c. may be brought before the End of the second Term, after the Offence committed.

But by 2 G. 3. ch. 19. Such Actions, &c. may be brought or exhibited within six Months after the Fact committed.

And the Whole of such pecuniary Penalties, recovered by Action or Information in any of the Courts at Westminster, shall be to the sole Use of the Prosecutor, with double Costs, and no Part to the Poor of the Parish.

And no Person shall, upon any Pretence whatsoever, take, kill, destroy, carry, sell, buy, or have in his Possession or Use, any Partridge, between the 12th of February and 1st of September, or any Pbeasant, between the 1st of February and 1st of October, or any Heath Fowl, commonly called Black Game, between the 1st of January and 20th of August, or any Grouse, commonly called Red Game, between the 1st of December and 25th of July, in any Year, (except Pbeasants, taken in the Season allowed by this Act, kept in Mews or Breeding Places) upon the Forfeiture of 5l. per Bird to the Prosecutor, upon Conviction by the Oath of one credible Witness; and such Penalty may be sued for and recovered, with full Costs of Suit, in any of the Courts at Westminster.]

See 11 H. 7. ch. 17. Concerning the Forfeiture of 10*l.* for taking Pheasants or Partridges with Engines, and killing or taking away Hawks. 15 H. 8. ch. 10. Concerning the Forfeiture of six Shillings and eight Pence for tracing or killing a Hare in the Snow. 23 El. ch. 10. For taking or killing Pheasants and Partridges in the Night; under the Forfeiture of 20*s.* for every Pheasant; and 10*s.* for every Partridge; and the Forfeiture of 40*s.* for Hawking or Hunting with Spaniels in standing Corn. And see *Burn's Justice*, Title *Game*, per *Totum*.

8. Concerning the Destruction of Corn, Wood, &c.

By 43 El. ch. 7. If any shall be convicted by his own Confession, or one Witness upon Oath, before one Justice of the Peace, to have cut or taken away any Grain growing, robb'd any Orchard or Garden, broken any Hedges, Pales, or other Fences, [See 5 Geo. 1. ch. 15. under the last Title] cut or pulled up any Trees, to the Intent to take the same away, cut or spoiled any Woods, Pales, or Trees standing (not being Felony) [or any Bark or Bast of Trees, Gates, Stiles, Posts, Broom, or Furze, by 15 Car. 2. ch. 2.] or been accessory thereto, he shall pay the Damages, or be committed to the Constable, to be whipp'd.

[And by 15 Car. 2. ch. 2. Any Officer or Inhabitant of the Place may apprehend any suspected Person, having or carrying any Kind of Burthen or Bundles of Wood, Bark, &c. and any Officer, by Warrant under the Hand and Seal of a Justice, may enter and search the Dwelling-house, or other Place belonging thereto, of suspected Persons, and carry such suspected Person, so conveying Wood, &c. or found to have Wood, &c. upon such Search, before a Justice, and such suspected Person, not giving a satisfactory Account how he came by the same, or not producing, within convenient Time, the Person of whom he bought the same, or some credible Witness of the Sale thereof to the Offender, shall be convicted, and suffer the Pains and Penalties inflicted by 43 El. and this Act. And,

For the first Offence against this Act, the Offender shall, besides paying the Damages to the Owner, also pay a Sum (not exceeding ten Shillings) for the Use of the Poor of the Parish, or in Default thereof, be committed to the House of Correction for a Time not exceeding one Month, or be whipped by the Constable: For the second Offence, shall be committed to the House of Correction for one Month, there to be kept to hard Labour; and for the third Offence, shall be deemed an incorrigible Rogue.

And one Justice of the Peace may hear and determine on any Charge of Buying stolen Wood, &c. and award the Buyer to pay treble the Value to the Owner, to be levied by Distress and Sale, or for want thereof, commit the Party to Gaol for one Month.

No one to be punished by this Act, unless he be questioned within six Weeks after the Offence committed.]

[See 22 & 23 Car. 2. ch. 7. §. 5. Whereby treble Damages to be recovered by Action, are given against Persons destroying Plantations of Trees, or throwing down Inclosures in the Night; and 13 G. 2. ch. 21. whereby treble Damages and full Costs are given against Persons maliciously drowning Coal-Pits.]

By 1 Geo. 1. St. 2. ch. 48. If any Person shall maliciously destroy, or bark, spoil, or break down, any Timber-Trees, Fruit Trees,

or other Trees, (or break open, throw down, or destroy any Hedge, Gate, Ditch, or other Inclosure of such Woods, Plantations, or Trees, by 6 G. 1. ch. 16.) the Persons damaged shall receive Satisfaction from the Inhabitants of the Parish, to be levied as by 13 Ed. 1. St. 1. ch. 46. for Hedges and Ditches overthrown, (unless the Offender be convicted by such Parish in six Months, by 6 G. 1. ch. 16.) And any two Justices on Complaint shall commit the Offender to the House of Correction for three Months, to be kept to hard Labour (or to Gaol for four Months, where no House of Correction is within the District) and to be whipp'd every Month, and before Discharge, to find Sureties for good Behaviour for two Years. [See 29 Geo. 2. ch. 36.]

These are the chief Offences against Publick Trade. [Besides which, as it concerns Trade in general, it may be proper to take Notice of 23 G. 2. ch. 13. Whereby

Persons, convicted of seducing Artificers in the Manufactures of Great Britain out of the Dominions of Great Britain, shall forfeit five hundred Pounds, and be imprisoned for twelve Months, and until such Forfeiture is paid; and for the second Offence, one thousand Pounds, and two Years Imprisonment; Prosecution to be within twelve Months after Offence. (See 5 G. 1. ch. 27.)

And Persons exporting Tools or Utensils used in the Woollen or Silk Manufactures, to any Place not in the Dominions of Great Britain, shall forfeit the same, and two hundred Pounds, and the Captain of the Ship one hundred Pounds, to be recovered by Action.]

4. There are Offences against the Health and Ease of the King's People, which are Nuisances (from Nuis, to Hurt) of several Sorts and Kinds.

A Nuisance, particularly so call'd, is where one incroaches on the King's Land, or the Highways, or common Rivers, or common Streets of a City, &c. endeavouring to make that private which ought to be publick. But these are also accounted Nuisances, (viz.) When one erecteth a Wall, or doth any Thing upon his own Ground, to the unlawful Hurt or Annoyance of his Neighbour; or maketh Annoyances upon common Ways, by Logs, Blocks, Hedges, Gates, Dunghills, Pales, Ditches, Carrion, by stopping or turning Waters out of their right Course, or straitning the Passages, and sometimes a Nuisance may be committed by neglecting to do a Thing, which the common good requires, or by Suffering or not Suffering.

Nuisances are either publick, common, or private. Publick, against the whole Kingdom; common, against all that pass that Way; private, against a particular Person, as to his House or Mill. But Nuisances are usually divided into common or private Nuisances only. Common, such are Annoyances in Highways, Bridges, and publick Rivers; disorderly Ale-houses, Bawdy-houses, Gaming-houses, Stages for Rope-Dancers, Mountebanks, Brewing-houses, and Melting-houses for Candles, erected in inconvenient Places, Cottages and Inmates. [See the Statute, *infra*.] Common Scolds, Eaves-droppers. Private, such are Nuisances by stopping up the Light of another's House, building a House so near to mine, that the Rain which falleth from that House, falleth upon mine. This may be justified by Custom in London, by building on the old Foundation

Of Offences
against the
Health and
Ease of the
King's People.
2 Inst. 272.
2 Roll. Abr.
83; 137, &c.
Hawk. P.C.
B. 1. ch. 75.
See p. 318.

2 Inst. 406.

3 Inst. 201.
9 Rep. 54, 58.
5 Rep. 101.
Danv. Abr.
173, 174.
2 Ld. Ray.
1163.

to any Height. Every Man must have Light and an wholesome Air. Therefore, if a Lime-kiln is built so near to me, that the Smoke thereof is offensive to me; or if a Hogsty is built so near to me, that the Smell is ungrateful or infectious; it is a Nufance, and an Action lieth.

* 5 Rep. 73.
1 Inst. 56. a.
1 Roll. Abr.
391.
1 Vent. 208.

There must be an *Indictment* at the Suit of the King for all common and publick Nufances, Incroachments, Purprestures, and all Annoyances upon Highways, tho' it is but a common Footway; and the Party may be fined and imprisoned. For here no one shall have an Action of the Case; for the Law avoideth Multiplicity of Suits; because if one might have an Action, all Men might have the like. Therefore the Indictment must be *Ad Commune Nocumentum Omnium Ligeorum Domini Regis*, not to the Damage of private Persons, or to Inhabitants of such a Town, &c. Upon which Account, if a private Way is straitned, there can be no common Nufance.

b 2 Cro. 382,
490.

2 Roll. Abr.
138, 139.
Contra,

5 Rep. 104.
1 Cro. 548.

* 1 Inst. 56. a.

5 Rep. 73.
Comy. 58.

A new Dove-house erected cannot be a common Nufance, or be indicted as such, [but see 18 Ed. 2. the Statute for *View of Frank-pledge*] tho' perhaps the Owner may be liable to an Action of the Case at the Suit of the Lord of the Manor, for erecting such a House without his Licence, to the Prejudice of his Dove-house. For common Nufances the Law hath provided an apt Remedy in the Turn or Leet. But if one has a particular Damage, as if he and his Horse fall into a Ditch, that is made overthwart the Way, he may have an Action of the Case for his particular Damage upon a common Nufance. ^d An Indictment will not lie for a private Nufance; but one may bring his *Action* for it, to recover Damages, and to have Judgment, that the Nufance should be removed. But both in publick and private Nufances one may justify the Removing of them himself.

* 5 Rep. 101.

9 Rep. 54.

55.

2 Roll. Abr.

83, 84, 144.

145.

Finch 18.

See B. 4. ch. 3.

§. 3. and B. 4.

ch. 4. §. 1.

post.

A common Scold (*Communis Rixatrix*) is a common Nufance, and is punishable by being put in a Ducking-stool.

There are some Nufances punished by *Statutes*; as Nufances in Highways, by disorderly Ale-houses, Cottages, Fireworks, unwarrantable Undertakers by publick Subscriptions, &c.

1. Of Highways.

[See the Statutes concerning Highways, B. 1. ch. 7. ante. Tit. Surveyors of Highways.]

* H. P. C.

146.

Dalt. ch. 7.

P. 33, 44.

2. Nufances relating to *Inns* and *Ale-houses*, are where the Keeper of them usually and knowingly harbours Thieves, idle Rogues, and Vagabonds, or suffers frequent Disorders in his House, or where one sets up a new Inn or an Ale-house, where there is no Occasion for one, or in an improper or blind Place in a Town, or remote from any Town. At the Common Law the Keeper of such a House may be indicted and fined.

It is not fit, that Bailiffs or Serjeants should be allowed to keep such Houses. [See 22 & 23 Car. 2. ch. 20. §. 9.]

* 8 Rep. 32.

9 Rep. 87.

Dalt. ch. 7.

P. 30.

The true Use of Inns and Alehouses is for Lodging and Relief of Travellers. [See 1 Ja. 1. ch. 9.] Therefore if an Inn-keeper or Ale-house-keeper refuses to lodge a Traveller, or to find him

* *Infinutum in jure reprobatum.* 2 Inst. 340, 597. 4 Inst. 115. 7 Rep. 45. Victuals

Victuals for his Money, he may be indicted, or the Party may have an Action of the Case against him.

* At Common Law it was lawful, for any Person, to erect an Inn without Licence, to receive Travellers. But as Ale-houses multiplied, and were too often used to disorderly Purposes, ^{so several Statutes were made for the Regulation or Suppression of them; which Statutes generally concern the Granting of Licences to them, the Punishment of Disorders in them, or the Duty of Officers in putting those Statutes in Execution against them. Inn-keepers are equally concerned in those Statutes with Ale-house-keepers, except as to the Licence. For an Inn-keeper is not required to have a Licence; the keeping of an Inn being no Franchise, but a lawful Trade. But for Disorders in the House an Inn may be suppressed, as well as a common Ale-house: [And Inn-keepers are expressly named in the late Acts for granting Licences; and certainly if they sell Wine, Ale, or spirituous Liquors, they must have a Licence, as well as other Sellers of those Liquors by Retail.]}

Concerning *Inn-keepers* See 21 *Ja. 1. ch. 21.* and for Licencing of *Ale-houses, &c.* See 5 & 6 *Ed. 6. ch. 25.* 3 *Car. 1. ch. 3.* 2 *G. 2. ch. 28.* 25 *G. 2. ch. 36.* 26 *G. 2. ch. 13 & 31.* 28 *G. 2. ch. 19.* 29 *G. 2. ch. 12.* For Punishment of Disorders in Inns and Ale-houses, See 1 *Ja. 1. ch. 9.* 4 *Ja. 1. ch. 5.* 7 *Ja. 1. ch. 10.* 21 *Ja. 1. ch. 7.* 1 *Car. 1. ch. 4.* 30 *G. 2. ch. 24.*

3. ^d Cottages are esteemed to be Nests for Idle Persons, Thieves, Stealers of Wood, &c. and prejudicial to the Education of Youth. Therefore,

By 31 *El. ch. 7.* No one must build or convert a Building to a Cottage for Habitation, unless he lay to it four Acres of freehold Land of Inheritance, to be occupied with it; in Pain to forfeit 10 *l.* to the King for every Erection or Conversion, and 40 *s.* a Month, so long as he continues the same.

And no Owner or Occupier of any Cottage shall suffer any Inmates, or more Families than one, to inhabit therein, in Pain to forfeit to the Lord of the Leet 10 *s.* a Month.

Hence we may observe that a Cottage (*Sax. Cote*) is a little House for Habitation, without any Land belonging to it.

This Statute does not extend to Houses that are Copyhold. But four Acres of Ground holden by Copy, or for Life or Lives, or for any Number of Years, will not be sufficient, to make it a lawful Cottage. And the four Acres in Fee-simple or Fee-tail must lie near the Cottage, and be occupied therewith, so long as the Cottage shall be inhabited.

Neither does this Statute extend to Cottages in Cities, Boroughs, or Market-Towns, or to those provided for Labourers in Mines, Quarries, or for Sea-faring Men, or for a Keeper or Warrener, so long as they dwell therein; or to Cottages theretofore made, and inhabited by a Shepherd or Herdsman, or poor and impotent Persons; nor to Cottages tolerated by Order of the Justices of Assize, or of the Peace. And Justices of the Peace may also, with the Consent of the Lord, order Houses to be built on the Waste for the Poor to inhabit, and place Inmates or more Families than one in a Cottage. By 43 *El. ch. 2.*

* Kitch. 92.

* 1 Str. 405.
Contra.

* 2 Inf. 740.

That Branch of the Statute concerning *Inmates*^a, extendeth to Cottages only, and to Cottages having four Acres of Ground, or more laid to them, as well as to others having no Ground at all; as also to *Inmates* in Cottages^b in any City, Borough, or Market-Town. [24.] For crowding in one House may be very dangerous in Time of Infection. ^c Cottages cannot by this Statute be pulled down; yet the Execution of the Penalty will work the desired Effect.

New erected Cottages within the Memory of Man, though they have four Acres of Ground laid to them, ought not to common in the Wastes of the Lord.

4. Of Fireworks.

By 9 & 10 W. 3. ch. 7. To make or sell any Fire-Works, as Squibs, &c. or to permit any Fire-works to be cast out of his House, or Place of Habitation, into any publick Street, Highway, Road, or Passage, or to throw, or to be assisting in throwing, any Fire-Works in or into any Street, House, Shop, River, Highway, Road, or Passage, is a common Nuisance.

Any Person, who shall make, sell, give, or utter, any Fireworks or Cases or Implements for making the same, shall, upon Conviction, by Confession, or the Oath of two Witnesses, before a Justice, forfeit five Pounds; or who shall suffer any Fire-works to be thrown from his House, Shop, or Lodging, or any Place thereto belonging or adjoining, shall forfeit twenty Shillings, to be levied by Distress and Sale. And any Person who shall throw or fire any Fire-works, or aid or assist therein, in or into any publick Street, House, Shop, River, Highway, Road, or Passage, shall forfeit twenty Shillings, and upon Non-payment immediately on Conviction, shall be sent to the House of Correction, to be kept to hard Labour for any Time not exceeding one Month, unless he shall sooner pay such Forfeiture.

5. Of unwarrantable Undertakers by publick Subscriptions, &c.

See p. 423.
and.

By 6 Geo. 1. ch. 18. (commonly called the Bubble Act) All unwarrantable Undertakings by publick Subscriptions, Receipts, Assignments, Transfers, &c. are deemed publick Nuisances.

This is a Summary of our Criminal Laws or Pleas of the Crown, and an Account of the Punishments for Offences, whether Capital or not Capital. It would be endless to mention every small Offence, that is punishable by a Justice of Peace, &c. I proceed therefore to the fourth and last Object of our Laws.

The End of the Third Book.

BOOK

BOOK IV.

Of the Courts of Justice, or Jurisdiction
of Courts.

CHAP. I.

Of a Court, and of the several *Kinds* of Courts, which are of the *largest Extent*, (*viz.*) The *Parliament*, The *Privy Council*, The Court of the *Lord High Steward*, The *Chancery*, The *King's Bench*, The *Common Pleas*, The *Exchequer*, The Court of the *Constable and Marshal*, The *Admiralty*, The Court by *Commission by Virtue of 28 H. 8.* The *Affizes*, The *Quarter-Sessions*, The *Sheriff's Turn*, The *County-Courts*, *Hundred-Courts*, *Courts-Leet*, *Courts-Baron*, *Antient Demefne Courts*, The Courts of *Coroners*, The Courts of *Clerks of the Markets*, *Pie-powder Courts*, Of the Courts of the *Commissioners of Sewers*, *Commissioners of Bankrupts*, *Commissioners for Examination of Witnesses*, *Forest-Courts*, The *Ecclesiastical Courts*, or Courts *Christian*.

THE *fourth Object* of our Laws are the Courts of Justice, Of the Courts for the Relief of Persons that are injured, for the Security of their Estates, and for the Punishment of Crimes, and Offences committed by them. I purpose to treat of these Courts in the five following Chapters. The *first* whereof shall describe what is a Court, and the several *Kinds* of our Courts, which are of the *largest Extent*, that have Power throughout *England*, and are not confined to one particular County or Precinct. The *second* shall set forth the Courts that are *particular, limited, or exempt Jurisdictions*. The *third* shall shew, what *Remedies* there may be *without Suit* in Court. The *fourth* shall describe in *General* the *Proceedings* in *civil Causes*; and the *fifth* the *Proceedings* in *Causes criminal*.

The

^a 6 Rep. 11. ^a The King may create a Court of Law, and appoint Judges in it.

^b 1 Inst. 58. a. A Court (*Curia à Curâ*) ^b is a Place where the Power of the Law is judicially administred. *Jurisdiction* is the Right by which that Power is administred. ^c To usurp a Jurisdiction, and by Colour thereof to imprison another, is punishable. [See *Mag. Chart. ch. 29.*] All the Courts of Judicature are called the King's Courts, as all our Laws are called the King's Laws. And these Courts are either of Record or not of Record.

^d 1 Inst. 117. b. A Court of ^d Record is that which hath Power to hold Plea according to the Course of the Common Law, of real, personal, and mixt Actions, where the Debt or Damages amount to 40 s. or above, and of Trespasses *Vi et Armis*; and whose Acts and Memorials are in Parchment. The Rolls being the Memorials of the Judges, are of such uncontrollable Credit, that they admit of no Averment, Plea, or Proof to the contrary, inasmuch that they are to be tried only by themselves. † For otherwise there would be no End of Controversies. But yet, during the Term wherein any judicial Act is done, the Roll is alterable in that Term, as the Judges shall direct. When the Term is past, then the Record admits no Alteration, Averment, or Proof that it is false in any Instance. To a Grant by Letters Patent under the Great Seal, you cannot plead that there is *no such Record*; but as it is in the Nature of a Conveyance, one may deny the Operation of it, and plead *Non Concessit*, and prove that the King had nothing in the Thing granted, &c. If the Judges do err, a *Writ of Error* lieth only from a Court of Record. These Courts of Record are created by Parliament, Letters Patent, or Prescription.

^e 1 Inst. 117. b. A Court ^e not of Record is either, where it cannot hold Plea of Debt or Trespass, if the Debt or Damages amount to 40 s. or of Trespasses *Vi et Armis*; or where the Proceedings are not according to the Course of the Common Law, and where the Acts of Court are not inrolled in Parchment; as in the County-Court, Hundred-Court, Court-Baron, Ecclesiastical Court. Here the Proceedings may be denied, and tried by a Jury; and upon the Judgments of such Courts a Writ of Error lieth not, but a Writ of *false Judgment*, or an *Appeal*.

^f 8 Rep. 38. ^f Note, That a Court, that is not of Record, cannot impose a Fine, or imprison.

^g 11 Rep. 43. Some Courts may fine, but not imprison; as the Leet. Some may imprison but not fine; as the Constables at the Petit-Sessions, for an Affray made in Disturbance of the Court. Some Courts cannot fine or imprison, but amerce; as the County-Court, Hundred-Court, Court-Baron. Some Courts cannot fine, imprison, or amerce; as the Ecclesiastical Courts. But the Courts of Record at *Westminster*; or elsewhere, may fine, imprison, and amerce, as the Case requires.

^h *Nemo potest contra recordum verificari per patriam.* 2 Inst. 380.

ⁱ *Recorda sunt veritatis et vetustatis vestigia.* 1 Inst. 118. a.

^j *Expedit republicæ ut sit factum huius.* 1 Inst. 303. b. 6 Rep. 45.

Some

* Some Jurisdictions are Ecclesiastical, some Temporal. Of these some be primitive or without Commission, some derivative and delegated by Commission; some to inquire, hear, and determine, some to inquire only; and some are guided by one Law, and some by another.

In every Court there must be a *Judge, Plaintiff* and *Defendant. Serjeants, Counsellors, Registers, Attornies, &c.* may be Assistants.

A *Judge* is a Person appointed by publick Authority with Jurisdiction. To him it belongs especially to judge what is a *reasonable Time, Custom, Fine, &c.* and not to a Jury. He cannot be excepted against or challenged, or regularly have an Action brought against him for what he doth as Judge. [But see *Car. 2. ch. 2. §. 12.* or the *Habeas Corpus Act.*] But he ought not to be Judge in his own Cause, except in Case of Necessity. He is to be of Counsel with Prisoners. And in all Cases the King doth judge by his Judges. [See *18 Ed. 3. St. 4.* and *20 Ed. 3. ch. 1.*]

The *Plaintiff* (*Querens, Actor*) is he that calls the Defendant to Trial. In some criminal Causes he is called the *Informor*. The *Defendant* (*Defendens, Reus*) is he against whom the Action or Information is brought.

A *Serjeant at Law*, (*Serviens ad Legem*) *Serjeant Counter* or *Serjeant of the Coif*, is the highest Degree taken in the Law, that of a Doctor in the Civil or Canon Law. He is the chief Advocate or Patron of Causes, and is supposed to be the most experienced in the Law and Practice of the Courts. One Court, (*viz.*) The *Common Pleas* is set apart for Serjeants only to plead; yet they may also plead in other Courts. These are made by the King's Writ directed unto them, commanding them upon great Penalty to take upon them that Degree by a certain Day. But if one refuses, he cannot be fined more than once. They shall be impleaded only in the *Common Pleas*, as some say; but others insist that they may be sued in any of the Courts at *Westminster*, and that if they are sued in any Court *elsewhere*, they may plead their Privilege, to be sued only there. [See their Oath, *2 Inst. 214.*] Of these one or more are especially called the *King's Serjeants*, to plead for him in all Causes. [See their Oath, *Ibid.* and see *West. 1. ch. 29.*]

A *Barrister* (heretofore called an *Apprentice of the Law*) is a Counsellor learned in the Law (*Counsel* being taken for Advice and Direction in Law) admitted to plead without the Bar, and there to take upon him the Protection and Defence of his Client. He is admitted to this Degree without Oath. [See *West. 1. ch. 29.*] It has been questioned, whether an Action of Debt doth lie for a Counsellor for his Fees against the Party that retained him. For his Fee is

* *Derivativa potestas est ejusdem jurisdictionis cum primitiva.* 2 Inst. 71. Noy's Max. 4. Finch 11.

In presentia majoris cessat potestas minoris. 2 Inst. 26, 166. 4 Inst. 7. 9 Rep. 118.

* *Aliquis non potest esse judex et pars.* 1 Inst. 141. a.

Aliquis non potest esse judex in sua propria causa. Ibid. 2 Inst. 103. 8 Rep. 118.

* *Actori incumbit onus probandi.* 4 Rep. 71.

Honorarium quiddam, not mercenarium, as that of an Attorney or Solicitor. Certainly if it is upon a special Retainer, the Action will lie. A Barrister who constantly attends the King's Bench, &c. ought to have the Privilege of being sued in all transitory Actions in Middlesex.

^a 2 Ld. Ray.
1556.
² Str. 822.
S. C.

^b Terms of
the Law, v.
Preignotary.
^c Finch 227.
228.

A Register is he that takes the Minutes and Acts of the Court, and enters all the Proceedings. He goes under several Names in Courts, as ^b Preignotary, Proto-Notary, Clerk, Steward. Any Error that appeareth to the Court to be the Clerk's Misprision or Mistake, may be amended at any Time. [See 14 Ed. 3. St. 1. ch. 6. 9 H. 5. St. 1. ch. 4. 4 H. 6. ch. 3. 8 H. 6. ch. 12 & 15. 27 El. ch. 5. 4 An. ch. 16. 9 An. ch. 20. §. 7. and 5 Geo. 1. ch. 13.]

^d Inst. 31. b.
^e Inst. 215.
Terms of the
Law, v. At-
torney.

^f Terms of
the Law, v.
Attorney.
^g Inst. 117.
^h Vent. 1.

An Attorney at Law is he that at the Request of another stands in his stead or turn, to manage his Cause for him; his Warrant (or Proxy) implies it. His Duty is to follow the Advice of the Serjeants and Barristers that are retained in the same Cause, and to carry on the practical Part of it. An Attorney is either general or special. A general Attorney is he that is appointed by a general Authority, to manage all Affairs or Suits; as the Attorney General of the King; who is usually one of the most learned of the Barristers. He and the Solicitor General are made by Letters Patent *Quam diu se bene Gesserint*. [Qu. if not during Pleasure only.] A special Attorney is he that is employed in one or more Causes. There are also in several Courts Attornies at large, and Attornies

ⁱ F. N. B. 25.
Terms of
the Law, v.
Attorney.
^j Inst. 249.

special belonging to one Court only. By the Common Law no one could appear by Attorney without the King's Writ or Letters Patent; but was forced to follow his Suit in Person, by Reason whereof there were but few Causes in our Courts. But since several Statutes have provided, that it shall be lawful to appoint an Attorney, without any such Authority to enable him. One cannot make an Attorney irrevocably; for such an Authority is of its own Nature revocable.

^k 8 Rep. 82.

[See West. 1. ch. 20. Against deceitful Practice. 4 H. 4. ch. 18. 3 Ja. 1. ch. 7. 2 G. 2. ch. 23. 22 G. 2. ch. 46. For regulating and restraining the Number of Attornies: And 18 H. 6. ch. 9. 32 H. 8. ch. 30. 18 El. ch. 14. 4 An. ch. 16. Of filing Warrants of Attorney.]

By 3 Ja. 1. ch. 7. An Attorney, Solicitor, or Servant to any, shall not be allowed any Fees laid out for Counsel or otherwise, unless he hath Tickets thereof signed by the Hand of them that receive such Fees.

He shall also give unto his Client true Bills of all Charges of Suit under his own Hand, before he can charge his Client with the Payment thereof.

[And by 2 G. 2. ch. 23. §. 23. He shall not commence any Action for his Fees till one Month after Delivery of his Bill, wrote in a legible Hand, and in English, (except Law Terms and Names of Writs) and in Words at length (except Times and Sums.)]

If he delays his Client's Cause for Gain; or demands by his Bill more for Disbursements than he hath laid out, the Client shall have his Action against him, and recover therein Costs and treble Damages; and he shall be for ever after disabled from being an Attorney or Solicitor.

An Attorney shall not admit any other to follow a Suit in his Name, in pain that each of them shall forfeit 20*l.* to be divided betwixt the King and the Party grieved.

[And by 2 G. 2. ch. 23. §. 17. Attornies permitting others, not being sworn Attornies or Solicitors of some other Court, to act in their Names, (or by 22 G. 2. ch. 46. practising as Agents for Persons not qualified, or permitting Persons not qualified to act in their Names at any General or Quarter-Sessions of the Peace, besides forfeiting 50*l.*) shall be incapable of acting as Attornies from thenceforth, and their Admission shall be void.]

[See 7 & 8 W. 3. ch. 24. Which requires all Practicers of the Law to take the Oaths to the Government (the Form of which, as now altered, see in 1 G. 1. St. 2. ch. 13.) and to subscribe the Declaration under the Penalties and Forfeitures in the Statute of *Præmunire* of 16 Rich. 2. ch. 5. which Oaths and Declaration are by 9 G. 2. ch. 26. to be taken and made within six Months after entering upon such Practice.]

An Attorney may be a Solicitor for his Client in other Courts as well as in the Court where he is Attorney; and a Promise to pay him for it is lawful: but in this Case he cannot sue for his Fees without a special Promise; as he may upon a general Retainer in the Court, where he is an allowed Attorney. [But by 2 G. 2. ch. 23. §. 10. an Attorney or Solicitor may practice in other Courts than where admitted, in the Name of an Attorney or Solicitor of that Court, with his Consent in Writing.] Also a Solicitor of inferior Rank, who solicits Causes for his Clients, may take Recompence, and take a Promise to be repaid what he shall lay out. But if he retains an Attorney to prosecute a Suit for his Client in the Court where he is allowed, and undertakes to pay him his Fees: In this Case an Action of Debt lies against the Solicitor for the Fees, and Expenses disbursed in the Suit; for the Contract was made betwixt the Attorney and Solicitor, not in the Name of his Client.

An Attorney hath a Privilege to sue and to be sued only in that Court at *Westminster*, of which he is admitted. But he shall not have this Privilege, after he has left off Practice, or in an Action brought against himself and his Wife, or when he is sued jointly with others. If an Attorney is Executor or Administrator, he shall not be allowed his Privilege. He shall not be forced to put in special Bail; for though he is an Attorney at large, he hath the same Privilege with the Clerks of the Court; and is supposed to appear *de die in diem*.

[See the Oaths to be taken by Attorneys and Solicitors, and of their Admission, Inrolment, &c. in the several Acts for Regulation of Attornies and Solicitors of 2 Geo. 2. ch. 23. 6 Geo. 2. ch. 27. 12 Geo. 2. ch. 13. and 22 Geo. 2. ch. 46. and see 12 Geo. 1. ch. 29. in p. 430. ante.]

There are inferior Officers likewise attendant upon every Court. In the higher Courts at *Westminster*, the Sheriff of every County is supposed to be present, to execute the King's Writs; and the Ordinary is their Officer for Matters Spiritual; as to certify Excommunication.

The Courts of Justice are open four Times in every Year, called *Term Time*; during which Time the Causes are dispatched. One is called *Hilary Term*, and begins the 23d of January and endeth the

1 Cro. 475.

459.

3 Cro. 159.

160.

1 Roll. Abr.

17.

2 Cro. 520.

1 Roll. Abr.

17. 593. 594.

1 Vent. 299.

Hob. 177.

3 Lev. 298.

1 Ld. Ray.

342. 533.

2 Str. 1141.

the 12th of February following; this hath four Returns. The second is *Easter Term*, which begins the *Wednesday* Fortnight, or seventeen Days after *Easter Day*, and ends the *Monday* next after *Ascension Day*, and hath five Returns. The third is *Trinity Term*, beginning the *Friday* next after *Trinity Sunday*, ending the *Wednesday* Fortnight after, and hath four Returns. [See 32 H. 8. ch. 21.] The fourth is *Michaelmas Term*, which begins on the 6th of November, and ends the 28th of November, and hath four Returns. [See 16 Car. 1. ch. 6. 24 Geo. 2. ch. 48.]

But Note, That if either the Return Day, or first or last of the Term falls upon the Lord's Day, or *St. John Baptist*, then the Day following is taken instead of it.

¹ Inst. 135. a. ² Inst. 264, 265. In all these Terms there are *Dies non Juridici* (viz.) The Lord's Day throughout the whole Year; in *Easter Term*, *Ascension Day*; in *Trinity Term*, *St. John Baptist*, when it falls in that Term; in *Hilary Term* the Day of the *Purification* of the *Virgin Mary*.

The rest of the Year is call'd the *Vacation*.

¹ Id. Ray. 1557. N.B. The Courts will judicially take Notice of the Beginning and End of the Terms, as well moveable as immoveable.

But the High Court of Parliament, the Privy Council, the Court of the Lord High Steward, and several inferior Courts, do not observe these Terms. Neither is the High Court of Chancery confined to them. But the Courts of the King's Bench, Common Pleas, and Exchequer (the highest Courts at Common Law) are confined to them.

The *Essoine Day* (from *Essoine* or *Exonnie*, *Excuse*) is regularly the first Day of the Term, but the fourth Day after is allowed of Favour, tho' every Term is to be accounted but as one Day to many Purposes; and therefore a Plea or Judgment on the last Day of the Term is as effectual, as on the first Day of Term.

Hilary and *Trinity* Terms are *issuable* Terms; because in those Terms the *Issues* (or Facts to be tried) are joined, and the Records made up, that they may be tried at the *Affizes*; which respectively follow each of these Terms.

Now there are several Courts, and several Sorts of them, whose Jurisdiction extends, or which are dispersed, throughout the Kingdom, (viz.) The Parliament, The Privy Council, The Court of the Lord High Steward, The Courts of Chancery, King's Bench, Common Pleas, Exchequer, Of the Constable and Marshal, The Admiralty, The Court by Commission by Virtue of 28 H. 8. The *Affizes*, The *Quarter-Sessions*, The *Sheriff's Turn*, The *County-Courts*, *Hundred-Courts*, *Courts-Lect*, *Courts-Baron*, *Antient Demesne Courts*, The Courts of the Coroners, Clerks of the Markets, *Pie-Powder Courts*, The Courts of Commissioners of Sewers, Bankrupts, and for Examination of Witnesses, The *Forest-Courts*, The *Ecclesiastical Courts* or *Courts Christian*.

Of the Parliament.

¹ Inst. 109. b.

110. a.

4 Inst. 1. 2.

1 Ventr. 324.

325.

I. The Parliament (from *Parler la ment*, to speak the Mind sincerely) is the highest, most honourable, and most absolute Court of Justice, consisting of the King and the three Estates. The Lords Spiritual (two Archbishops and twenty-four Bishops, who are called by Writ, and sit there by Succession in respect of their Baronies Parcel of their Bishopricks) are the first Estate. The Lords Temporal (Dukes, Marquisses, Earls, Viscounts, and Barons, who sit in Parliament

Parliament in respect of their Descent or Creation) are the *second Estate*. Every one of which, being of full Age, ought to have a Writ or Summons. The *Commons* are the *third Estate*, whereof there are Knights of Shires, Citizens of Cities, and Burgessees of Boroughs. These are elected to this Office by the People, [and a Person having an undoubted Right to vote in any such Election, whose Vote is refused by the returning Officer, may have an Action on the Case ² *Ld. Ray.* against such Officer] these represent all the Commons of *England*, ^{938.} every Member, tho' chose for one particular Place, serving for the whole Kingdom. They are called to Parliament by Force of the King's Writ of Summons out of *Chancery*, at least forty Days before the Parliament begins.

The chief *Statutes* concerning the Election of Knights, Citizens, and Burgessees to Parliament, are as follow :

By 23 H. 6. ch. 14. The Sheriff, after the Receipt of the Writ, shall deliver a Precept under his Seal to every Mayor and Bailiff of Cities and Boroughs, or to the Bailiff or Bailiffs, where no Mayor is, commanding them to choose Members to come to Parliament; and such Head Officers shall return such Precept to the Sheriff by Indenture betwixt them and the Sheriff of such Election, and the Sheriff shall make a Return of every such Writ, and of the Return made by such Head Officers. Head Officer making a false Return shall forfeit 40 l. to the Person chosen, that is not returned. The Sheriff not making due Return shall forfeit 100 l. as by 8 H. 6. ch. 7. concerning the Election of Knights of the Shires. [See 8 H. 6. ch. 7. and 7 & 8 W. 3. ch. 25. *infra*.]

By 5 & 6 W. & M. ch. 20. No Officer of the Excise, or other Person concerned therein, shall make any Interest, or dissuade any from giving a Vote for Members of Parliament under the Penalty of 100 l. one Moiety to the Informer, the other to the Poor of the Parish where such Offence shall be committed; and upon Conviction on any such Suit, he is to be incapable of ever exercising any Office of Trust under the King.

By 12 & 13 W. 3. ch. 10. §. 91. Officers of the Customs; By 9 An. ch. 10. Officers belonging to the Post-Office; By 9 An. ch. 11. Officers concerned in the Duties upon Leather; By 10 An. ch. 19. Officers and other Persons concerned in the Duties upon Soap, Paper, striped Linens imported, Hackney Chairs, Cards, and Dice, &c. are in like Manner restrained from interfering in Elections under the same Penalties.

By 7 W. 3. ch. 4. No Person hereafter to be elected to serve in Parliament for any Place after the Teste of the Writ of Summons to Parliament, or ordering of the Writ of Election, or after any Place becomes vacant, shall directly or indirectly before his Election, give, present, or allow to any Person, having a Vote, any Money, Entertainment, Gift, Reward; or promise, or agree to give or allow any Money, &c. to any such Person, or to any such County, City, Town, or Borough in general, for being elected, or in order to be elected, upon Penalty to be incapable to serve as a Member.

[And by 2 G. 2. ch. 24. Electors of Members of Parliament shall, before they poll at the Election, (if demanded by either of the Candidates, or any two of the Electors) take the Oath against Bribery (or being Quakers, affirm) as therein set forth, which the presiding Officer shall administer, on pain of forfeiting fifty Pounds. The Sheriff

or returning Officer admitting any Person to poll without taking such Oath, if demanded as aforesaid, to forfeit one hundred Pounds, and the Person so polling shall incur the like Penalty.

And if any Person, having or claiming any Right to vote in any such Election, shall ask, receive, or take any Money or other Reward by way of Gift, Loan, or other Devise, or agree or contract for any Money, Gift, Office, Employment, or other Reward, to give his Vote, or to refuse or forbear to give his Vote, or if any Person by himself, or any Person employed by him, shall, by any Gift or Reward, or by any Promise, Agreement, or Security for any Gift or Reward, corrupt or procure any Person to give his Vote, or to forbear to give his Vote, in any such Election, he shall for every such Offence forfeit five hundred Pounds, and after Judgment or Conviction for such Offence, shall be for ever disabled to vote in any Election of Members of Parliament, or to hold, exercise, or enjoy any Office or Franchise, as Member of any City, Borough, Town Corporate, or Cinque Port, as if naturally dead.

Offenders within twelve Months after Election, and before Conviction of any Offence against this Act, discovering any other Offender, so that he be thereon convicted, shall be indemnified.

The Prosecution on this Act must be commenced within two Years after Offence, and be carried on without wilful delay: And by 9 G. 2. ch. 38. no Person shall be liable to the Disabilities and Penalties, unless actually and legally arrested, summoned, or otherwise served with Process, within two Years after the Offence, unless the same be prevented by his absconding or withdrawing out of the Kingdom.

By 7 & 8 W. 3. ch. 7. If any Person shall make a Return of a Member of Parliament contrary to the last Determination in the House of Commons of the Right of Election for such Place, or shall wilfully, falsely, and maliciously, return more Persons than are required to be chosen by the Writ or Precept, the Party grieved shall recover double Damages with full Costs of Suit. All Contracts and Securities, given to procure any Return of any Member of Parliament, or any Thing relating thereto, are adjudged void. And the Person that makes any Contract or Security, or gives any Gift or Reward, to procure such false or double Return, shall forfeit 300*l.* one Third to the King, another to the Poor of the Place concerned, the other to the Informer with Costs. The Action to be brought within two Years.

By 7 & 8 W. 3. ch. 25. There shall be forty Days between the Teste and Return of the Writ of Summons to every new Parliament; and in case of a new Parliament, or upon any Vacancy, the Sheriff shall issue out Precepts to Cities, Boroughs, &c. three Days after the Receipt of the Writ of Election, [See 10 & 11 W. 3. ch. 7. *infra.*] who are to proceed to Election in eight Days, having given four Days Notice at least of the Day appointed for Election. And for Election of Knights of the Shire, the Sheriff shall hold his County-Court at the most publick and usual Place in the County, and where the same hath most usually been for forty Years past, and at the next County-Court proceed to Election, unless the same falls out to be within six Days after the Receipt of the Writ, or upon the same Day; and then shall adjourn the same Court to some convenient Day, giving ten Days Notice of the Time and Place of Election (such Adjournment not to exceed sixteen Days, by 18 G. 2. ch. 18. §. 10.); and in Case such Election be not determined upon the View, but a Poll shall be required, then be, or

in his Absence the Under-Sheriff, shall appoint a Number of Clerks to take the Poll in his Presence, or in the Presence of his Under-Sheriff, or such as he shall depute.

Every Clerk so appointed shall be sworn by the said Sheriff, or Under-Sheriff, truly and indifferently to take the Poll, &c. And the Sheriff or Under-Sheriff shall appoint Inspectors of every Clerk to be nominated by each Candidate; and every Freeholder shall, before he is admitted to poll, if required by any of the Candidates (for any other Person having a Right to vote at such Election, by 10 An. ch. 23.) take the Oath of his being a Freeholder, &c. [The Form of which, as now altered, see in 18 G. 2. ch. 18.]

Where the County-Court hath usually been held on a Monday, it shall now be held on a Wednesday.

The Sheriff, or the Under-Sheriff, shall not adjourn the Court to any other Town or Place without the Consent of the Candidates, nor by any unnecessary Adjournment in the same Place delay the Election, but shall proceed from Day to Day.

Every Sheriff or other Officer, to whom the Execution of any Writ or Precept, shall belong for the Election of Members of Parliament, shall forthwith deliver to any Person that shall desire it, paying for Writing the same, a Copy of the Poll taken at such Election.

Every such Sheriff or Officer, as aforesaid, for every wilful Offence contrary to this Act, shall forfeit to every Party grieved the Sum of 500*l.* with full Cost of Suit.

Trustees or Mortgagees are not capable of voting in the Election of a Member of Parliament unless they are in a *Real Possession*. But the Cestuy que Trust or Mortgagor in Possession may vote for the same Estate. [See 9 An. ch. 5. *infra*.]

All Conveyances of Lands, Tenements, or Hereditaments, in order to multiply Votes, shall be void; and no more than one Vote shall be admitted for one and the same House or Tenement. [See 10 An. ch. 23. *infra*.]

No Person under the Age of twenty-one shall be admitted to vote, or to be elected a Member.

By 10 & 11 W. 3. ch. 7. Sheriffs and other Officers must make their Returns, in case of a new Parliament, on or before the Day such Parliament is called to meet, or in case of a Vacancy, within fourteen Days after the Election, on Pain of 500*l.* The proper Officer of the Cinque Ports, shall be allowed six Days for Delivery of the Precept after the Receipt of the Writ, notwithstanding 7 & 8 W. 3. ch. 25. to the contrary.

By 12 & 13 W. 3. ch. 2. No Person born out of the King's Dominions, tho' naturalized, or made Denizen, except born of English Parents, (or unless naturalized before the Accession of King George the First, by 1 G. 1. St. 2. ch. 4.) shall be Member of either House.

By 2 An. ch. 4. The Register of Deeds, &c. for the West-Riding of the County of York, or his Deputy, is not capable of being chosen a Member of Parliament: Nor by 6 An. ch. 35. the Register for the East-Riding, or his Deputy: Nor by 7 An. ch. 20. the Register for Middlesex, or his Deputy, or any Person receiving Profit out of the Office: Nor by 8 G. 2. ch. 6. the Register, Deputy, or other, &c. for the North-Riding of Yorkshire.

By

By 11 & 12 W. 3. ch. 2. §. 150. No Member of Parliament shall be capable of being a Commissioner of the Excise or Appeal, or of holding, in his own Name, or in the Name of any other, or of executing by himself or Deputy any Office concerning the Management of the Excise. [Nor of the Customs, by 12 & 13 W. 3. ch. 10. §. 89.]

By 6 An. ch. 7. No Person having new Office or Trust or Benefit thereof, erected since 25th October 1705, or hereafter to be erected, under the Crown, nor Commissioner or Subcommissioner of Prizes, Secretary or Receiver of Prizes, Controller of the Account of the Army, Commissioner of Transports, or of the sick and wounded, Agent for a Regiment, Commissioner for Wine-Licences, Governor or Deputy Governor of a Plantation, Commissioner of the Navy imployed in any the Out-Ports, nor Person having Pension from the Crown during Pleasure, shall be capable of being elected Member of the House of Commons. And if any Member accepts of any Office of Profit from the Crown, his Election shall be void. But such Member shall be capable of being again elected.

By 1 Geo. 1. ch. 56. No Person having a Pension from the Crown for any Term or Number of Years, either in his own Name or in Trust for him, is capable of being elected Member of the House of Commons; and if any Person, who shall have such Pension at the Time of his Election, or at any Time after, shall sit or vote in the House, he shall forfeit 20 l. for every Day he shall so sit or vote, with full Costs of Suit.

[By 15 G. 2. ch. 22. No Commissioner of the Revenue in Ireland, or Commissioner of the Navy or Victualling Offices; nor any Deputy or Clerk in any of the said Offices, or in any of the Offices following, to wit, the Office of Lord Treasurer or Commissioners of the Treasury, of the Auditor of the Receipt of the Exchequer, of the Tellers, or of the Chancellor, of the Exchequer; of the Lord Admiral or Commissioners of the Admiralty, of the Paymasters of the Army, or Navy; of the Secretaries of State; of the Commissioners of Salt, or Stamps, or Appeals, or Wine Licences, or Hackney Coaches, or Hawkers or Pedlars; nor any Person having any Office Civil or Military, in Minorca or Gibraltar, other than Officers having Commissions in Regiments there only, shall be capable of being elected Member.

If any such Person is returned, such Election and Return shall be void, and he shall forfeit twenty Pounds for every Day he shall sit or vote as a Member, with full Costs, and be thenceforth incapable of taking or enjoying any Place of Profit or Honour under the Crown.

But this Act shall not extend to the Treasurer or Comptroller of the Navy, the Secretaries of the Treasury, of the Chancellor of the Exchequer, or of the Admiralty, the under Secretaries of State, or the Deputy Paymaster of the Army, or to any Person holding any Office for Life, or so long as he shall behave well therein.]

By 9 An. ch. 5. No Person is qualified to be a Knight of the Shire, who hath not an Estate in England or Wales of Freehold or Copyhold for Life at least of 600 l. per Annum; nor to represent any City, Borough, or Cinque-Port, who hath not 300 l. per Annum to and for his own Use, either in Law or Equity, clear of all Incumbrances; otherwise the Return of such Person shall be void.

Proviso, That the eldest Son of a Peer, or of any Person qualified to serve as Knight of the Shire, shall not be incapable; that the Universities may return Members as formerly; that a Mortgagee, when the Equity of Redemption is in another, shall not be capable, unless the Mortgagee shall have been in Possession seven Years before the Election.

Every Candidate, except as aforesaid, at the Request of another Candidate, or of two or more Persons that have a Right to vote, shall at the Time of the Election, or before the day fixed in the Writ for the Meeting of the Parliament, take an Oath (mentioned in the Statute) of the Value of his Estate, and where situate. The Oath shall be administered by the Sheriff, or Under-Sheriff, or by the Officer who is to take the Poll, or make the Return, or by any two or more Justices of the Peace. The Candidate refusing to take such Oath as aforesaid, his Election and Return shall be void.

[By 33 G. 2. ch. 20. Every Person (except the eldest Son or Heir apparent of a Peer, or of a Person qualified to serve as a Knight of the Shire, the Members for the two Universities, and the Members for Scotland) who shall be elected a Member of the House of Commons, shall, before he votes or sits there, after the Choice of a Speaker, deliver in at the Table, while the House is sitting, an Account signed by him of the Place where his Estate lies, by which he makes out his Qualification, and take and subscribe the Oath there mentioned, That he truly, and bona fide hath such Estate, of such Value, &c. Any Member presuming to sit or vote before he has delivered such Account, and taken and subscribed such Oath, or not being qualified according to 9 An. his Election shall be void, and a new Writ shall issue.]

By 10 An. ch. 23. Fraudulent Conveyances and Estates made to qualify Voters at Elections of Knights of the Shire, subject to an Agreement to reconvey or determine the same Estate, shall be taken against the Grantors as free and absolute, and be held by the Grantee, discharged of all Manner of Trust or Condition, and all Securities and Agreements for defeating such Estate shall be void; and the Person making such Conveyance, or who being privy to such Purpose, shall devise or prepare the same, and the Person voting by Colour thereof, shall forfeit 40 l. to any Person that will sue for the same in any Court at Westminster, together with full Costs.

No Person shall vote for Knights of the Shire in Right of Lands or Tenements, for which such Person shall not have received, or have been entitled to receive, the Profits to his own Use for one Year before the Election, unless such Lands, &c. came to him within that Time by Descent, Marriage, Marriage-Settlement, Devise, Presentation, or Promotion. The Person voting contrary shall, for every Offence, forfeit 40 l. one Moiety to the Poor of the Parish, where the Lands are, and the other Moiety to him that will sue for it in any Court of Record at Westminster.

[And by 13 G. 2. ch. 21. The Provisions in the above Act are extended to Electors for such Cities and Towns as are Counties of themselves, wherein Persons have a Right to vote in respect of Lands, Tenements, or Hereditaments, of the yearly Value of forty Shillings.]

[By 18 G. 2. ch. 18. No Person shall vote in the Election of Knights of the Shire in Right of any Messuages, Lands, or Tenements, which have not been charged to the Land-Tax, twelve Calendar Months next before such Election, except in Right of Rents, or Chambers in

Inns of Court or Chancery, or any Messuages or Seats belonging to any Offices, which have not been usually charged to the Land-Tax.

No Person shall vote in such Election without having a Freehold Estate in the County, of the clear yearly Value of forty Shillings, above all Rents and Charges payable thereout, or without having been in the actual Possession or Receipt of the Rents and Profits thereof to his own Use, above twelve Calendar Months, unless the same came to him within the Time aforesaid, by Descent, &c. (as in the above Act) or shall vote in Right of any Freehold Estate granted to him fraudulently on purpose to qualify him, or shall vote more than once at the same Election; upon pain to forfeit to the Candidate, for whom such Vote shall not have been given, and who shall first sue, forty Pounds, to be recovered, with full Costs, by Action of Debt, in the Courts at Westminster; the Proof in such Action to lie on the Person against whom brought, unless the Fact whereon it is grounded be the having polled more than once.

But no publick Tax or Rate shall be deemed a Charge on a Freehold within the Meaning of this Act.

All Actions, Suits, and Prosecutions, on this Act, are to be commenced within nine Calendar Months after the Fact committed, and the Plaintiff or Informer discontinuing, becoming nonsuit, or having a Verdict pass against him, shall pay the Defendant treble Costs.]

[And by 19 G. 2. ch. 28. The Provisions in the above Act are extended to Elections for such Cities and Towns as are Counties of themselves, wherein Persons have a Right to vote in respect of Freehold Lands, Tenements, or Hereditaments, of the yearly Value of forty Shillings. And

The Sheriff of every City or Town, being a County of itself, and having a Right to elect by Virtue of the Writ of Summons, without any Precept thereupon, shall forthwith, upon Receipt of the Writ, give publick Notice of the Time and Place of Election, and shall proceed to the Election within eight Days, exclusive, after the Receipt of the Writ, and give three Days Notice thereof, at least, exclusive.]

[And by 31 G. 2. ch. 14. No Person who holds his Estate by Copy of Court-Roll shall be intitled thereby to vote at the Election of Knights of the Shire; such Vote shall be void, and the Person so voting shall forfeit fifty Pounds.]

[By 2 G. 2. ch. 24. No Person convicted of wilful and corrupt Perjury, or Subornation of Perjury, shall be capable of voting in any Election of any Member of Parliament.]

[See 7 Geo. 2. ch. 16. and 16 G. 2. ch. 11. For better regulating Elections of Members of the House of Commons for Scotland; 8 Geo. 2. ch. 30. for regulating the Quartering of Soldiers during the Time of the Elections of Members to serve in Parliament; and 30 Car. 2. St. 2. 13 & 14 W. 3. ch. 6. and 1 G. 1. St. 2. ch. 13. concerning the Oaths of Allegiance and Supremacy to be taken, and the Declaration against Transubstantiation to be subscribed by Peers and Members of Parliament, before they sit or vote in the House.]

* 4 Inst. 46. The Fees of Knights of the Shire are four Shillings a Day, of Citizens, and Burgesses two Shillings a Day. [See 12 Ri. 2. ch. 12. 23 H. 6. ch. 10. 6 H. 8. ch. 16. 35 H. 8. ch. 11.]

At

At the Return of the Writs the *Parliament* cannot *begin* but by the Royal Presence of the King, either in Person, or by ^a Representation by Letters Patent or Commission. If the Parliament is prorogued upon Return of the Writs of Summons, it begins at the End of the Prorogation. ^{4 Inst. 6, 7. 1 Ld. Ray. 343.}

The ^b *Jurisdiction* of this Court is so transcendent, that it makes, ^{1 Inst. 110. a.} enlarges, diminishes, abrogates, repeals, and revives Laws and Statutes concerning Matters Ecclesiastical, common, civil, criminal, martial, maritime, &c.

And as every Court of Justice hath Laws and Customs for its Direction, so the High Court of Parliament hath its own proper Laws and Customs, called the ^c *Laws and Customs of Parliament*. ^{4 Inst. 14. 15. Salk. 19. 2 Ld. Ray. 938, &c.} Inasmuch that no Judges ought to give any Opinion of Matters done in Parliament; because they are not to be decided by the Common Law.

^d There can be no Act of Parliament without the Consent of the Lords and Commons, and the Royal *Fiat* of the King, giving his Consent personally, or by his Letters Patent signed by his Hand. ^{2 Inst. 157. 585, 586, 587. 4 Inst. 25.} [See 33 *H. 8. ch. 21.*] But Acts of Parliament may be good without the Consent of the spiritual Lords; that is to say, if they refuse to vote, or voluntarily absent themselves.

^e The *Lords and Commons* in their respective Houses have Power of *Judicature*, and so have both Houses together. ^{4 Inst. 23. 4 Inst. 13.} Every Member hath a judicial Place, and cannot be a Witness, [But this seems to extend only to such Things as pass in the House.] ^{2 Ld. Ray. 1105. 1 Ld. Ray.} The Lords have one that *presides* in common Affairs; [either the Lord Chancellor, or Lord Keeper of the Great Seal for the Time being, or, in his Absence, the Lord Chief Justice of the King's Bench, or some Peer appointed by the House] and the Commons have their Speaker, chosen by the House, but to be approved of by the King. The Commons have often ^f impeached several Persons before the House of Lords, and have prosecuted them to Judgment. ^{4 Inst. 11. 23, 24.} For the Commons coming from all Parts are the general Inquisitors. [See 12 & 13 *W. 3. ch. 2.*]

The *House of Lords* is a ^h *distinct Court* for many Purposes. They may try Causes of Life and Death, [upon an Impeachment of the Commons, or where a Peer is Defendant] take a Recognizance, and before the Lords in the upper House, the Proceedings in Chancery, or the Equity Side of the Exchequer, upon an Appeal from those Courts, or upon Writs of Error to reverse Judgments by Original in the King's Bench, or Judgments in the Exchequer Chamber, Errors in such Judgments may be examined. All their Decrees are as Judgments, and if they err, the Parliament only hath Power to reverse their Judgments. ^{2 Inst. 536. 4 Inst. 21, 22. 23. Finch 233. 1 Ld. Ray. 15.}

ⁱ The *House of Commons* is also a *distinct Court* for several Purposes, *viz.* to examine Elections, to expel their own Members, to commit them or others to Prison for any Contempt of the House. The Book of the Clerk of the House of Commons is a Record. ^{2 Inst. 536. 4 Inst. 23, 28. 2 Ld. Ray. 1105. 2 Hob. 110. 1 Ld. Ray. 15. contra.} [See 6 *H. 8. ch. 16. 7 & 8 W. 3. ch. 7.*]

A Lord being absent may make another Lord his Proxy, but one of the House of Commons cannot make his Proxy.

A Member of Parliament shall have ^j *Privilege of Parliament*, not only for himself and his Servants, to be free from Arrests, ^{4 Inst. 24. 25.} *Sub-pœna's*, Citations, &c. but for his Horses and Goods, to be free from

from Distresses. Privilege of Parliament doth generally hold, except in Treason, Felony, and Breach of the Peace. * And this Privilege to be free from Arrests is claimed by the Commons to be for forty Days, both before and after the Sessions, *eundo & redeundo*, but the Time has never been expressly determined, however, there must be a reasonable Time, even after a Dissolution.

[See 12 & 13 W. 3. and 11 G. 2. ch. 24. under Title *Arrest*, in ch. 4. post. See also 5 H. 4. ch. 6. 11 H. 6. ch. 11. and p. 438. ante.]

* 4 Inst. 27.

The passing of any Bill, or the giving any Judgment in Parliament, doth not make a Session; but the Session doth continue, till it is *prorogued* or *dissolved*. Every Session of Parliament is in Law a several Parliament. By Prorogation in open Court, there is a Session, and then such Bills as passed in either House, or in both Houses, and had not the Royal Assent to them, must fall. But may be brought in again at the next Session. If the Parliament is only *adjourned*, that does not make a Session, but all Things continue in the same State, as they were in before the Adjournment.

* 4 Inst. 28.

This is the Difference between Prorogation and Adjournment. * The House of Commons is not prorogued or adjourned by the Prorogation or Adjournment of the Lords House. For, as hath been said, it is a distinct Court for some Purposes; and therefore it may prorogue or adjourn itself. [But now * an Adjournment by the King of the Parliament is called a *Prorogation*, and when either House adjourns itself, it is not called a Prorogation but an *Adjournment*, and has no Relation to the other House; nor has it the same Effect of putting an End to the Sessions as a Prorogation of the Parliament by the King has, which is never now called an Adjournment.]

* 1 Ld. Ray.
343.

When the Parliament is *dissolved* without any *Act* or Judgment passed, it is no Session, but a Convention. * The King only can dissolve the Parliament, in Person, or by Representation.

* 1 Inst. 110.

By 5 An. ch. 8. *An Act for an Union of the two Kingdoms of England and Scotland, there is to be but one Parliament for Great Britain.*

By 6 An. ch. 7. *The Parliament shall not be dissolved by the Death of a King or Queen; but, if then sitting, shall immediately proceed to act, and if then separated by Adjournment or Prorogation, shall immediately after such Demise, convene and sit, or if no Parliament then in Being, that hath sat, then the last preceding Parliament shall immediately convene and sit, and in all the said Cases, the Parliament shall continue to act for six Months after such Demise, unless sooner prorogued or dissolved by the Successor.*

[By 30 G. 2. ch. 25. §. 46. *If the Parliament is separated by an Adjournment or Prorogation, which will not expire in fourteen Days; the King may, in Case of an actual Invasion, or imminent Danger thereof, or in Case of a Rebellion, issue a Proclamation for their Meeting, giving fourteen Days Notice of the Day appointed, and the Parliament shall accordingly meet on that Day, as if it had stood adjourned or prorogued to that Day. But Note, This Act is not perpetual, but near expiring.*]

By 6 & 7 W. & M. ch. 2. *A Parliament shall be holden once in three Years, at furthest, and shall not have Continuance longer than three Years. But,*

By 1 Geo. 1. St. 2. ch. 38. *The Continuance of a Parliament may be for seven Years, and no longer.*

So much of the Parliament, as it is the highest and most honourable Court of Justice.

II. The *Privy Council* is a most noble Assembly of the King ^{Of the Privy} and Privy Counsellors in the King's Court or Palace, for Matters of ^{Council.} State. The King chuses his Counsellors; and by Force of an Oath ^{4 Inst. 531} they are made Privy Counsellors, without Patent or Grant, and are to continue so during the King's Pleasure. They are to advise the King for the publick Good with Relation to Affairs at Home and Abroad. There are some here that bear the highest Offices. As,

1. There is a *Lord President* of this Council; whose Office is ^{4 Inst. 551} granted by Letters Patent under the great Seal *Durante Beneplacito*.

He makes a Report to the King of the Business at the Council Table.

2. There is also a *Lord Privy Seal*, who sits in Council next to ^{4 Inst. 551} the Lord President, and takes a particular Oath as Lord Privy Seal. He must not put his Seal to any Grant without good Warrant, nor with Warrant, if it is against Law or inconvenient, but must first acquaint the King with it. ^{4 Inst. 554} The *Privy Seal* is a Seal that the King ^{555. 556.} useth in Grants, that are to pass the Great Seal. For first they pass ^{8 Rep. 18, 19.} the *Privy Signet*, then the *Privy Seal*, and then the *Great Seal*. [See 27 H. 8. ch. 11. How the King's Grants, Writings, Leases, shall pass the *three* Seals, (*viz.*) the *Privy Signet*, the *Privy Seal*, and the *Great Seal*; and the Duties of the *Clerk* of the *Privy Signet* and *Privy Seal*, and what *Fees* shall be paid, and where none at all, &c. and many Articles concerning the passing of the King's Grants, &c.] ^{2 Inst. 555.} No Protection can be granted under the *Privy Seal*, but under ^{2 Rep. 17.} the *Great Seal*. But a Warrant of the King under the *Privy Seal* ^{11 Rep. 92.} to issue out Money out of his Coffers, is sufficient, because it concerns but a Chattel in Possession. ^{2 Roll. Abr. 183.} And the *Privy Seal* is sometimes used in Things of less Consequence, that never pass the *Great Seal*; as to cancel a Recognizance made to the King, to discharge a Debt, But no Writs shall pass under the *Privy Seal*, which touch the Common Law. [See 28 Ed. 1. ch. 6. 11 Ri. 2. ch. 10.]

3. The *Secretaries of State* are also of the *Privy Council*. These every Day attend upon the King, and receive and dispatch Petitions of the Subjects at Home, and are employed about foreign Affairs. The *Principal Secretary of State* hath the Custody of the *Privy Signet*, because the King's private Letters are signed with it. ^{2 Inst. 555.} There ^{556.} are four *Clerks* of the *Privy-Signet Office*, who write out such ^{4 Inst. 115.} Grants, Letters Patent, as pass by Bill signed, or Bill superscribed ^{116.} by the *Sign Manual*, or under the Hand of the King; which being ^{2 Rep. 17.} transcribed and sealed with the Signet is a Warrant to the *Privy Seal*, as the *Privy Seal* is a Warrant to the *Great Seal*. ^{8 Rep. 18, 19.} The Law ^{11 Rep. 92.} takes Notice of the *Sign Manual*, and in a more particular Manner ^{2 Roll. Abr. 183.} of the *Privy Signet*. For a *Ne Exeat Regno* may by Command ^{See p. 348.} be under the *Privy Signet* or the *Privy Seal*, as well as by the King's Writ under the *Great Seal*; and the Subjects ought to obey it. But a Warrant under the *Privy Signet* is not sufficient to issue out any Treasure, or to discharge a Debt; much less an Order by

Word of Mouth. For it ought to be under the Great Seal, or at least under the Privy Seal.

The *Paper-Office* belongs to the Secretaries of State, where all Paper-Writings that pass the Secretaries, are transmitted and kept.

^a 1 Str. 3.

ⁱ Ld. Ray.

65.

^b Ibid.

^c 3 Inst. 182,

183.

⁴ Inst. 53.

See p. 20.

ante.

A Secretary of State hath Power to commit Criminals for Treason to safe Custody, as *Conservators* of the Peace, or as Justices of the Peace all over England, or at least by immemorial Usage.

It is in the Power of the Privy Council as a Court, to enquire into all Crimes against the Government, and to commit the Criminals in order to their Trial in some of the other Courts. Any one or two of the Privy Council may lawfully do it. But they take Cognizance of no private Matters, that may be determined in other Courts. Yet for Controversies arising in Point of Law amongst the King's Subjects in the Isles of Jersey and Guernsey, and the Plantations abroad, the King and his Privy Council are the proper Judges without Appeal.

The King, by the Advice of his Privy Council, doth publish Proclamations binding to the Subject, if they are not against Common or Statute Law, or introductory of a new Law.

By 16 Car. 1. ch. 10. It is declared, That neither the King nor the Privy Council, have Authority by English Bill, Petition, Articles, Libel, or any other arbitrary Way, to examine or draw into Question, or to determine or dispose of the Lands, Tenements, Hereditaments, Goods, or Chattels of any Subject of this Kingdom.

By 12 & 13 W. 3. ch. 2. No Person born out of the King's Dominions, though naturalized or made denizen, except born of English Parents, (or naturalized before the Accession of George the First, by 1 G. 1. St. 2. ch. 4.) shall be of the Privy Council.

By 6 An. ch. 6. There is to be but one Privy Council for the Kingdom of Great Britain.

By 6 An. ch. 7. The Privy Council shall continue and act for six Months after the Demise of the King, unless sooner discharged by his Successor.

[See 3 H. 7. ch. 14. Of Felony in conspiring to destroy the King or his Counsellors; and 9 An. ch. 16. Of Felony to attempt to kill, &c. a Privy Counsellor, p. 353. ante; and for their Precedency and Place, See 31 H. 8. ch. 10.]

Of the Court

of Lord High

Steward.

^a 4 Inst. 58,

59, 60.

III. There is also a Court of the Lord High Steward of Great Britain. This Office is very antient, and was antiently of Inheritance; but is now granted only *pro hac vice*; as when a Lord of Parliament is indicted for Treason, Felony, or Misprision of Treason or Felony. He to whom this Office is granted must be a Lord of Parliament. His Commission is restrained to proceed only on that Indictment, according to the Laws and Customs of England. But he is not sworn.

At every Coronation he hath a Commission also, under the Great Seal, to hear and determine the Claims of Grand Serjeanty, and other honourable Services, to be done for the Solemnization thereof. For which Purpose he holds a Court some Time before the Coronation. But to return.

When

When a Peer has committed Treason, Felony, or Misprision of Treason or Felony, the Indictment is to be found by Freeholders before Commissioners of Oyer and Terminer, or in the King's Bench if the Offence was committed in the County where the King's Bench sits, tho' the Trial may be in any County. And if he hath a Par- don, he may plead it there before the Judges of that Court, who have Power to allow it. But he cannot confess the Indictment, or plead Not guilty there. This must be done before the Lord High Steward, when the Indictment is removed by *Certiorari* out of Chancery before him.

This Trial is given by *Magna Charta*, *ch. 29.*

For the Method of Trying a Peer *Per Pares* before the Lord High Steward, See 3 *Inst.* 27, 28, 29. and see of Trial, *ch. 5.*

IV. The High Court of Chancery, The King's Bench, The Common Pleas, and the Court of Exchequer, have been the King's Courts Time out of Mind.

In the Chancery (*Cancellaria*) are two Courts. One ordinary, where the Proceedings are according to the Laws and Statutes of the Realm; another extraordinary, being a Court of Equity.

1. The ordinary or legal Court is a Court of Record, held *Coram Domino Rege in Cancellaria*, on the Petty-Bag Side.

The Lord Chancellor (*a Cancellando*, from his Power to cancel Letters Patent, being the highest Point of his Jurisdiction) or Lord Keeper, is the Judge of this Court of Common Law.

He hath these Officers under him, (*viz.* twelve Masters of Chancery, whereof the Master of the Rolls is the Chief) The Clerk of the Crown, the Clerk of the Hamper, the Sealer, the Chase-Wax, the Controller of the Chancery, twenty-four Curfitors (incorporated by Queen Elizabeth) for making out Writs of Course, or formed Writs, according to the Register of Writs, a Book of great Antiquity and Authority. The Clerk of the Presentations, the Clerk of the Faculties, [See 25 *H. 8. ch. 21.*] the Clerk Examiner of Letters Patent, the Clerks of the Petty-Bag, (in whose Office the Proceedings of this Court are filed and kept) the six Attornies.

This Court hath Jurisdiction to hold Plea by *Scire Facias* for Repeal of the King's Letters Patent, at the Suit of a former Patentee, when they are granted to several Persons for one and the same Thing. But when they are against Law, or granted upon a false Suggestion, the King may have a *Scire Facias* to repeal his own Grant by Letters Patent. [See 18 *H. 6. ch. 1.* 3 & 4 *Ed. 6. ch. 4.* 13 *El. ch. 6.*] Here also it may hold Plea of Petitions, *Monstrans de Droit*, (*i. e.*) for a Subject to be restored unto Lands, which he shews to be his Right. [See 34 *Ed. 3. ch. 14.* 36 *Ed. 3. ch. 13.*] Tra- verses of Offices, (*i. e.*) to prove that an Inquisition taken of Lands or Goods is defective and wrong. There may be also a *Scire Facias* upon Recognizances in this Court, [See 23 *H. 8. ch. 6.*] Execution upon a Statute-Staple; but the Execution upon a Statute-Merchant is returnable in the King's Bench or Common Pleas. And this Court may hold Plea of all personal Actions by or against any Officer of this Court, and, by Acts of Parliament, of several Offences and Causes.

The

The *Process* is under the Great Seal, and in *Latin*, according to the Common Law. [It is now in *English*, as are all other Law-Proceedings, by 4 *Geo. 2. ch. 26.*] But when the Parties come to issue, this Court cannot try the Cause by a Jury, but the Record is to be delivered by the Lord Chancellor into the King's Bench, to be tried there; and after Trial it is to be remanded into Chan-

^a 2 Saund. 27.
Contra.
¹ Eq. Ab. 128.

^b 1 Vern. 131.
Contra.
¹ Eq. Ab. 129.
^c 4 Inst. 80.

cery, that the Judgment may be given there according to the Rules of Law. [2y.] But if there is a Demurrer in Law, it shall be argued and adjudged in this Court. Upon a Judgment given in this Court a Writ of Error^b doth lie returnable into the King's Bench, [2y.] This Court is said to be *Officina Justitiæ*, out of which all original Writs, all Commissions of charitable Uses, Bankrupts, Sewers, Idiots, Lunatics, &c. that pass under the Great Seal, do go forth. And for these Ends this Court is always open. ^d So one from hence may have an *Habeas Corpus*, or Prohibition, in the Vacation; which issue out of other Courts only in the Term-Time. It is said, no Motion can be made on the Petty-bag Side in the Vacation. Here also a *Subpoena* may be had to force Witnesses to appear in other Courts when they have no Power to call them. [2y.]

^f 4 Inst. 79,
82, 84.

2. ^f The extraordinary Court is a Court of Equity, and proceeds by the Rules of Equity and Conscience. This Equity consists in abating the Rigour of the Common Law (for it rather considers the Intention than the Words of the Law) and exerting Power, in Cases wherein the Subject is without Remedy in the Courts of Common Law.

^g 4 Inst. 87,
121, 213, 242,
248.
¹ 2 Rep. 113.
² Roll. Abr.
164.

^g A Commission or Letters Patent, without an Act of Parliament, cannot raise a Court of Equity. But a Court of Equity may be held by Prescription.

The Officers are these that follow, (*viz.*)

^h 4 Inst. 84.

The Lord Chancellor or Lord Keeper, the chief^h Judge in this extraordinary Court of Equity, as well as in the ordinary Court of Common Law. ⁱ He is not made by Letters Patent, but by the Delivery of the Great Seal to him, and by taking an Oath^k to serve the King and his People faithfully in the Office of Lord Chancellor. ^l This Great Seal is said to be *Clavis Regni*; under which are passed Commissions, Charters, Letters Patent, Writs, as hath been said. ^m By the Common Law no Grant of any Land by the King is available, or pleadable, but under this Great Seal.

¹ 2 Inst. 552,
554, 555, 556.
⁴ Inst. 80.
^m 2 Rep. 16.
² Roll. Abr.
182.

ⁿ 4 Inst. 167.
Crompt. Jur.
47. a. 54. b.

ⁿ When an Act of Parliament doth authorize the Lord Chancellor, or Lord Keeper, to grant any Commission under the Great Seal, he may grant the same without further Warrant, because the King is Party to the Act.

See p. 157.
ante.

The Lord Chancellor or Lord Keeper is to visit all Hospitals and free Chapels of the King's Foundation. And it is his Privilege, to present to all the King's Benefices of or under twenty Pounds in the King's Books, where the King is Patron in Right of his Crown; but not if the King hath them by a collateral Title, as by Lapse: For then the King himself shall present. [See 22 *Ed. 4. ch. 18.*]

¹ *Nunquam decurritur ad extraordinarium, sed ubi deficit ordinarium.* 4 Inst. 84.
By

By 5 El. ch. 18. The Authority, Prebeminence, and Advantage of the Lord Keeper of the Great Seal, and of the Lord Chancellor, are declared to be the same to all Intents and Purposes.

By 1 W. & M. Sess. 1. ch. 21. Commissioners to be appointed to execute the Office of Lord Chancellor, or Lord Keeper, may use and exercise like Jurisdiction, and have the like Privileges and Advantages, which the Lord Chancellor or Lord Keeper of right ought to use, or have, as belonging to their Offices, or otherwise; and shall take Place after the Peers and Speaker of the House of Commons.

One Commissioner may hear Motions, and give Orders touching interlocutory Proceedings; so as such one in the Absence of the others shall not make any Decree, or put the Great Seal to any Thing whereunto the whole Broad Seal ought to be affixed, unless there be two Commissioners present.

The Lord Chancellor (or Lord Keeper) in case of Sickneſs, or extraordinary Buſineſs, may call ſome of the Judges to aſſiſt him.

But he cannot make a Deputy.

He hath twelve Maſters under him, whereof the Maſter of the Rolls is the Chief, as before obſerved.

The Maſter of the Rolls in his Abſence doth make Orders and Decrees. This Office is granted by the King for Life. [See his Oath, 18 Ed. 3. ch. 16.]

The judicial Authority of the Maſter of the Rolls is confirmed by 3 Geo. 2. ch. 30. [And ſee 23 G. 2. ch. 25. as to the Increase of his Salary.]

The Maſters in Chancery are Aſſiſtants to the Lord Chancellor or Lord Keeper, or to the Maſter of the Rolls, and ſit with them; to whom References touching Accounts, Matters of Practice, &c. are made, upon which they make a Report. They take Affidavits (or Oaths in Writing) made before them, Acknowledgment of Deeds and Recognizances. [See their Oath 18 Ed. 3. ch. 16. And 13 Car. 2. (not Printed) Concerning the Office of the Maſters in Chancery.]

[See 12 Geo. 1. ch. 32. which erects the Office of Accountant-General.]

There are alſo in this Court ſeveral other Officers. As,

The Register, who hath many Registers under him to ſit in Court, and to draw up the Orders and Decrees. In his Office are filed all Reports from the Maſters upon References, and all Exceptions taken to any of the ſaid Reports.

The Six Clerks, in whoſe Office all Proceedings upon Bill and Answer, to the Decree, and after, are tranſacted and filed. The Office of a Six Clerk is in the Gift of the Maſter of the Rolls. [See 14 H. 8. ch. 8.]

Here are alſo the Maſters of the Subpœna-Office, the Clerk of the Affidavits, where you file ſuch Affidavits as are uſed in Court; the Examiners, who take the Depoſitions of Witneſſes, and make out Copies of the Depoſitions; the Clerks of the [Chapel of the] Rolls, who ſit conſtantly in the Rolls, to ſearch for Enrollments of Patents and Deeds, the Rolls whereof are kept there, and to make out Copies thereof. The Uſher of the Court. The Serjeant at Arms, who carryeth the Mace before the Lord Chancellor, or Lord Keeper, and by whom, or his Subſtitutes, Perſons ſtanding in Contempt of the Court are taken into Cuſtody. The Warden of the Fleet, who

receives such Prisoners, as are committed by the Court. The Clerk of the Appeals. [See 25 H. 8. *cb.* 19.]

2. The Jurisdiction and Power of this Court of Equity is of vast Extent, tho' no Court of Record. Almost all Causes of Weight and Moment, first or last, have their Determination here. In this Court the Lord Chancellor himself may sue. * But he cannot make a Decree in his own Cause. Here Relief is often given for or against an *Infant*, notwithstanding his Minority; for or against a *Married Woman*, notwithstanding her Coverture. In some Cases she may sue her Husband, as for Alimony or Maintenance, when they are parted. She may sue without her Husband, when he is beyond Sea, *Qu.* [or where she has a separate Estate.^b] Also in such Case she may be compelled to answer without her Husband. Here *Executors* may sue one another, or one Executor alone without the Rest may be sued. But he shall be charged for no more than he has received.

* *West. Symb. Of Chancery*, §. 18, 19.
 4 *Inst.* 84.
 1 *Danv. Abr.* 749, 750.
 751, 752.
 753, 754.
 &c. 769.
 770, 771.
 &c.
 1 *Str.* 447.
 1 *Eq. Abr.* 129, &c.
 All *Frauds* and *Deceits*, for which there is no Remedy at Common Law; all *Accidents*, as to relieve Obligors, or Mortgagors against Penalties and Forfeitures upon Statutes, Bonds, and Mortgages, where the Intention was to pay the Debt or Duty, but some extraordinary Matter happened to disable the Debtor; and all Breaches of *Trust* and Confidence, not executed by 27 H. 8. *cb.* 10. concerning *Uses*, are properly cognizable here, and are allowed by all Parties to be under its Jurisdiction. Also this Court will afford Relief, when unreasonable Engagements have been made, or Engagements without Consideration; where a Charge lies upon one Man alone at Common Law, to make others contribute to the Charge; it will compel Men to perform their Agreements; reduce the General Customs of a Manor to a Certainty; relieve a Copyholder against the ill Usage of the Lord; ascertain Fines of Copyholders; [correct an erroneous Judgment given upon Petition in the Lord's Court^d;] decree for a Liberty of Common, or Fishing; for Recovery of Money or Land given to charitable Uses, and misemployed; distinguish a Man's Land confounded with others; decree that one shall have the Tuition of a Child^e; make Executors and others give Security and Interest for Money that is to lie long in their Hands; order the Performance of a Will, especially if it concerns Lands; confirm a Title to Land, tho' one hath lost his Writings by which he should make out his Title; make Conveyances, defective thro' Fraud or Mistake, good and perfect; enforce the Inrolment of a Deed, if there is need for it; force Men to come to an Account with each other; decree for Things in Action upon Assignment to an Assignee upon Consideration. ^f In such like Cases the Court may, without any Regard to Form or Mispleading, proceed to a Decree according to Equity and good Conscience.

Note, That this Court will not retain a Suit by *English Bill* under 10*l.* Value, except in Cases of Charity; nor under the Value of 40*l.* *per Ann.* in Lands, except it be for a Rent-Service, &c.

This Court also will restrain other Courts, that exceed their Jurisdiction, and remove the Suit to itself by *Certiorari*.

But let it be observed, That in all Cases where the Plaintiff hath his Remedy at Common Law, he ought not to be relieved here. Nor will this Court give Relief, where the Substance of the Suit

tends to the Overthrow of an Act of Parliament made for the Publick Peace, or to the Overthrow of any Fundamental Point of Common Law, or take from other Courts their Peculiar Jurisdiction; though Judgments and Sentences in other Courts may be examined in Equity; (and in some Cases this Court may have a concurrent Jurisdiction.) [See 4 H. 4. *ch.* 23. and upon that Statute, *Dr. 53*. *135*. *Stud. Dial.* 1. *ch.* 18. 15 H. 6. *ch.* 4. and 3 *Inst.* 119, 123, 124. 4 *Inst.* 84, 85, 86, 87. And see more at large *Crompt. Cur. Tit. Chancery*, and *Harrison's Practice in Chancery*, For the Jurisdiction and Power of the Court of Chancery. And see of *Præmunire*, B. 3. *ch.* 1. ante.]

3. The Method of Proceeding in this Court, is, First, To file a Bill of Complaint [See 4 *Ann. ch.* 16. §. 22.] for some Fraud, Force, or Injury done, praying Relief. And if the Bill is to quiet the Possession of Lands, or to stay Waste, or to stay Proceedings at Law, an *Injunction* is also therein prayed.

When the Bill is filed, Process of *Subpæna* must be taken out, to compel the Defendant to appear, upon Pain of 100*l.* (being Words of Course) and answer the Bill. If he doth not appear, then upon Affidavit of the Service of it personally, or that it was left at his Dwelling-House with one of the Family, an *Attachment* issues out against him; and if a *Non est Inventus* is returned, then a Writ of *Proclamation* goes against him; and if he stands further out in Contempt, then a *Commission of Rebellion* may be issued forth, directed to the Sheriff, or to Private Persons for apprehending of him, for which Purpose they may break open any Door, [2*y.*] If the Defendant stands further out in Contempt, a *Serjeant at Arms* may be sent to take him. And if he cannot be taken, a *Sequestration* of his Lands and Goods may be obtained, 'till he doth appear. [See 5 *Geo.* 2. *ch.* 25. for making Process in Courts of Equity effectual against Persons who abscond.]

But if a *Peer* is Defendant, the Lord Chancellor first writes a Letter to him, and if he does not appear, then a *Subpæna* goes out, and (if he is still in Contempt) an *Order* to shew Cause why a *Sequestration* should not go forth; and if he still stands out, a *Sequestration* goes forth; but no Process of Contempt against his Person.

There are several other *Subpæna's* besides a *Subpæna* to answer; as a *Subpæna* to make better Answer, *Subpæna* to rejoin, a *Subpæna* for *Witnesses* to testify, to bear Judgment, to bring in Writings, for *Costs*. All the *Processes of Contempt* are likewise taken against those that obey not Orders, or stand otherwise in Contempt of the Court.

When the Defendant doth appear, then the Proceedings are by the Defendant's Answer to the English Bill of Complaint, if there is no Cause for *Plea* (To the Jurisdiction, in Disability of the Person, or in Bar) or *Demurrer* to the Bill. Then the Plaintiff enters his *Replication*, unless he files *Exceptions* to the Answer as insufficient, which are referred to a Master to report whether the Answer is insufficient, or not; To which Report *Exceptions* also may be taken by the Parties. After Answer, Replication, and Rejoinder, the Parties being then come to Issue, *Witnesses* are to be examined upon *Interrogatories* pursuant to the Bill or Answer, either

Eq. Abr.
135.
Wms. 156.

West's Symb.
sect. 20, &c.

West's
Symb. Of
Chancery,
Sect. 201.
2 Vent. 342.
Danv. Abr.
776.

West's
Symb. Of
Chancery,
Sect. 33, &c.
See Ch. 4.
§. 6. post.
See ibid.

by the Examiners in Town, or by Commission (called a *Dedimus Possidem*) in the Country; then when the Plaintiff and Defendant have examined their Witnesses, there is to be *Publication* of the *Depositions* of the Witnesses, and the Cause is to be set down for *Hearing*, after which follows the *Décree*. The Decree being served upon the Party, by a Writ of Execution thereof under the Seal of the Court, and not obeyed, all the Processes of Contempt will issue out against him for his Imprisonment, 'till he yields Obedience to it; or there may be an *Injunction* granted for Possession of Land, where the Decree is for Land, and the Party remains obstinate after his Imprisonment. And if this is disobeyed, the Court may grant a *Sequestration* of the Land, or a Commission to some Justices (and if need be, a Writ of Assistance of the Sheriff) to put the Plaintiff in Possession. Though it has been strongly urged, that this Court of Equity can bind the Person only, not the Lands or Goods of the Defendant. [But long Usage seems now to have establish'd the Jurisdiction of this Court, as well against the Lands and Goods as the Person of the Party.]

4 Inst. 84,
213.
Crompt. Jur.
41. b.
1 Danv. Abr.
749.

If the Plaintiff dismisseth his own Bill, or the Defendant dismisseth the same for want of Prosecution, the Bill is to be *dismissed* with Costs, to be taxed by the Master. [See 15 H. 6. ch. 4. 4 Ann. ch. 16. §. 23.]

In several Parts of these Proceedings, there may be *Affidavits*, *Petitions*, *Motions*, *References*, *Reports*, *Certificates*, *interlocutory Orders*, and *Injunctions*. Lastly, there may be a *Bill of Review* where there is any Error in Law, or an *Appeal* to the House of Lords. [See 12 & 13 W. 3. ch. 3. For exhibiting Bills in Chancery, against any intitled to Privilege of Parliament.]

Of the Court
of King's
Bench.

1 Inst. 71. b.
2 Inst. 21.
4 Inst. 71, 73.
74, 75, 76.
1 Str. 302.

2 Inst. 555.

4 Inst. 73.

4 Rep. 57.

9 Rep. 118.

2 Inst. 166.

4 Inst. 73.

4 Inst. 70.

71.

18 Ed. 3. St. 4.

18 Ed. 3. St. 4.

18 Ed. 3. St. 4.

18 Ed. 3. St. 4.

18 Ed. 3. St. 4.

18 Ed. 3. St. 4.

18 Ed. 3. St. 4.

18 Ed. 3. St. 4.

18 Ed. 3. St. 4.

18 Ed. 3. St. 4.

18 Ed. 3. St. 4.

18 Ed. 3. St. 4.

V. The Court of King's Bench (because the Proceedings are supposed to be *Coram Nobis*, (i. e. *Rege*) consists of a Chief Justice created by Writ, who is stiled Lord Chief Justice, and three other Judges created by Letters Patent. All of them are to continue *Quam Diu se bene Gesserint*. [See 12 & 13 W. 3. ch. 2.] [And by 1 Geo. 3. ch. 23. their Commissions are to continue and remain in full Force, notwithstanding the Demise of the Crown, and their Salaries are to be paid so long as their Commissions remain in Force.]

This Court is removeable at Pleasure. The Seal of this Court is in the Custody of the Lord Chief Justice. The Judges in this Court are the Sovereign Justices of Oyer and Terminer, Gaol-Delivery, and of Eyre, Conservators of the Peace of England, and the Sovereign Coroners of the Land. [See their Oath, 18 Ed. 3. St. 4.] They have supreme Authority, the King himself being supposed by the Law to sit there; 'tho' the King doth judge by his Judges, who even in his Presence answer all Motions. The King himself cannot judge in his own Cause. And tho' several Statutes say, That Delinquents shall be fined at the Will of the King, It is to be understood, that the Fine shall be imposed by his Justices according to Law; for that is the Will of the King. I shall set forth the Subordinate Officers of this Court and its Jurisdiction.

1. As to the Officers. The Subordinate Officers on the Crown-side, or for Pleas of the Crown, are the Clerk of the Crown, with his Secondary and Clerks, who

who frame all Indictments, and transact all other Business relating to criminal Prosecutions and Contempts of the Court.

The subordinate *Officers* on the *Plea-side* or *Civil-side* betwixt Party and Party, are the chief *Clerk* or the *Prothonotary*, who hath his *Secondary* and *Clerks*. The *Secondary*, commonly called the *Master*, receives Matters referred to him by the Court to be examined and reported, signs Judgments, taxes Costs, strikes special *Juries*, attends the Court to inform them in Matters of Practice, and to swear Attorneys, and to take the acknowledgment of Deeds, &c. The *Prothonotary* hath also a Deputy, who keeps the Stamp for signing all Writs and *Processes*, and keeps Remembrances of them, and files the Writs return'd.

The *Clerk* of the *Treasury* and *Custos Breviarum* files all Originals and other Writs, and hath the Custody of the Records in the *Treasury* of this Court, examines and seals all Records of *Nisi Prius* for Trials at the *Affizes*, and keeps several Clerks under him.

The *Clerks* of the *Papers* make up all special Pleadings and Demurrers.

The *Clerk* of the *Declarations* files all Declarations after they are ingrossed in Parchment.

The *Signer* of Bills of *Middlesex* keeps a Book to enter the Plaintiffs and Defendants Names in all such Writs.

The *Clerk* of the *Rules* takes Minutes of all Rules and Orders made in Court on the *Plea-side*, and afterwards draws them up, and enters them in a Book at large. He also files all *Affidavits* used in Court, and with him are given all Rules of *Course*.

[See 29 Car. 2. ch. 5. Concerning Commissioners to take *Affidavits* in the Country, touching any Matter depending in the Courts at *Westminster*. 16 & 17 Car. 2. ch. 9. In the Court of the *Dutchy* of *Lancaster*. For all *Affidavits* must be made before one of the Judges of the Court or before a Commissioner authorized by Act of Parliament. See also 4 W. & M. ch. 4. As to Commissioners for taking *Bails*.]

The *Philizers*, one for each County, make the mean *Process* after the Original in suing to the Outlawry.

The *Clerk* of the *Errors* allows all Writs of *Errors*, and makes *Superfedeas* thereon. He also transcribes the Records, to be carried into the *Exchequer-Chamber*, or *House of Lords*.

The *Clerk* of the *Bails* and *Posseas*, files *Bail-Pieces*, and marks the *Posseas*.

The *Marshal* of the *King's Bench* hath the Custody of all Prisoners, committed by the Court. [By 27 G. 2. ch. 17. The Power of appointing this Officer is reposed in the Crown.]

There are also *Attornies*, *Tipslaves*, *Cryer*, and *Porter*.

2. As to the Jurisdiction of this Court.

The *Jurisdiction* of this Court is general, and over all *England*. It hath Jurisdiction in criminal and civil Causes, and accordingly is divided into a *Crown-side* and a *Plea-side*.

The *Crown-side* originally takes Cognizance of all Treasons, Felonies, Misdemeanors, tending to the Breach of the Peace, or Oppression of the Subject; and of all Causes prosecuted by Way of Indictment, Inquisition, or Information. Into this Office Indictments

6 H

from

4 Inst. 71.
72. 73.
9 Rep. 118.
Hawk. P. C.
Book 2. ch. 3.

of the
Clerks,
who

from all inferior Courts and Orders of Sessions, may be removed by *Certiorari*; and a Rescous may be returned by the Sheriffs. Inquisitions of *Felo's de se*, and of Murder by Misadventure, are certified hither of Course. Hence also issue Attachments, for disobeying Rules, or Orders; concerning which the Party shall be examined upon Oath to Interrogatories; and if guilty, shall be fined; if innocent, discharged.

^a 3 Inst. 27.

⁴ Inst. 73.

⁹ Rep. 118.

Hawk. P. C.

Book 2. ch. 3.

It is the supreme Court of criminal Jurisdiction. Wherefore by the coming of the Court of King's Bench into any County, the Powers of Commission of Oyer and Terminer, Gaol-Delivery, and of those that have Conusance of Pleas, within the same County, are suspended, without writing to them, during the Term. But by a *Special Commission of Oyer and Terminer*, the Commissioners may sit in the same County where the King's Bench sits, and proceed upon an Indictment found before them in the Vacation.

^b 4 Inst. 74.

The Justices of this Court have no Commission or other Means to hold Pleas, but their Power is original and ordinary. For when the King hath appointed them, they have their *Jurisdiction* from the Law, both in criminal and civil Causes. [See 6 H. 8. ch. 6. For remitting Prisoners with their Indictments to the Places where the Crimes were committed. 4 W. & M. ch. 18. and 22. for preventing malicious Informations, and for the Regulation of the Crown Office.]

^c 4 Inst. 71.

72.

Crompt. Jur.

67, 68, 78,

138.

2. ^c On the *Plea-side*, or the civil Branch, it hath Cognizance in all Pleas by *Bill* for Debt, Detinue, Covenant, Account, and of all Actions of the Case, either upon Promises, for scandalous Words, special Nuisances, Trover and Conversion, on penal Statutes, and all other personal Actions, and Ejectments, &c. against any Person in the Custody of the Marshal; as every one sued here is supposed to be; or for or against any Officer, Minister or Clerk of the Court. These Officers, if they are sued in any other Court, must have Privilege of this Court, in respect of their necessary Attendance here. This Court also may hold Plea by *Writ* out of the Chancery of all Trespases *Quare vi et Armis*, Replevins, and *Quare impedit*, &c. [See 12 & 13 W. 3. ch. 3. which gives Power, to hold Plea by Bill, against Persons having Privilege of Parliament ^d.]

^d 2 Str. 734.

2 Ld. Ray.

1442 S. C.

^e F. N. B. 20,

21, cont.

Finch 480.

This Court may regularly examine all and all Manner of Errors, in Fact and in Law, of all Judges and Justices, in their Judgments, Processes, and Proceedings in Courts of Record; not only in Pleas of the Crown, but in all Pleas, real, personal, and mixt, the Court of Exchequer excepted, as shall appear hereafter. It may reverse a Judgment given in the King's Bench in Ireland. [See 6 Geo. 1. ch. 5.]

It granteth an *Habeas Corpus* upon Motion, to relieve Persons wrongfully imprisoned; for upon Return of the Cause they may be bailed or discharged.

It granteth *Prohibitions* to Courts Temporal and Ecclesiastical, to keep them within their proper Jurisdiction.

Also, this Court may *Bail* any Person whatsoever, restore Freemen unjustly *disfranchised*, repeal the *Patent* of the King by *Scire facias*.

The

The Errors of the King's Bench cannot be examined but in the House of Lords, when the Proceedings are by Original out of Chancery; but when the Action is by Bill in this Court, without any original Writ (as the Proceedings now usually are) the Errors are, by Virtue of 27 *El. ch. 8.* to be examined in the Exchequer-Chamber. But thence they may be removed into Parliament. [See the Manner of the Proceedings in civil and criminal Causes, *ch. 4 & 5. post.*]

VI. The Court of *Common Pleas* (otherwise the *Common Bench*) Of the Court of Common Pleas.
is the King's Court held at *Westminster-hall*, or other certain Place, *Coram Justiciariis nostris apud Westmonasterium*; though in antient Time Common Pleas were holden in the King's Bench, which was removeable at Pleasure. *1 Inst. 71. b. 8 Rep. 145. and Pref. 2 Inst. 22. 1 Ld. Ray. 485.*

Let us view its Officers and Jurisdiction.

1. Of the Officers.

In this Court are *four* Judges, (*viz.*) the *Chief Justice* (who is stiled *Lord Chief Justice*) assisted with *three* other Judges. They are created by *Letters Patent* *Quam diu se bene Gesserint.* [See 12 *W. 3. ch. 2.* And see their Oaths, 18 *Ed. 3. St. 4.*] [And by 1 *G. 3. ch. 23.* their Commissions are to continue in Force, and their Salaries to be paid, notwithstanding any Demise of the Crown.] *4 Inst. 109.*

The *Lord Chief Justice* is placed on the Bench by the Lord Chancellor or Keeper; and the *other Judges* by the Chancellor or Keeper and the Lord Chief Justice. The Seal of this Court is committed to the Custody of the Lord Chief Justice. *2 Inst. 555.*

The rest of the Officers belonging to this Court, are, *4 Inst. 101.*

The *Custos Brevium*; who files and keeps all Writs returnable here, and at the End of every Term receives from the *Prothonotaries* all the Records of *Nisi Prius* or *Postea*, &c.

The *three Prothonotaries*; who enter all Pleadings, record and exemplify all common Recoveries, &c. They have their Secondaries.

The *Clerk of the Warrants*; who enters all Warrants of Attorney for Plaintiff and Defendant, and all Deeds of Indenture of Bargain and Sale acknowledged in Court, or before any Judge thereof out of Court, &c.

The *Philizers*; who, having several Counties of England divided amongst them, make out all mesne Process, as *Capias*, *Alias*, *Pluries*, between the original Writ and the Appearance, and enter the Appearances and Bails put in thereon.

The *Clerk of the Effoins*; who enters all Effoins, and keepeth the Roll thereof, and also provides Parchment, and cuts it into Rolls, for entering Judgments, marking the Numbers thereof, and docketts the Judgments of this Court, pursuant to 4 & 5 *W. & M. ch. 20.*

Four Exigenters, each being appointed for several Counties, who make all Exigents and Proclamations in order to an Outlawry upon the Return of the *Pluries Capias*. *Dyer 175.*

The *Clerk of the Superfedeas*; who makes out Writs to supersede the Outlawry, upon the Parties appearing to the Exigent.

The *Clerk of the Outlawries*; who makes out the *Capias Utlagatum* upon the Return of the Exigent. He is only a Deputy to the Attorney General for the Time being, who is Master of this Office.

The

The Clerk of the *Juries*; who makes out all Writs of *Habeas Corpora Jur.* for the Trial of Issues.

The Clerk of the King's *Silver*; who enters upon Record the Money which the King is to have upon the Fines; or the Post-Fines, according to the Value of the Land, as it is rated upon the Writs of Covenant.

The *Chirographer* [or *Cyrographer*;] who engrosseth all Fines upon Writs of Covenant, makes the Indentures of all Fines levied, and delivers them to the Parties, &c. [See his Fees, settled by *West. 2. ch. 44. 2 H. 4. ch. 8. and 23 El. ch. 3.*]

The Clerk of the *Inrollments of Fines and Recoveries*. [See *23 El. ch. 3.*]

The Clerk of the *Errors*; who allows all Writs of Error brought upon Judgments given in this Court, and makes out the *Superfedeas* upon Writs of Error, and transcribes the Records, and transmits the same out of the Common Pleas into the King's Bench.

The Clerk of the *Treasury*; who keepeth the Rolls of the Court, and makes Copies and Exemplifications thereof, makes up and seals all Records of *Nisi Prius*, &c.

The *Proclamator* of the Court; the *Keeper* of the Court; four *Cryers*, substitute to the Proclamators.

The *Warden of the Fleet*; or of the Prison proper for all Commitments by this Court.

None are admitted to plead at the Bar, or to sign any special Pleadings in this Court, but *Serjeants at Law*.

The *Attornies* are not limited to any certain Number.

2. As to the Jurisdiction.

^a 4 Inst. 100.
^b 4 Inst. 99,
100.

The *Jurisdiction* of this Court is general, and extendeth itself throughout all *England*. It hath Jurisdiction in all *civil Causes*, real, personal, or mixt. *Real*, or concerning Inheritances, by which Fines and Recoveries do pass, and all other real Actions by original Writs. In *personal* and *mixt* Actions this Court and the King's Bench, for the most part, have a concurrent Jurisdiction. But this Court hath no Cognizance of *Pleas of the Crown*. *Common Pleas* are said to be all Pleas that are not Pleas of the Crown.

^c 2 Str. 734.
^d 2 Ld. Ray.
1442. S. C.

Regularly this Court cannot hold any Plea in any Action real, personal, or mixt, but by *Writ* out of the Chancery returnable in this Court. But in certain Cases it may hold Plea by *Bill* (without any Writ in the Chancery) as for or against an *Officer* or other privileged Person of this Court, or against one having privilege of Parliament. And this Court, without any Writ, or Plea depending, or Attachment, may upon a Suggestion grant *Prohibitions*, to keep Temporal and Ecclesiastical Courts within their due Bounds. Also this Court hath Jurisdiction for the Punishment of their Officers and Ministers. In a Word, all Actions cognizable by this Court come thither either by *Original*; or by *Bill*, Writ of *Privilege*, or *Attachment*, for or against privileged Persons; out of the *inferior Courts of Record* by Writ of *Habeas Corpus cum Causa*, or *Certiorari*; and out of *inferior Courts not of Record*, by *Pone*, *Tolt*, *Recordare*, *Accedas ad Curiam*, or *Writ of false Judgment*.

See of Writs,
ch. 4. post.

Of the Court
of Exchequer.
^a 2 Inst. 551.
^b 4 Inst. 112.

VII. ^a The Court of *Exchequer* (*Scaccarium Computorum*, from the Resemblance that the *chequered* Cloth bears to a *Chefs-Board*, which covereth the great Table in that Court) is the last of the

four

four Courts at *Westminster*. An antient Court of Record, set up to order the Rights and Revenues of the Crown, and for Debts and Duties due to the King in Right of his Crown.

This Court consists of ^a Two Parts, whereof the *Upper Part* ^{4 Inst. 103.} dealeth especially in the *Judicial* hearing and determining all Causes belonging to the King's Treasure; the *Lower Part* (called the *Receipt* of the Exchequer) in receiving and paying Money.

Each hath its proper Officers.

^b The *Upper Court* is governed by the *Lord High Treasurer*, the ^{4 Inst. 104.} Keeper of the King's Treasure. He hath this Office by the Delivery of a White Staff at the King's Will and Pleasure. This Office is sometimes executed by Commission. He is also *Treasurer* of the *Exchequer* by Letters Patent.

The ^c *Chancellor* and *Under-Treasurer* governs this Court under ^{2 Inst. 555.} the Lord High Treasurer, and hath the Custody of the Seal of this ^{4 Inst. 104.} Court.

^d It is usual, under this Seal to grant Leases for Life or Years; ^{2 Rep. 16.} especially in small Things, and to poor Men. But in Matters of ^{17.} great Concern, it is the surest Way, to take a Lease under the ^{2 Roll. Abr.} Great Seal. ^{182.}

The *Lord Chief Baron* is the chief Judge of this Court, assisted ^{3 Cro. 513.} with three other Barons, who are the ^{528.} *Sovereign Auditors of England*, ^{2 Inst. 381.} and hear and determine all Causes in Law or Equity. They are ^{4 Inst. 115.} created by ^{4 Inst. 117.} Letters Patent, *Quamdiu se bene Gesserint*. [See the ^{3 Cro. 203.} 12 & 13 W. 3. ch. 2. and see their Oath, ^{4 Inst. 109.}] [And by ^{3 Cro. 203.} 1 G. 3. ch. 23. their Commissions are to continue in Force, and their Salaries to be paid, notwithstanding any Demise of the Crown.]

There also sits in this Court another Baron, called the *Curfitor Baron*, who administers the Oath of all High Sheriffs, Under-Sheriffs, Bailiffs, Auditors, Receivers, Collectors, Controllers, Surveyors and Searchers of all the Customs in *England*.

The two ^a *Chamberlains* keep the Keys of the *Treasury*, where ^{2 Inst. 106. a.} the Records do lie with the Book of *Domesday*. They have a Vote ^{2 Inst. 380.} in Pricking of Sheriffs. ^{4 Inst. 106.}

The King's *Attorney General* is made privy to all extraordinary Matters in this Court, and exhibits in his own Name all Informations for Concealment of Customs, Seizures, and Receipts; as also Informations for Intrusions, Wastes, Spoils, Encroachments, and Annoyances done upon any of the King's Lands, or Informations upon Penal Statutes, Forfeitures, and Breach of Covenant.

The *subordinate Officers* in this *Upper Exchequer*, are;

The *Remembrancers*, who keep the Records of the Court of Exchequer betwixt the King and his Subjects, and enter the Rules and Orders there made. ^a One is called the *King's Remembrancer*, ^{4 Inst. 106.} the other, the *Lord Treasurer's Remembrancer*. [See 37 Ed. 3. ch. 4.] ^{08.} These Remembrancers have several Attornies in their Offices, to do ^{Cowel's Int.} Business under them. There is also a ^{v. Remem-} *Remembrancer* of the *First-Fruits*, who takes Bonds of the Beneficed Clergy for First-Fruits and ^{4 Inst. 106.} Tenth's, and makes Process against those that do not pay the same. ^{120.} ^{See p. 37.}

The Clerk of the ¹ *Pipe*; in whose Custody are conveyed, out of ^{ante.} the Offices of the King's and Treasurer's Remembrancers, (as ^{4 Inst. 106.} Water thro' a Pipe into a Cistern) all Accounts and Debts due to the ^{107.} King. So as whatsoever is in Charge in this Roll, or Pipe, is said ^{Cowel's Int.} in ^{v. Clerk of} the ^{the Pipe.} Pipe.

in the Law to be duly charged. In the Treasury of this Office are kept the Great Rolls of the Exchequer, containing the antient Revenue of the Crown, and the foreign Accounts, which contain Part of the Revenue which is granted by Act of Parliament.

The *Controller of the Pipe*; which is the Chancellor of the Exchequer.

The *Clerk of the Pleas*; in whose Office all Officers and privileged Persons in this Court are to sue, and to be sued.

The *Clerk of the Estreats or Extracts*; who every Term receiveth *Estreats* out of the Lord Treasurer's Remembrancer's Office, and writeth them out, to be served.

^a 4 Inst. 107. The *Foreign Opposer, or Apposer*; who opposeth all Sheriffs and Bailiffs of Liberties of their Green Wax, *i.e.* Fines, Issues, Amerciaments, Recognizances for Peace or good Behaviour, Recognizances for Appearances in any Court, certified in several *Estreats* into the Office of the Lord Treasurer's Remembrancer, who delivereth the same to the Clerk of the *Estreats* to be put into Process. And because the *Estreats* annexed to the Writ are under the Seal in Green Wax, they are vulgarly called, Green Wax.

^b 4 Inst. 106. ^c 10 Rep. 103. The *Auditors*; who take the Accounts of the King's Receivers, Sheriffs, Collectors, and Customers, and audit and perfect them. [See 33 H. 8. ch. 39.]

The *Clerk of the Nichils, or Nibils*, who maketh a Roll of such Sums, as the Sheriff upon Process for the Green Wax returns *Nihil*. [See 5 Ri. 2. St. 1. ch. 13.]

The *Marshal*; to whom the Court committeth the keeping of the King's Debtors, during Term-Time, to the End that they may provide to pay the King's Debts, or else to be further imprisoned.

Clerk of the Summons, the Under-Chamberlains of the Exchequer, Secondaries in the Office of the King's Remembrancer, Secondaries in the Office of the Lord Treasurer's Remembrancer, Secondaries of the Pipe, the Usber of the Exchequer.

^e 4 Inst. 107. ^f 108. The *Officers of the Receipt or Lower Court* (besides the Lord High Treasurer, the Treasurer of the Exchequer, the Chancellor, the two Chamberlains before-mentioned) are four Tellers, the Clerk of the Tallies, Clerk of the Pells (from his Parchment-Roll, called *Pellis Receptorum*) two Deputy-Chamberlains, two Usbers, a Tally-Cutter, four Messengers. [See 2 H. 6. ch. 10. Concerning Officers that may make Deputies.]

Thus much of the Officers. Now let us view its Jurisdiction.

^g 2 Inst. 551. ^h 4 Inst. 112. ⁱ 113, 114, 118. The *Jurisdiction of the Judicial Part of this Court in General*, concerneth the Lands, Rents, Franchises, Hereditaments, Debts, Duties, Accounts, Goods, Chattels, and other Profits and Benefits belonging to the King.

^k Bumb. 34, 35. The Officers and Ministers of this Court are privileged to sue and to be sued here. So is the King's Debtor, and the Debtor of the King's Debtor; Prisoners in this Court; Accountants, that have enter'd into their Account. So that all the Officers, their Clerks and Servants, all the King's Tenants and Farmers, all Manner of Debtors or Accountants of the Exchequer are privileged, to sue and implead one another, or any Stranger, in like Actions as are prosecuted in the King's Bench or Common Pleas.

The

The *Judicial* Part is a Court both of *Law* and *Equity*; and the *Jurisdiction* of the one Court is as large as the other, both being for the Benefit of the King, or where the King is concerned.

1. The Court of *Common Law* is in the *Office of Pleas*, after the Course of the Common Law, held *Coram Baronibus* only. Here the Plaintiff ought to be a Tenant or Debtor to the King, or some way Accountant to him. The Leading Process is either a Writ of *Subpœna* or *Quo Minus*; the first is generally used; and both go into *Wales*; where no Process of the *King's Bench* or *Common Pleas* ought to run, except the *Capias Utlagatum*. [See 1 Ri. 2. ch. 12. and 33 H. 8. ch. 39.]

2. The Court of *Equity* is holden in the *Exchequer-Chamber*, before the Lord High Treasurer, Chancellor and Under-Treasurer, Lord Chief Baron, and other Barons of the Exchequer. [As the Treasury is now in Commission, the Bills in this Court are directed to the Chancellor of the Exchequer, the Lord Chief Baron, and the other Barons; but the Chancellor never sits, unless the Barons are equally divided in Opinion, in which Case the Chancellor comes down, and hears the Cause, and gives his Opinion.] The Manner of their Proceedings is almost according to the Practice of the High Court of Chancery. But the Plaintiff must set forth in his Bill, That he is a Debtor to the King; but whether he is so or no, it is not material. In this Court the Clergy frequently exhibit *English* Bills against such as refuse to pay them their Tithes, to make the Defendants set them forth upon Oath, to prove the Payment of them, &c. And here the King's Attorney may exhibit *English* Bills for any Matter concerning the King. And any Person grieved in any Cause at Law prosecuted against him on the Behalf of the King, or any Patentee of the King, may exhibit his Bill against the Attorney General, and others that are interested in the Cause, to be relieved in Equity.

The Leading Process is a *Subpœna*, as in the Court of Chancery.

By 1 El. ch. 4. The First-Fruits and Tenths of the Clergy are within the Survey of the Court of Exchequer.

[See 13 El. ch. 4. 14 El. ch. 7. 27 El. ch. 3. 7 Ja. 1. ch. 15. How Accountants Lands are liable to the Payment of the King's Debts.]

By 6 H. 4. ch. 31. Commissions may be sent to enquire of the Accounts of Sheriffs and other the King's Officers.

To speak exactly, there are Seven Courts in the Court of Exchequer, (*viz.*) the Court of Pleas or of Common Law, the Court of Equity, the Court of Accounts, the Court of Receipt, the Court of Exchequer-Chamber, (being the Assembly of all the Judges of England to debate difficult Matters of Law,) the Court of Exchequer-Chamber upon Errors in the Court of Exchequer, [See 31 Ed. 3. St. 1. ch. 12. 31 El. ch. 1. 16 Ch. 2. ch. 2. and 28 Ch. 2. ch. 4.] The Court of Exchequer-Chamber upon Errors in the Court of King's Bench. [See 27 El. ch. 8. 31 El. ch. 1.]

Thus far of the Courts at *Westminster*, (*viz.*) the Chancery, King's Bench, Common Pleas, and the Exchequer. These are all Courts of Record, except the Equity-side in the Chancery and the Exchequer.

Of the Court
of Chivalry or
Court Martial.

a 4 Inst. 123.

1 Inst. 74. a.

b 1 Lev. 230.
Cases in Parl.
65, 66.

2 Salk. 553.

7 Mod. 125.

1 Inst. 74. b.

4 Inst. 127.

128.

Hawk. Pleas

of the Crown,

Book 2. ch. 4.

c 4 Inst. 125.

126, 127.

d 4 Inst. 126.

Hob 121.

See of Evi-

dence, ch. 4.

post.

e 1 Lev. 230.

4 Mod. 128.

Cases in Parl.

58, 59, &c.

contra.

1 Sid. 352.

353, 354.

Hawk. Pleas,

&c. Book 2.

ch. 4.

f 1 Inst. 261. a.

391. b.

3 Inst. 48.

4 Inst. 123.

124, 134.

g 6 Rep. 47.

48.

12 Rep. 104.

1 Inst. 261. b.

4 Inst. 134.

135, 140.

141, 142.

h 1 Inst. 74. a.

& b. 261. a.

4 Inst. 125.

341.

i 4 Inst. 125.

* 4 Inst. 125.

341.

VIII. The Court of Chivalry (or Court Martial) the Fountain of the Martial Law, is next to be considered. It is now held at Doctors Commons in London.

The Judges of the Court were the Lord Constable of England and the Earl Marshal of England. Marshal is derived from Marc, in Saxon signifying a Horse, and Schalc a Governor. But now the whole Office is given to the Earl Marshal, except in Matters touching Life and Member, which must be before the Constable and Marshal; a Constable being appointed for that Turn only.

The Grant of this Office is by Letters Patent, to exercise by himself or his sufficient Deputy.

Attendants on this Court are the Heralds, created by Letters Patent. Of which three (now four) are called Kings at Arms; the rest are Pursuivants. These Heralds are Messengers of War and Peace, skilful in Descents, Pedigrees, and Armories, taking Care of the Genealogies of the Nobility and Gentry. Their Learning in Descents and Pedigrees, upon just Proof, may be a Means to quiet many Controversies about Titles of Honours, Dignities, and Inheritances. They marshal the Solemnities of Coronations, Marriages, Christenings, Funerals, Feasts of Great Persons, upon Request. They pretend to have the sole Power of painting Arms, marshalling Funerals, &c.

They were incorporated by Ri. 3. and afterwards by King Philip and Queen Mary.

The Jurisdiction of this Court is declared by 13 Ri. 2. St. 1. ch. 2. (viz.) That it hath Cognisance of Contracts touching Deeds of Arms and War out of the Realm, and also of Things that touch War within the Realm, which cannot be determined or discussed by the Common Law, with other Usages and Customs to the same Matters appertaining. [See 8 Ri. 2. ch. 5.]

Out of the Realm, (i. e.) In foreign Parts beyond Sea. For upon the Sea the Admiral hath Jurisdiction.

But if the Cause of Action done out of the Realm is transitory, an Action lies at Common Law, tho' done out of the Realm; or if the Contract made beyond Sea is for doing any Act within the Realm, that Part gives it to the Common Law. An Obligation made beyond Sea may be sued here in England in what Place the Plaintiff pleases; tho' it bears Date at a Place beyond Sea. But if the Action is criminal or local, then the Cause belongs to this Court.

The Words, with other Usages and Customs, support the Claim of this Court, to give Relief to any of the Nobility and Gentry, that are abused in Matters of Honour; and to keep up the Distinction and Degrees of Quality.

The Proceedings are according to the Customs and Usages of the Court by Witnesses (and formerly by Combat) and in a summary Way by Petition; and in Cases omitted according to the Civil Law, and Law of Arms. Therefore upon Attainders, here can be no Forfeiture of Land, or Corruption of Blood.

By 1 H. 4. ch. 14. All Appeals, for Offences done out of the Realm, are cognizable before the Constable and Marshal; but not Appeals of Offences within the Realm.

All Appeals in Case of Arms or Heraldry from Grievances, or Sentences, are to the King. This Sort of Appeal is different from

an

an Appeal on an Offence. This is a Removal of the Cause to a Superior Court.

But this Court is grown much out of Repute, and hath little or no Business. For,

By 26 H. 8. ch. 13. 35 H. 8. ch. 2. 5 & 6 Ed. 6. ch. 11. *All Treasons and Misprisions of Treason committed out of England shall be inquired of in the King's Bench by a Jury of the said County where the said Bench shall sit; or in such County by a Jury, and before such Persons, as the King shall appoint by Commission.*

IX. The Admiralty Court (*Curia Admiralitatis*) is holden at *Of the Court* *Doctors Commons* in London. The Admiralty Sessions for Trial of *of Admiralty.* Malefactors on the Sea is held in *Southwark*, [or in the *Old-Baily*.]

In the Admiralty-Court are the Admiral (*Admirallus*) his Deputy Judge (commonly a Doctor of the Civil Law) Two Registers, ^{1 Inst. 260. b.} ^{4 Inst. 147.} Advocates, Proctors, and a Marshal.

It is not allowed to be any Court of Record, because it proceeds ^{4 Inst. 135.} by the Civil Law; and therefore the Judge has no Power to take ^{1 Roll. Abr.} such a Recognizance as a Court of Record may. [24.] Yet this ^{531.} Court may fine and imprison for a Contempt in the Face of the Court. ^{1 Cro. 685.} ^{1 Vent. 1.} ^{Raym. 78.} ^{12 Rep. 104.}

The Process and Proceedings are in the Name of the Lord Admiral, and by Libel; and the Plaintiff and Defendant enter into Stipulation (or Bail by a Sort of Recognizance) for Appearance, and to abide the Sentence. ^{4 Inst. 135.} ^{1 Roll. Abr.}

Besides the Civil Law, the Maritime Laws of *Rhodes*, and *Oleron* ^{531.} ^{1 Inst. 11. b.} are made Use of. ^{260. b.}

It hath Jurisdiction and Power to determine all Maritime ^{See Molloy de} Causes, or Causes arising wholly upon the Sea, out of the Jurisdiction of a County. ^{Jur. Mar.} ^{1 Inst. 260.} ^{a. & b.}

A Judgment on a Thing done upon Land, is void. 'It is no Part ^{4 Inst. 134.} of the Sea, where one may see what is done on one Side of the Wa- ^{139.} ^{1 Roll. Abr.} ter and the other. 'So Note, That on the Sea below the Low- ^{531.} ^{532.} Water Mark, the Admiral hath sole and absolute Jurisdiction. But ^{1 Salk. 31.} between the High-Water Mark and Low-Water Mark, The Com- ^{4 Inst. 140.} mon Law and the Admiral have Jurisdiction by Turns; one upon ^{141.} the Water, the other upon Land. But if the Water is within a ^{5 Rep. 107.} County, the Common Law claims the sole Jurisdiction. ^{3 Inst. 113.} ^{4 Inst. 124.} ^{138.}

The Jurisdiction of the Admiral is declared by Statutes, ^{4 Inst. 135.} which cannot be dispensed with by any *Non Obstante*; because All the ^{136.} ^{137.} King's Subjects have an Interest in the Jurisdiction of the Admiralty.

By 13 Ri. 2. ch. 5. *The Admirals and their Deputies shall not meddle with any Thing done within the Realm, but only with Things done upon the Sea.*

By 15 Ri. 2. ch. 3. *The Court of Admiralty hath no Manner of Cognisance of any Contract, or of any other Thing done within the Body of a County, either by Land or Water, nor of Wreck of the Sea.*

The Admiral hath no Jurisdiction of *Wreck*, i. e. of Goods ^{5 Rep. 106.} cast and left upon the Land by the Sea; but of *Flotsam*, *Jetsam*, ^{107.} ^{1 Roll. Abr.} and *Lagan* he hath Jurisdiction, for They are in and upon the Sea. ^{531.} But to go on with 15 Rich. 2. ^{See p. 217.} ^{ante.}

Nevertheless, *Of the Death of a Man and of Mayhem done in Great Ships, being and hovering in the main Stream of great Rivers only beneath the Bridges of the same Rivers next to the Sea, and in none other Places of the same Rivers, the Admiral shall have Cognisance.*

zance. And likewise to arrest Ships in great Fleets, for the great Voyages of the King and Kingdom; and shall also have Jurisdiction in such Fleets, during such Voyages.

Note, That the Lord Admiral hath greater Jurisdiction in Case of the Death of Man and of Mayhem than in other Cases.

By 2 H. 4. ch. 11. The 13 Ri. 2. ch. 5. is confirmed, and that Statute and the Common Law shall be holden against the Admiral, and his Deputies. And the Party grieved by the Non-Observance of that Statute, shall (by Action upon his Case) recover double Damages against the Prosecutor in the Admiralty; and the Prosecutor shall also forfeit Ten Pounds to the King, being thereof Attainted.

As to Contracts, the whole is to be done upon the Sea, and no Part within a County, to give the Admiral Jurisdiction; [unless it be for Seamens Wages; ^a or against the Ship for Necessaries for the Ship, or for Money to buy them, during the Voyage ^b, and for which the Master hath hypothecated it.] For where ^c Part of the Act is done, or is to be done in England, and Part out of the Realm, that Part that is, or is to be performed out of the Realm, shall be tried by a Jury, if Issue be taken upon it. As in a Covenant by Charter-Party, that a Ship shall sail from a Place in England to a Place in Spain, and remain some Days; if the Issue or Question is, Whether the Ship sailed thither, and remained there so many Days, it shall be tried by a Jury. ^d So if the Contract was made beyond Sea, for doing of an Act, or Payment of Money, within this Kingdom; or if the Contract is upon the Sea, and not for a Marine Cause, as to pay Money in England. For where Part belongs to the Common Law, and Part to the Admiral, the Common Law shall be preferred. But the Admiralty-Court may award Executions upon ^e Land, or within a County, for that is not to hold Plea of any Thing arising upon Land. Upon Letters Missive or Request, it may also award Execution upon a Judgment given beyond Sea.

This is the current Opinion among the Common Lawyers concerning the Jurisdiction of the Admiralty. But it is insisted on the other Hand by the Civilians, that the Lord Admiral hath Cognizance of Contracts made at Land, touching Navigation and Trade by Sea. ^f It is allowed on both Sides, that the Lord Admiral hath Cognizance of Seamens Wages. [But ^g not of the Wages of a Master of a Ship, unless the Contract for them is made on the Sea.] [See 4 & 5 Ann. ch. 16.] and that He hath Power to erect Beacons; but it is insisted further, that He hath Cognizance of Things done in Ports and Navigable Rivers; as concerning Damages done to Persons, Ships, Goods, Annoyances of Free Passage, unlawful Fishing; and also Cognizance of Contracts and other Things done beyond Sea, relating to Navigation and Trade by Sea ^h.

The Common Lawyers do not pretend to have Cognizance of All Bargains and Contracts made upon the Sea, or beyond Sea, but yield, that some Contracts are under the Cognizance of the Constable and Marshal, and some under the Cognizance of the Lord Admiral.

^k See 2 H. 5. St. 1. ch. 6. Concerning Appointment of Confederators of Truces and Safe Conduct in every Port.

By 8 El. ch. 5. Upon Appeal from an erroneous Sentence given in this Court, the Sentence of Delegates appointed by Commission out of Chancery shall be final.

^a Ld. Ray. 398, 632.

^b 1044.

^c 1 Ld. Ray. 152, 578.

^d 2 Ld. Ray. 806, 982.

^e 1 Inst. 261. b.

^f 4 Inst. 134.

^g 135, 139, 140.

^h 141, 142.

ⁱ 6 Rep. 47, 48.

^j 1 Roll. Abr. 528, 529.

^k 532, 533.

^l 4 Inst. 134.

^m 139, 142.

ⁿ Hob. 11, 79.

^o 212, 213.

^p 1 Roll. Abr. 532, 533.

^q 13 Rep. 52.

^r 4 Inst. 141.

^s 2 Damv. Abr. 265.

^t 1 Roll. Abr. 533.

^u 1 Ventr. 146,

^v 343.

^w 2 Ventr. 181.

^x 4 Inst. 148,

^y 149.

^z 1 Salk. 31, &c.

^{aa} 2 Ld. Ray. 805.

^{ab} 1 Ld. Ray. 152.

^{ac} 2 Str. 858,

^{ad} 937.

^{ae} 1 Ld. Ray. 576.

^{af} 2 Ld. Ray. 1453.

^{ag} See 4 Inst. 134, &c.

^{ah} 4 Inst. 134.

^{ai} 4 Inst. 152.

As there are many inferior Admiralty Courts, their Appeals are made to the Lord High Admiral in this Court. But the Lord Warden of the Cinque Ports is Admiral there, and hath the Jurisdiction of the Admiralty exempt from the Admiralty of England. See Ch. 2. post.

By 2 W. & M. Sess. 2. ch. 2. Commissioners of the Admiralty, have like Authority and Jurisdiction as the Lord High Admiral.

By 11 & 12 W. 3. ch. 7. Piracies and Felonies committed upon the Sea, or where the Admiral hath Jurisdiction, may be tried at Sea or upon Land, in any of His Majesty's Islands, Plantations, Colonies, Ports, or Factories, by Commission, according to the Course of the Admiralty. The Accessories in Piracy may be tried in like Manner.

But see 4 Geo. 1. ch. 11 *infra*. See also 18 Geo. 2. ch. 30. And 8 Geo. 1. ch. 24. For the more effectual Suppressing of Piracy. And also 22 Geo. 2. ch. 33. For amending, explaining, and reducing into one Act of Parliament, the Laws relating to the Government of the King's Ships and Forces by Sea, wherein the Articles for their Government are set out, and the Admiralty are empowered to grant Commissions for holding Courts Martial for the Trial of Offenders at Sea or in any Port, and many other Regulations are established relating thereto, too long to be here inserted.

X. The Court by Commission, according to the Statute of 28 H. 8. Of the Court chap. 15. Must be holden before the Admiral or his Lieutenant or Deputy, and Three or Four Persons more, as shall be nominated by the Lord Chancellor. And the said Commissioners, or Three of them, have Power to enquire of All Treasons and other Capital Crimes and Offences committed at Sea, or in any other Place where the Admiral hath Jurisdiction, and by a Jury of Twelve Men of the County, limited by the Commission. And every Indictment so found shall be good. And such Order, Process, Judgment and Execution shall be had thereupon as against such Offenders at Land, according to the Course of the Common Law. Also the Trial of such Offences (if they be denied) shall be had by Twelve Men of the County, limited in the said Commission.

The Process and Proceedings here are to be in the Name of the King.

The Act of 35 H. 8. ch. 2. or 5 Ed. 6. ch. 11. concerning the Trial of Foreign Treasons, or of Treason committed out of the Realm, does not take away the 28 H. 8. ch. 15. for Trial of Treasons done upon the Sea, though they are done out of the Realm. Besides, by 11 & 12 W. 3. ch. 7. This Statute of 28 H. 8. is declared to be still in Force.

By 1 Ann. ch. 9. Captains and Mariners, belonging to Ships and destroying the same at Sea, or where the Admiralty hath Jurisdiction, shall be tried in such Places as shall be limited by the King's Commission, and according to the 28 H. 8.

By 4 Geo. 1. ch. 11. Pirates, Felons, and Robbers, within the 11 & 12 W. 3. ch. 7. may be tried according to 28 H. 8. ch. 15.

[See 11 & 12 W. 3. ch. 12. Whereby Oppression or other Offences committed by Governors of Plantations, or Colonies beyond Sea, may be tried in England in the Court of King's Bench, or in any County by the King's Commission. And 3 Ann. ch. 20. For the Trial of Officers and Soldiers, that either upon Land out of Great Britain, or at Sea, hold Correspondence with a Rebel or Enemy.]

XI. The

Of the Court
of Assizes.

^a 1 Inst. 153. b.

⁴ Inst. 158.

XI. * The Court of *Assizes* (from *Assideo*, to sit together) is a Court wherein the *Twelve Judges*, (*viz.*) The Justices and Barons of the King's Courts at *Westminster*, are empowered by Commission to try all Causes Civil and Criminal in every County of England, except *Middlesex*, where the King's Courts of Record do sit, and except where his Courts for his Counties Palatine are held. The Progress into the several Counties is called the *Circuit*. These *Circuits* are *six*, to each of which two Judges are appointed. For *Wales*, there are four Circuits, including what is called the *Chester Circuit*; And

By 18 El. ch. 8. The King may appoint Two Persons learned in the Laws to be Judges in each of the Welch Circuits, which had but One Justice before, and may grant Commissions of Association, &c. [See 34 & 35 H. 8. ch. 26.]

The Judges are to be attended by the Sheriff of each County, and his under Officers, if he is absent, or negligent in his Duty, the Judges may fine him.

^b 1 Inst. 293.

a. & b.

² Inst. 498.

⁴ Inst. 184.

185, 291.

Bacon's Elem.

15, 16, 17.

^c Bacon's

Elem. 17, 18.

22, 23, 25.

^d 4 Inst. 163,

164.

The Judges of Assize came into the Place of the antient *Justices* in *Eyre* (*Justiciarii Itinerantes*) about the Time of Rich. 2. who tried Titles of Lands or Goods, and all Treasons, Felonies, &c. going round the Kingdom once in Seven Years.

The Judges of Circuits sit by Virtue of ^c Five several Commissions.

A ^d Commission is a Delegation by Virtue of the Common Law or of an Act of Parliament, whereby Jurisdiction, Power, and Authority is conferred on others. All Commissions of New Invention are against Law, until they have Allowance by Act of Parliament.

^e 2 Inst. 419.

568.

⁴ Inst. 73.

162, 163, 164.

165, 166, 167.

⁹ Rep. 118.

H. P. C. 161.

Crompt. 121,

226.

¹ Vent. 85.

Hawk. P. C.

Book 2. ch. 5.

1. * By a Commission of *Oyer and Terminer* (to hear and determine) directed to them and many other Gentlemen of the County. But the Judges are to be of the *Quorum*, so as the Rest cannot act without one of them. [See 13 Ed. 1. St. 1. ch. 29. 2 Ed. 3. ch. 2. 34 Ed. 3. ch. 1.] By Virtue of this Commission, they have Power to hear and determine Treasons, and all Manner of Felonies and Misdemeanors.

This is the largest Commission that they have. It may be either general or special. *Special*, i. e. to try only particular Persons or Offences.

They cannot proceed but upon Indictments taken before themselves, unless they have a Commission of *Gaol-Delivery* too, or a special Commission. For the Authority of Commissioners of *Oyer and Terminer* is, *Ad INQUIRENDUM, Audiendum, et Terminandum*, to inquire, hear, and determine. They may, upon an Indictment found, proceed the same Day against the Party indicted. [See 1 Ann. St. 1. ch. 8.]

¹² Inst. 568.

⁴ Inst. 168.

169.

H. P. C. 158.

7 Rep. 31.

Dalt. ch. 73.

p. 168.

Hawk. P. C.

Book 2. ch. 6.

Crom. Jur.

125.

2. * By a Commission of general *Gaol-Delivery*, directed only to the Judges themselves, and the Clerk of the *Assize* associate, they have Power to try every Prisoner in the Gaol, committed for any Offence whatsoever, and the same Day he is indicted; but none but Prisoners in the Gaol: So that one way or other they rid the Gaol of all the Prisoners in it. They may proceed upon Indictments taken

^a *Sapientis iudicis est cogitare tantum sibi esse permissum, quantum commissum et creditum.* 4 Inst. 163.

taken before Justices of the Peace, as well as upon Indictments taken before themselves. [See 27 *Ed. 1. St. 1. ch. 3. 4. Ed. 18. ch. 2. and 10. 1. Ed. 6. ch. 7. 1. & 2. Ph. & Mar. ch. 13. And 2 & 3 Ph. & M. ch. 18. For Corporations. See also 33 H. 8. ch. 24. infra.]*

3. By a Commission of *Affize*, directed to themselves only, and the Clerk of the Affize, to take Affizes; upon which Account they are called Justices of Affize. The Office of these Justices is to do Right upon Writs of *Novel Disseisin* (called *Affizas*) brought before them, by such as are wrongfully thrust out of their Lands. These Writs were frequent heretofore; but now Mens Possessions are sooner recovered by sealing Leases upon the Land; or by bringing Ejectments, the Defendant agreeing to confess Lease, Entry, and Ouster. Divers Acts of Parliament have given them great Authority in criminal and civil Causes.

Hereunto belong Commissions of *Association*, for others to be associate, or to be joined to them as fellow Justices; Writs of *Admittance* directed to the Justices, to admit them; the Writ of *Si non Omnes*, for the rest to proceed, though the others do not come. And these the King may grant with respect to Justices of *Oyer and Terminer*, and Gaol-Delivery. [See 27 *Ed. 1. ch. 13. and 2 Ed. 3. ch. 2.*]

Errors before Justices of Affize shall be redress'd in the King's Bench, and not in the Common Pleas.

By 8 Ri. 2. ch. 2. and 33 H. 8. ch. 24. None shall exercise the Office of Justices of Affize or Gaol-Delivery, in any County where he was born or inhabits, in Pain of 100 l. This Act does not extend to Officers in Cities or Corporations, or of the Duchy of Lancaster.

Yet the contrary has been often done by a *Non Obstante* in the Patent. But now it is declared by 1 W. & M. Sess. 2. ch. 2. That the pretended Power of suspending Laws, or the Execution of them by regal Authority only, is illegal.

[By 12 G. 2. ch. 27. The Chief Justice and Justices of either Bench, the Chief Baron and other Barons of the Exchequer, and any other Person learned in the Law, may exercise the Office of Justice of Oyer and Terminer, or Gaol-Delivery, in any County for which he is appointed, notwithstanding his having been born or inhabiting within such County.]

4. By Commission (or rather Writ) of *Nisi Prius*, directed to the Judges and Clerk of Affize, who are therefore called Justices of *Nisi Prius*. Their Authority is annexed to the Justices of Affize. It is called a Commission of *Nisi Prius* from a judicial Writ of *Distingas*, whereby the Sheriff is commanded to distrain the impanelled Jury by their Lands, to appear at Westminster at a certain Day in the following Term, to try some Cause, *Nisi Prius Justiciarii Nostri ad Affizas Capiendas Venerint, &c.* unless the Justices of Affize come before that Day to such a Place in such a County, where the Cause is triable. [The Entry in the Plea-Roll of the Respite for Default of Jurors, or Continuance to the next Term, hath the Clause *Nisi Prius, &c.* See *West. 2. or 113 Ed. 10 ch. 30.*] For

Civil Causes grown to issue (or where Suit is contested, and the Fact ready to be tried) in the Courts at *Westminster*, are brought down in the Vacation, before the Day of Appearance appointed for the Jury above, into the County where the Action is laid, for the Ease of the Plaintiff, Defendant, Jury, and Witnesses, to be tried there, which is usually done in two or three Days. And then upon the Return of the Verdict, given by the Jury, to the Court above, the Judges there give Judgment for the Party, for whom the Verdict is found. The Authority^a of the Judge of *Nisi Prius* is by the Commission of Assize; for by the Statute of *Nisi Prius* 13 Ed. 1. ch. 30. which gives the Trial by *Nisi Prius*, it is to be before Judges of Assize.

^a 2 Ld. Ray.
1143.

[See 27 Ed. 1. St. 1. ch. 4. 12 Ed. 2. St. 1. ch. 3 & 4. 14 Ed. 3. St. 1. ch. 16. 7 Ri. 2. ch. 7. 14 H. 6. ch. 1.]

By 18 El. ch. 12. The Chief Justices or Chief Baron, or in their Absence two other Justices or Barons, [by 12 Geo. 1. ch. 31. any one Judge] as Justices of *Nisi Prius* for the County of Middlesex, shall try Causes upon Writs of *Nisi Prius*, upon Issues joined in the King's Bench, Common Pleas, or Exchequer, in the Term-Time, or four [by 24 Geo. 2. ch. 18. fourteen] Days after each Term.

Tho' Trials by *Nisi Prius* are for the Ease of the Parties, Juries and Witnesses, by saving them the Charge and Trouble of coming up to *Westminster*; yet in Matters of great Weight, or where the Title is intricate, the Court, upon Motion, will retain the Cause to be tried there; and then the Jury and Witnesses in such Case must come up to the Court at *Westminster* for the Trial of the Cause, which is called a Trial at Bar. The King hath his Election, to try his Suits at the Bar, or in the Country, and in what Court he pleases.

^b 4 Inst. 170,
&c.
Dalt. ch. 5.

5. By Commission of the^b Peace in every County of their Circuit. All the Justices of the Peace of that County, where the Judges have their Assizes, are bound to be present. And if they make Default without lawful Impediment, the Judges may set a Fine upon them for their Neglect.

Note, That there is a Commission of the Peace, Oyer and Terminer, and Gaol-Delivery of *Newgate*, held eight several Times in a Year for the City of London and County of Middlesex, at Justice-Hall in the Old-Baily, where the Lord Mayor is the Chief Judge.

These are the five Commissions, by Virtue of which the Judges in their Circuits execute their Authority

^c 4 Inst. 165.
Crompt. Jur.
125.

^c But if Justices sit by Force of a Commission, and do not adjourn the Commission, it is determined; if the Commission has no Time limited for its Continuance. Those that sit by Virtue of a Commission are not countermanded by any new Commission, unless the new Commission be shewed unto them, or proclaimed in the County; or unless the new Commissioners do sit by Force of the new Commission. [See 2 & 3 Ph. & M. ch. 18.]

By 9 Ed. 3. ch. 5. The Justices of Assize, Gaol-Delivery, and of Oyer and Terminer, shall send their Records and Processes to the Exchequer every Year at Michaelmas, to be kept in the Treasury, &c.

By 1 Ed. 6. ch. 7. No Process or Suit before any Justices of Assize, Gaol-Delivery, Oyer and Terminer, Justices of the Peace, or other the King's Commissioners, shall be discontinued, by the Making or Publishing a new Commission, or Association, or by altering the Names of any of the Justices or Commissioners; but the new Justices or Commissioners may proceed, as if the old ones had remained.

[See 11 H. 6. ch. 6.]

By 1 An. St. 1. ch. 8. No Commission of Assize, Oyer and Terminer, General Gaol-Delivery, or Association, Writ of Admittance, or Si non Omnes, or Assistance, or Commission of the Peace, shall be determined by the Death of the King, but shall continue six Months unless before superseded, [See 7 & 8 W. 3. ch. 27.]

[See 14 H. 6. ch. 3. For holding the Assizes at Carlisle for the County of Cumberland. 1 Geo. 1. ch. 37. For holding the Assizes for the County of Cornwall. 20 G. 2. ch. 21. For holding the Assizes for Norfolk. 21 G. 2. ch. 12. For holding the Assizes for Bucks.]

XII. The General or *Quarter Sessions* of the Peace is a Court of Record, held every Quarter of the Year, in every County, before two or more Justices (one *Quorum*) for the Execution of their Authority, given them by the Commission of the Peace, and several Acts of Parliament. In some of the larger Counties the Justices divide the Shire into three or four Parts, and keep four several Sessions in each Part.

Of the Court of the Quarter Sessions. Lamb. Book 4. ch. 19, 20;

By 2 H. 5. St. 1. ch. 4. The *Quarter-Sessions* is appointed to be kept four Times in the Year (viz.) In the first Week after Michaelmas-Day, in the first Week after Epiphany, in the first Week after the Close of Easter, in the Week after the Translation of Thomas à Becket (being the 7th of July) and oftner if Need be.

But Custom, contrary to the Rules of Law, prevails against this Statute in some Counties, and the *Quarter-Sessions* are kept at other Times.

By 14 H. 6. ch. 4. The Justices of Middlesex are not obliged to keep their Sessions above twice in the Year.

By 32 H. 8. ch. 43. Justices of the Counties Palatine of Chester and Lancaster are to keep Sessions only at Michaelmas and Easter.

The Sessions may last two or three Days, yet the Record ought to mention, that the Sessions was holden at one certain Day (viz.) the first Day thereof.

4 Rep. 48; 2 Str. 832, 865.

The Place for keeping the *Quarter-Sessions* in the County is usually in one of the principal Towns in the County, according to the Discretion of the Justices. This being agreed on, the Sessions ought to be warned by Warrant of two or more Justices (one *Quorum*) directed to the Sheriff, thereby commanding him to summon a Sessions of the Peace, to return a Grand Jury before them or their Fellow Justices, at a certain Day and Place, and to give Notice to all Stewards, Constables, and Bailiffs of Liberties to attend. And such a Precept by any two such Justices cannot be superseded by any of their Fellows, but only by Writ out of Chancery.

2 Ld. Ray; 1338. Lamb. Book 4. ch. 2. Crompt. 122. b.

By 5 Ed. 6. (not printed) The Sessions for Anglesey is to be kept at Beaumaris. But,

By 1 Geo. 1. ch. 26. The Justices may adjourn to other Places, for taking the Oaths to the King.

Let

Let us consider the *Persons*, that attend this Court, and its *Jurisdiction*.

1. There must attend at this Court,

^a 2 Inst. 674. The *Custos Rotulorum*, or his *Deputy*; he hath the keeping of
Dalt. ch. 185. all Bargains and Sales by Deed indented and inrolled, and of the
P. 513. Records of the Sessions, and of the Commission of the Peace. [See

37 H. 8. ch. 1. 3 & 4 Ed. 6. ch. 1.]
^b Dalt. ch. 185. p. 513. The *Justices of the Peace*; who are to certify their Recogni-
514. zances, [See 3 H. 7. ch. 1. 5 & 6 Ed. 6. ch. 25.] and Examina-
Cont. Lamb. tions taken by them, and to hear Causes, &c. [See 12 R. 2. ch. 10.
Book 4. ch. 3. 2 H. 5. St. 1. ch. 4.] If any one does not attend, or does misbe-
Burn, Tit. Seff. have himself, the Court, as a Court, upon an Indictment, may fine
Hawk. P. C. and imprison him. [2y. As to one of themselves.]
B. 2. p. 41.

The *Clerk of the Peace*; to read the Indictments, to enter the Acts of the Court, and to draw up Process. He is Deputy to the *Custos Rotulorum*.

By 1 W. & M. Seff. 1. ch. 21. The *Clerk of the Peace* is to be appointed by the *Custos Rotulorum* without Fee or Reward, on Pain of forfeiting double Value of the Sum or Reward given, and of both *Custos* and *Clerk* being disabled to enjoy their Places. He is to hold his Office *Quam diu se bene Gesserit*. But for misdemeaning himself, the *Justices in Sessions* may discharge him. And then the *Custos Rotulorum* is to choose another Resident in the County, or on Default the *Justices in Sessions* to appoint one. [See 27 H. 8. ch. 16. 10 & 11 W. 3. ch. 23. 3 Geo. 1. ch. 18. and 22 G. 2. ch. 46. *infra*.]

The *Sheriff*, or his Deputy; to return Juries, to receive the Fines set by the Court on Delinquents, &c.

Coroners also must attend, because they are Parties to Exigents, and in some Cases have Power to commit; so the *Gaoler* with his Prisoners. [See 3 H. 7. ch. 3.] The *Governor of the House of Correction*, to give a Calendar of such Rogues and disorderly Persons, as have been committed, and to receive those that are committed by the Court. [See 7 Ja. 1. ch. 4.] The *Bailiffs of Hundreds and Liberties*, to return the Sessions Process; the *Constables of Hundreds*, &c. to make a Return of their Warrants, to bring their own Presentments, of what is amiss in the County, and those Presentments which they receive from their petty Constables; *Treasurers* of the County-Stock; all Persons that are bound by *Recognizance* to appear and answer for themselves, or to give Evidence or prosecute; all *Jurors* (of the *Grand* or *Petty* Jury) returned by the Sheriff, on Pain of Loss of Issues or Profits of their Lands.

^c 1 Lev. 159. Freedom from Arrest upon mean Process is to be allowed to all that attend upon a Court of Record. So that if such a one is arrested upon mean Process, this Court may discharge him.

^d 1 Ld. Ray. 426. 2. The *Jurisdiction* of the *Justices in Sessions* consists in hearing and determining Felonies, Trespasses, and other Misdemeanors against the publick Peace, mentioned in their *Commission*, or given

^e 2 Str. 1256. by *Statutes*. Upon Conviction in Trespass, this Court may fine, &c. But tho' they have Power to hear and determine Felonies, they usually

try only Petty Larcenies; other Felonies being of Course tried at the Assizes.

But there are many Offences, which by particular Statutes ought to be prosecuted in this Court^a; as concerning Alehouse-keepers^b, and selling Ale to an unlicensed Alehouse-keeper, Bastard-Children, Badgers of Grain, Butter and Cheese, Bakers, concerning Bridges, Cottages, Forestalling, Regrating and Ingrossing, Game, Highways, Masters and Apprentices^c, Malsters, Settlements, and Appeals concerning the Poor, Popish Recufants, Raising Money for passing Vagrants, Wages, Weights, and Measures.

Some Things are particularly enjoined to be done in *Easter* and *Michaelmas* Sessions,^{*} and cannot be done in any other. In *Easter* Sessions, Relief for maimed Soldiers is to be raised by an Assessment, the Wages of Labourers taxed, Treasurers for the County-Stock are to be appointed, and the Prices of the Carriage of Goods are to be settled. In *Michaelmas* Sessions, the Justices, who are to controul the Estreats of Sheriffs, must be chosen by the *Custos Rotulorum*, or by the Eldest of the *Quorum*; or the Prices of Victuals may be then assessed, or at *Easter*.

^a One ought not to be indicted and tried the same Sessions. *Qu.*

Besides Trials upon *Traverse*, i. e. where the Party takes Issue, or denies the chief Matters of the Indictment, or the Point of the Indictment, the Justices make Orders upon hearing of Complaints, which if disobeyed, they may bind the Delinquent to appear and answer the Contempt, or immediately commit him to Prison, till Obedience to the Order is performed. But an Order of the Quarter-Sessions may be removed by a Writ of *Certiorari* into the King's Bench, and be quashed for Insufficiencys appearing upon the Order; or it may be sent back again by *Procedendo*. Strictness of Words are not required in an Order of Sessions, as in an Indictment. [See 5 Geo. 2. ch. 19. which obliges Justices at the Quarter-Sessions, to determine Appeals according to the Merits, notwithstanding Defects of Form in the original Proceedings; and Persons suing Writs of *Certiorari* to remove Orders made on such Appeals, to give Security to prosecute the same with Effect.]

In this Court several Statutes are to be proclaimed by express Command in the said Statutes.

^a In some Counties the Sessions are usually adjourned, for Dispatch of Business, to a private Chamber; where four Justices make Orders concerning Matters of Importance, to promote some private Design, &c. *Quere*, If such Orders are good.

There is sometimes kept a *Special* or *Petty* Sessions by some Justices at an Inn, &c. for the more speedy Dispatch of Business in the Neighbourhood; as for licensing Alehouses, taking the Accounts of the Overseers of the Poor, and Surveyors of the Highways, and to get Information of the State of the Highways, and for examining the Register-Books of Rectors, and Vicars, as to Affidavits for burying in Woollen, &c.

[By 22 G. 2. ch. 46. §. 14. No Clerk of the Peace or his Deputy, or Under-Sheriff or his Deputy, shall act as a Solicitor, Attorney, or Agent, at any General or Quarter Sessions for the County or Place where he shall execute such Office, under the Penalty of Fifty Pounds.]

Several Corporations have their Quarter-Sessions within their own Limits. [See of Justices of the Peace, B. 1. ch. 7. ante.]

XIII. The Sheriff's ^a Turn (from Tour, a Circuit) is a Court of Record, held in the usual Place before the Sheriff twice every Year, (*viz.*) within a Month after *Easter*, and within a Month after *Michaelmas*, for Criminal Causes. Otherwise, if held at any other Time, the Presentments there are void. [See *Magna Charta*, chap. 35. and the 31 *Ed. 3. St. 1. ch. 15.*] It is the King's Leet throughout the County, though it is held in every particular Hundred, [See the Statute of *Marlebridge*, ch. 10.] and the Sheriff is Judge of it, as of a Court incident to his Office. The Style of this Court is *Curia visus Franci plegii Domini Regis tent. apud A. coram Vicecomit. in Turno suo primo die, &c.*

All ^b Ecclesiastical Causes were antiently determined in the Turn, and the Bishop, with the Sheriff, did go in Circuit twice every Year, through every Hundred in the County.

Those Things are inquirable here, as are inquirable in a Leet. For the Court-Leets were taken out of the Turn. [See *Mag. Chart.* ch. 17. and 2 *Inst.* 32. 28 *Ed. 3. ch. 9.* 1 *Ed. 4. ch. 2.* and of the Court-Leet, *infra.*]

An Offender here shall be amerced, and there shall be a Distress or Action of Debt for that Amerciament. But the Sheriff may impose a Fine on any, that are guilty of an Offence in the Face of the Court, and on Officers neglecting Duty. And for such Fine may distrain, or bring an Action of Debt.

XIV. The ^c County-Court (*Curia Comitatus*) is held from Month to Month by the Sheriff, or his Under-Sheriff, upon a certain Day, the Month being computed by twenty-eight Days, and not according to the Kalendar. [See *Mag. Chart.* ch. 35. and 2 *Ed. 6. ch. 25.*]

It may be kept at any Place within the County by the Sheriff, unless he is restrained by Statute. [7 & 8 *W. 3. ch. 25.*]

This Court is no Court of Record, but only a Court-Baron. The Freeholders or Suitors of this Court are the Judges, not the Sheriff. The first Process is a *Distingas*, or Distress, till the Defendant does appear; but no *Capias* can issue from this Court.

This Court is for Civil Causes, and doth hold Pleas betwixt Party and Party, where the Debt or Damage is under 40s. But it ought not to suffer the Plaintiff (as is too often practised) to divide his Debt into several Plaints under 40s. to empower this Court to hold Plea of it. For in this Case the Defendant may have a Prohibition. It hath not Cognizance of Trespass *Vi et Armis*, because a Fine is thereby due to the King, which it cannot impose. But by Virtue of a Writ of *Justicies* the Court may hold Plea of Trespass *Vi et Armis*, and of any Sum, or of all Actions Personal above 40s. For this Writ is in the Nature of a Commission to the Sheriff, and is *Vicontiel*, (i. e.) belongs to the Sheriff, is triable in the County-Court, and is not returnable. In a *Replevin*, the Sum may be above 40s. yet if *Freehold* is pleaded by the Defendant, this Court can proceed no further; for Freehold shall never be tried without Writ, therefore the Cause must be removed; as when a Defendant avoweth

avoweth for *Damage-feasant*, and the Plaintiff justifieth by Reason of Common of Pasture.

A *Coroner* is to be chosen here in full and open County by the Freeholders of the County, by Force of the King's Writ; and is to be present in this Court, to pronounce Judgment of Outlawry upon the *Exigent*, after *Quinto Exactus*, at the fifth Court, if the Defendant does not appear.

Knights of the Shire for the Parliament, and *Verderers* of the Forest, are here likewise to be chosen.

By 11 H. 7. ch. 15. *The Offences of Sheriffs and Bailiffs in deceitfully entering Plaints, and not duly warning the Defendants in County-Courts, are examinable by Justices of the Peace, and the Offenders shall forfeit 40s. for each Offence.*

See 23 Geo. 2. ch. 33. For preventing Delays and Expences in the Proceedings in the County-Court of *Middlesex*, and for the more easy and speedy Recovery of small Debts in the said County Court.

XV. The *Hundred-Court* is held before a *Steward*, but the *Suitors* are the *Judges*. It is derived out of the County-Court for the Ease of the Subject, and consequently is no Court of Record, having like Jurisdiction. It may be held every three Weeks. These Courts are *Franchises*, and the Sheriff hath nothing to do with them.

XVI. The *Leet* or *View of Frank-Pledge*, (from *Free-Pledge*, Surety for Freemen) is a Court of Record, held before the *Steward* of the *Leet*, that the King may be certified, by the View of the *Steward*, of the Manners of the People within that Precinct, for the Preservation of the King's Peace, and the Punishment of several Offences against the Publick. For this Reason every one must be within some *Leet*. None can be of two *Leets*, unless perhaps one hath not a General Jurisdiction. For then the Inhabitants within such a private *Leet* must attend the Sheriff's Turn for all other Matters, that are not within the Cognizance of the private *Leet*. If one's House stands in two *Leets*, he is said to be *Commorant* in that where his Bed stands. The Precinct of the *Frank-Pledge* is called *Decenna*; because it commonly consisted of ten Houses. The People did heretofore undergo great Trouble in travelling to the Sheriff's Turn, therefore *Leets* or *Views of Frank-Pledge* were granted to Lords of Hundreds and Manors and lesser *Franchises*, and to Mayors of Cities, &c. out of the Sheriff's Turn. [See 12 Ed. 4. ch. 8.] Upon this Account, there is a Duty in many *Leets* *De Certo Letæ*, towards the Charge of obtaining the Grant of the *Leet*. Yet these Courts are still the King's Courts, tho' the Profit goes to a common Person, or to a Subject.

Leets may be held by *Charter* or *Prescription*. By *Charter*, on the same Days contained in the Charter. By *Prescription*, on certain or uncertain Days, according to Usage. For it is said, that the Statute of *Magna Charta* (which provides that no *Leet* shall be holden but twice in the Year) was in Affirmance of the Common Law, and therefore that one might prescribe against it, or that that Statute, and 31 Ed. 3. St. 1. ch. 15. extend only to the Sheriff's Turn, and to those *Leets* only, that have been since granted out of the Turn; not to those that were before the Statutes. But they must

must be kept in a certain and determinate *Place* within the Precinct. A Man may prescribe for a Leet, to enquire of one or two Articles only, as before hinted.

^a 6 Rep. 12.
⁸ Rep. 38.
² Inst. 120,
121.

The *Steward* is the Judge, as the Sheriff is in the Turn. All *Freeholders* within the Precinct are obliged to come to it, and all other People above the Age of twelve Years, and under sixty, except Peers, Clergymen, Women, and Tenants in Antient Demefne. [See Stat. of *Marlebridge* 52 H. 3. ch. 10.] The *Jury* ought to consist of twelve *Freeholders* at least, to enquire and present all Things presentable. If there are not twelve *Freeholders* Resiants to be sworn on the Jury, or any Suitors, the *Steward* may cause Strangers, that come within the View or Precinct, to be of the Inquest or Jury. No one is bound to attend on the Account of his Lands lying within the Precinct, but only in respect of his personal Residency.

The *Steward* hath Power and Authority in this Court. 1. To elect Officers, as Constables, Tithingmen, Haywards, Ale-Tasters; ^b 1 Ld. Ray. 70. [2y. If the Homage are not the Electors of Common Right.] To punish Offenders by the *Common Law*, not by Statute, unless the Statute gives Authority, [See 18 Ed. 2.] but in no Case with Death. Petty Treasons, Felonies, Trespasses *Vi et Armis* are enquirable here by the Jury, and may be presented in this Court; but are not punishable here. They are to be certified by the *Steward* to the Justices of the Peace at the next Quarter-Sessions; other Offences may be enquired of, presented, and punished; some by *Common Law*, and some by Statutes.

^c 4 Inst. 265.
^d 2 Danv. Abr. 290, &c.
⁴ Inst. 262, &c.]

This Court hath Cognizance^d, by *Common Law*, or by Statute, of tipling in Ale-houses, Misdemeanors of Ale-Conners; Affrays, Assaults whereby Bloodshed ensueth; Common Barretors, Bawdy-Houses, Misdemeanors of Constables for neglecting to keep Watch and Ward, and to execute their Office upon Vagabonds and sturdy Beggars; Defects in Bridges, Causeways, and Highways; Destroyers of antient Bounds to distinguish Parishes, Tithings, and Commons; Misdemeanors of Bakers, that do not observe the Assize of Bread; Brewers, that do not observe the Assize of Ale and Beer; Offences of Butchers, Curriers, Cottages and Inmates, Decenners or Suitors resiant not appearing at the Leet; Estrays, Waifs, Treasure-Trove, and Goods wrecked belonging to the King, not to a Subject; Offences of Eaves-droppers, of those that neglect to hold a Fair or Market, Forestallers, Regrators, and Ingrossers, unqualified Persons keeping Guns, Dogs, or Engines to destroy the Game; unlawful Games, common Hedge-Breakers, those that neglect to make Hue and Cry after Robberies and Felonies committed, Misdemeanors of Higlers, Innholders, of those that give Lands in Mortmain without Licence, Millers, Night-walkers, common Nuisances; the Want of Stocks, Pillory, and common Pounds; Pound Breaches, Rescous, Scolds, Misdemeanors of Shoemakers, Searchers and Sealers of Leather; those that put Stone-horses of two Years old into a Common, Offences in Victuallers, false Weights and Measures, &c.

^e Dyer 13, 14.
Finch 386.
Kitchin 86,
91, 158.
² Inst. 32.
H. P. C. 175.
¹ L. Ray. 470.

Note, ^e That a Presentment in a Court-Leet, or Sheriff's Turn, after the Day of Presentment, subjects the Party forthwith to a Fine or Amerciament, and is not traversable, unless it toucheth the Party's Freehold; as that one ought to cleanse the Highway, by Reason of his Tenure. Here the Course is to remove such Presentment

sentment into the King's Bench by *Certiorari*, where the Party may traverse it. Neither the Turn or Leet have Power to try any Manner of Traverse. [See *Mag. Chart. ch. 17. i Ed. 4. ch. 2.*]

The Freeholders in a Leet may make *By-Laws*, relating to the Publick Good, for Matters within the Leet; and they shall bind every one, if they are for the Publick Good, or for the Commonwealth. Otherwise if they are for a Private Interest, they bind those only that agree to them, and must be in Pursuance of a Custom to make such By-Laws.

The Method of Punishment is by *Fine* and *Amerciament*, which are incident to Court-Leets.

* A *Fine* here signifies a pecuniary Punishment, assessed by the Steward for an Offence or Contempt committed in Court, or by Publick Officers out of Court in Administration of their Offices. A Fine is always to be assessed by the Steward, and is not to be affected; tho' sometimes it is called an *Amerciament*. For a Fine the Lord may have an Action of Debt, or distrain of common Right. This is the only Court that can fine and not imprison. An *Amerciament* (*Misericordia*, for it ought to be assessed *mercifully*) is a pecuniary Punishment, assessed by the Homage or Jury, for Offences committed out of Court by private Persons, to be mitigated by *Affeerors* [from *Affeurer*, to tax] affirming the Reasonableness thereof upon their Oaths, where no express Penalty is prescribed by Statute. An *Amerciament* is always to be assessed by the Homage. And if an *Amerciament* is agreed on, the Lord may have an Action of Debt for it, or distrain for it of common Right, and impound the Distress, or sell it at Pleasure [24.] But he cannot imprison for it. A Man cannot be amerced in a Leet for surcharging the Common, or for digging in the Common; because this concerns the Private, not the Publick Interest, and belongs rather to the Court-Baron to enquire of it.

Every one that hath a Leet or Market ought to have a Pillory, Tumbrel, &c. to punish Offenders. [See 51 H. 3. St. 6.] For Want thereof, as well as for other Neglects, the Lord may be fined, or his Liberty seized. Stocks are to be provided at the Charge of the Town. For originally they were not to punish, but to keep Men in hold.

Note, That the greatest Part of the Business of the Turn and Leet hath declined for several Years, and is devolved on the *Quarter-Sessions*.

XVII. The *Court-Baron* is a Court which every Lord of a Manor (anciently called a *Baron*) hath within the Precinct of his Manor. It is no Court of Record, and therefore County-Courts, Hundred-Courts, &c. are not of Record; because they are but Court-Barons. A Court-Baron is an inseparable Incident to a real Manor, not to a nominal Manor, where the real Manor has been once destroyed, by granting away the Demesnes, or Services. It must be held by Prescription, for it cannot be created at this Day. A Court-Leet is not incident to a Manor, but he that hath a Manor may also have a Court-Leet, to be held within his Manor by Prescription or Grant from the King. And that which of a Publick Nature is transacted in a Court-Leet, when it is held with a Court-Baron, shall be applied to the Court-Leet, as Private Matters shall

be applied to the Court-Baron. [See of *Estates by Copy of Court-Roll*, B. 2. ch. 1. ante.]

A Court-Baron must be holden on some Part of the Manor. For if it is holden out of the Manor, it is void; unless there is a Custom to hold Courts at one Manor for all, where the Lord hath several Manors.

This Court is of ^a Two Natures. 1. By *Common Law*, which is the *Barons or Freeholders Court*, or the Court-Baron that is incident to every Manor, of which the Freeholders, being Suitors (Men, not Women) are the Judges, and the Steward only Register. It cannot be a Court-Baron without Two Suitors at least. ^b A Jury finds that there is such a Manor, but that for twenty Years there has been but one Freehold Suitor; it shall not be intended that the Manor is destroyed, but that it is suspended *pro tempore* [24.] This Court may be kept from three Weeks to three Weeks. 2. By *Custom*, which is called the *Customary Court*, though it is kept but very seldom. This doth concern Customary Tenants and the Copyholders, whereof the Lord or his Steward is Judge. The Court-Baron may be of this double Nature, and the Rols contain Matter that concerns both, or One may be without the other. But as there can be no Court-Baron at Common Law without Freeholders, so there cannot be a Customary Court without Copyholders, or customary Tenants. And then, though it is not a Manor in Law without Freeholders, yet it is such a Manor, that the Lord may keep Courts, &c. for Copyholders.

This Customary Court cannot be held out of the Manor.

^c The Franchises of *Infangthefe* and *Outfangthefe* to be heard and determined within Court-Barons, are antiquated or gone. *Fang* in the *Saxon* Tongue signifies to take or catch, and *Thefe* a Robber. ^d So that the Words signify a Privilege or Liberty, granted unto Lords of certain Manors, to judge any Thief taken within their Fee, whether one of their own Men living in the Manor, or one living out of the Manor, that is taken there.

The *Persons* concerned in this Court are the Lord, the Steward, the Lord's Tenants, and the Bailiff.

The Lord is chief in Place of Authority. ^e His Acts are good tho' an Infant, *Non Compos Mentis*, outlawed in a Personal Action, excommunicate, &c. And tho' but Tenant for Years, at Will, Statute-Merchant, &c. he is *Dominus pro Tempore*, and a lawful Lord of the Manor for the Time being, not only to make Admittances upon Surrenders and Descents, but to grant voluntary Copies of ancient Copyhold Lands, which come into his Hands. Even the Voluntary Grants by Copy, made by such particular Lords, shall bind him that hath the Freehold or Inheritance; because all these are lawful Lords for the Time being. But Disseisors, Abators, Intruders, and others that have defeazable Estates, shall not bind others by their Voluntary Grants. A Tenant at Sufferance shall not bind them, because he is in by Wrong; though Admittances made upon Surrenders or Descents, by Disseisors and others in Possession that have defeazable Titles, shall stand good, against them that have Right; because it was a lawful Act, and they were compellable to do it. Nay, if the Lord of a Manor for the Time being is Lessee for Life or Years, Guardian or Tenant at Will of a Manor, and does take a Surrender into his Hands; and before Admittance

mittance his Estate is determined, yet the Lord that cometh in above, shall be compelled to make Admittance according to the Surrender; for there was *Legitimus Dominus pro Tempore*. What Custom doth confirm to a Copyholder, the Law will allow him; yet those Acts that are not strengthened by Custom, have no longer Continuance, than the Lord's Estate continueth. And therefore if a Lord for Life of a Manor granteth a *Licence* to a Copyholder to alien, and dieth, the Licence is destroyed and the Power of Alienation ceaseth.

* The Lord's *Authority* doth consist chiefly, 1. In punishing Offences and Misdemeanors committed within his Precincts; as for Non-Performance of Customs, Breach of By-Laws, &c. 2. In deciding Controversies about the Title of Copyhold Lands lying within his Bounds; where he may redress Matters as a Chancellor in Equity. These Authorities concern the Court-Baron, properly so called. 3. In admitting Copyholders upon voluntary Grants, Surrenders, or Descents, which may be done by him out of the Manor, in what Place the Lord pleaseth. 4. In giving Licence to Copyholders, to alien by Deed, or to demise for Years, &c.

The *Steward* (from *Stede* a Place, and *Ward* a Governor) is he that in the Lord's Absence sitteth as Judge in Cases of Copyhold in the Court (but he is only a Register in the Freeholders Court) to enter Plaints, Pleas, Surrenders, Admittances, Fealties, and to prove Testaments, and to commit Administrations of Persons dying within the Manor, &c. In the Lord's Absence he may also punish Offences, determine Controversies, redress Injuries, &c. he acts sometimes in the Lord's Name: Stewards for the most Part have Patents Appointments in Writing, for their Offices; yet they may be retained by Parol, or Word of Mouth, and they shall continue so until countermanded. But in the King's Manors a Steward cannot be retained by Parol. Neither can a Corporation make any such Officer without Writing. Yet if he is retained by Parol by a Corporation, his *Judicial Act* shall stand good, though his Authority is grounded upon a wrong Foundation. But Acts which he performeth as Custom's Instrument (not as Judge; as Voluntary Admittances, &c.) can never bind.

A Steward of the Court may take Surrenders in any Place without Custom; but he cannot, at any Court holden out of the Manor, make Grants of Copyhold Estates, or Admittances, unless by Custom, or express Words in his Patent, or by special Authority given him by the Lord.

The Office of a Steward may be forfeited by *Abuser*, *Non-User*, and *Refuser* to keep Court, &c.

An *Under-Steward* is the Steward's Deputy, and his Authority is equal to the Steward's, and though the Under-Steward can take a Surrender out of Court, he cannot make any Admittance out of Court, without special Authority, or particular Custom. A Steward must have special Words in his Patent, to make an Under-Steward, unless in Cases of Necessity; as where the Office of Stewardship descends to an Infant, or is granted to a Peer, then in Respect of Infancy or the Dignity he may make a Deputy.

The *Tenants* are the Freeholders and Copyholders.

The *Bailiff* is the Cryer, and his Duty is to execute the Process of the Court, to present all Pound-Breakers, and all Chattels waived and strayed.

As

As for the Jurisdiction of the Court-Baron.

^a Lit. 76.
⁴ Rep. 26.
¹ Inst. 58. a.
¹¹⁷ b. 118. a.
Coke's
Comp. Cop.
§. 31.

^b Coke's
Comp. Cop.
§. 31.

^c Finch 470.
⁴⁷¹.
¹ Roll. Abr.
543.
² Danv. Abr.
296.

¹ Inst. 60. a.

¹ Wms. 330.

⁴ 4 Rep. 26.
¹¹ Rep. 17.
18.
¹ Inst. 58. a.
¹ Roll. Abr.
527.

1. The ^a *Freeholders-Court* consists in hearing Complaints of Copyhold Lands (for Copyholders shall not implead, except against the Lord himself, or be impleaded in the King's Courts for their Tenements by the King's Writs, tho' a Copyholder's Lessee for one Year may bring an Ejectment) and for Debt, Trespass, &c. under 40 s. (not of Trespass *Vi et Armis*, because they cannot impose a Fine) where the Freeholders or Suitors are Judges. ^b These must be Twelve; though the Lord may hold a Court-Baron for other Purposes, where there are but two Tenants. But if there is Issue betwixt Party and Party, there must be Twelve; where the Trial by Jury is by Consent, the *Process* is the same as in the County-Court, by Distress infinite. But if the Defendant in Trespass appears and pleads Freehold, the Court shall cease. Every Stranger that comes within the Manor may be sued there in Debt, Trespass, &c. under 40 s. Yet if any foreign Plea is pleaded, it hath no Jurisdiction. And though every Copyholder may be impleaded in the Court of the Lord by Complaint, yet the Cause may be removed by the *Plaintiff* by *Tolt* to the County-Court, and from thence by *Pone* into the Common Pleas; but the *Defendant* may have a *Recordare facias* into the King's Bench or Common Pleas. ^c *Execution* is only by Distress and impounding till the Party is satisfied. There is no Power to sell, or deliver the Distress to the Party, neither is the Body to be taken in Execution. By Custom a *Levari Facias* may be awarded. But the Goods cannot be sold without Custom.

In this Court an Heir of a Copyholder may bring a Complaint in the Nature of an Assize of *Mortdancesfor*; and upon a Recovery there, a Writ of False Judgment doth not lie; but the Remedy is by Petition to the Lord, and he for Cause may reverse the Judgment. And the Court of Chancery will correct the Proceedings in the Lord's Court, if any Thing were done therein against Conscience; and yet no Appeal or Writ of Error lies of such Judgment.

Note, That Actions are seldom entered in this Court-Baron, for it is kept not above twice in the Year. Whereas it was at first intended that they should be held every Three Weeks.

A common Recovery may be had in this Court, if the Custom of the Manor can support it.

2. ^d The *Copyholders Court*, (or *Customary-Court*, to be held upon some Part of the Manor) is for making *Voluntary Grants* upon Escheats and Forfeitures, and for *Grants* and *Admittances* upon Surrenders and Descents on Presentment of the Homage or Jury. The Homage may enquire of all Persons, that owe Suit to this Court, and make Default, and present their Names. It may enquire of the Death of Tenants after the last Court, and who is the next Heir, &c. of fraudulent Alienation of Lands, to defeat the Lord of his Profits; Of Rent, Custom, or Service withdrawn; Of Lands concealed, or used without Licence of the Lord; Of Escheats and Forfeitures; Of Encroachments on any of the Lands of the Lord without Licence; with-holding Court-Rolls, Rentals, or other Evidences appertaining to the Lord; of Mortmain; Letting Copyhold-Land for a longer Time than a Year and a Day without Surrender, unless it is by Custom that one may let for longer Time; Alienations of Copy-

Copyhold by Deed; cutting down of Trees by Copyholder without Custom or Licence; Copyholder suffering his Houses to decay, and not repairing them; of Surrenders by Copyholders after the last Court to the Use of another, and not brought into Court; of Suit not performed at the Lord's Mill by Reason of Tenure; of Waste by Tenant for Life in Houses, Lands, Woods, Gardens; of Fishing, Hawking, or Hunting within the Liberty of the Lord without Licence; taking away Swans or their Eggs. The Homage may also inquire of Surcharge of Common with commonable Beasts, or of putting Beasts into the Common, that are not commonable; of Trespass in the Common, or Waste of the Lord, by digging, building, or Inclosure; of Trespasses in Corn, Grass, Meadow, Pasture, Woods, Hedges; of chasing Cattle into the Manor, and rechasing them; Rescous and Pound-Breach; removing Mere-Stones or Land-Marks; of Bailiff, and Constable, or Hayward, neglecting his Office; of By-Laws or Orders not observed. * For a Court-Baron may make By-Laws by *Custom*, as well as a Leet; and add a Penalty upon the Breach of a By-Law; which cannot be affeered, for a Penalty differs from an Amerciament.

In this Court there need not any Freeholders.

The Method of *Punishment* is by *Amerciament*. For Amerciaments are incident to Court-Barons, as well as to Court-Leets.

After the Homage hath presented *Offences*, the Steward cannot amerce, without three *Affeors* are sworn to *affeer* or *moderate* the Amerciament; and then the Lord may have an Action of Debt in his Court-Baron [or rather elsewhere] for an Amerciament affeered (not distrain for it without Prescription) for the Suitors are Judges there, and not the Lord, as hath been said. The Lord cannot amerce any one in his own Court for Trespass done to himself. *Fines* are never incident to Court-Barons as such. *Fines* are incident to some few Manors only, where there are Court-Leets.

A *Court of Survey* differs only from a *Court-Baron*, inasmuch as besides the ordinary Business of a Court-Baron, every Tenant is summoned to bring into Court his Lease, Copy, or Title to his Estate, to be surveyed by the Steward, when the Manor comes to a new Lord, &c. * But this Power is to be questioned. [See Stat. of *Marlebridge*, or 52 H. 3. ch. 22. 15 R. 2. ch. 12. 16 R. 2. ch. 2.]

XVIII. * The *Court of Antient Demesne* belongs to a Manor of antient Demesne, and is in the Nature of a Court-Baron, held by the King's Bailiff, or the Lord of the Manor, wherein the Suitors are Judges. It is no Court of Record. The Tenants have *Privilege* not to be sued out of this Court, but have Justice by the Writ of *Right Close* directed to the Bailiff or Lord. This Privilege doth not extend to personal Actions, in which the Title of the Freehold does not come in Debate. It extends to real Actions, or where the Realty of their Lands may come in Question. Therefore Antient Demesne is a good Plea in Ejectment, Replevin, &c. [* but this Privilege extends only to *Freehold* Lands held of the Manor, not to *Copyhold* Lands which are Parcel of the Manor.]

The Demandant in a Writ of Right Close cannot remove the Plea out of the Court of the Lord upon any Account, tho' the Tenant

Coke's
Compl. Cop.
§. 26.
1 Roll. Abr.
211.
11 Rep. 45.

2 Inst. 142.

Of the Court
of antient
Demesne.

2 Inst. 542.

543.

4 Inst. 269.

270.

5 Rep. 105.

1 Roll. Abr.

321, &c.

See p. 141.

ante.

1 Ld. Ray.

43.

2 Cro. 559.

3 Lev. 405.

nant may remove the Plea by *Recordare* for seven Causes. [See 4 Inst. 269, 270.]

If false Judgment is given in this Court, the Demandant or Tenant shall have a Writ of false Judgment (not a Writ of Error) as it is in other Courts not of Record.

Lands in antient Demesne may be extended upon Statutes, and upon an *Elegit*; because the Title of the Land is not directly put in Plea in the King's Courts. Regularly all general Acts of Parliament extend to antient Demesne.

Of the Court
of the Coroner.

• S. P. C. 51.

2 Inst. 32.

4 Inst. 271.

H. P. C. 170.

• 1 Str. 22.

• 5 Rep. 110.

3 Inst. 55.

H. P. C. 29.

271.

2 Danv. Abr.

210.

2 Lev. 341.

152.

1 Ventr. 181.

182, 178.

2 Inst. 32.

3 Inst. 271.

See of Ap-

peals, ch. 5.

post.

4 Hawk. P.C.

B. 2. p. 54.

Contra.

• 2 Str. 1097.

• 2 Danv. Abr.

209, 210, 211.

1 Str. 22.

• 1 Str. 167.

1 Salk. 377.

XIX. The Court of the Coroner is a Court of Record, to enquire where any one comes to a violent Death by Felony or Mischance. He can enquire of no other Felony, but of the Death of a Man, and then *Super Visum Corporis*, which no other can do.

If the dead Body is buried, or suffered to lie so long that it stinks before the Coroner hath viewed it, the Township shall be amerced. The Coroner may take up a dead Body out of the Grave, to view it, for the taking of an Inquest, if there is no Danger of Infection by digging it up. If there is Danger, or if the Body is drown'd, and cannot be found, he ought not to proceed. In such Cases the Enquiry may be by Witnesses of the Felony, before Justices of the Peace, Justices of Oyer and Terminer, or in the King's Bench, if the Felony was committed in the County where that Court sits. Inquisitions of one found *Felo de se* are traversable by the Executor or Administrator, the Inquisition being removed into the King's Bench by *Certiorari*; and so are Inquisitions in other Cases in Point of Offence. (24.)

The Coroner may take an *Indictment* upon View of the Body, as also an *Appeal* within a Year after the Death of one slain, not after the Stroke. [See *West. 1. ch. 10.*] He may likewise enquire of the Escape of the Murderer; and if it is found, that the Murderer escaped untaken, the Township cannot traverse such Escape; and if a *Fugam fecit* is found before the Coroner, it is not traversable. (24.)

He hath no Jurisdiction of Offences committed in the open Sea; between the high and low Water Mark when the Tide is in, but otherwise when the Tide is out; nor within the *Verge* of the King's Courts. [See the Statutes *infra*.]

Now as to the View of the Body. It is his Office, so soon as he is acquainted with the Suspicion at least of a violent Death, to send his Warrant or Precept to the Bailiff, and also to the Constable and Tithingman of the Hundred, &c. to summon twenty-four sufficient Men of the four, five, or six next Towns adjoining, that at a certain Day they come before him to such a Place, to enquire upon View of the Body of A. &c. If the Body is buried, it is to be taken up; and the Coroner is to record the Names of those that buried it. And if the Body has lain so long, that it cannot be judged how it came by its Death, that also must be recorded, that at the coming of the Justices of Assize, the Town where, &c. may be amerced upon the Sight of the Coroner's Rolls. If the Coroner and Jury are able to enquire of the Death, then they are to present the Manner of the Killing, whether the Party was killed by himself, or any other, or by some Mischance. And the Coroner, to assist in the

the Enquiry, may send his Warrant for *Witnesses* to appear, taking their Examination in Writing under their Hands. And if any one is to be tried for Felony, the Witnesses must be bound by Recognizance, to appear at the next Assizes, to deliver their Knowledge of the Fact; and the Felon, in the mean Time, is to be committed by the Coroner. The Jury upon Oath having brought in their Verdict, the Coroner must return the Inquisition either of Murder or Manslaughter by another, or *Felo de se*, or of a Killing by Misfortune, &c. to the next Gaol-Delivery of that County, or certify the same to the King's Bench. [See 3 H. 7. ch. 1.]

* For Mismanagement in the Coroner, &c. the Filing of the Inquisition may be stopped, or the Coroner may be ordered to attend, and amend his Inquisition. If he hath been guilty of Corruption or Bribery in taking the Inquisition, a *Melius Inquirendum* may be awarded to special Commissioners, to take a new one, who shall proceed on the Testimony of Witnesses, not upon View of the Body. If the Inquisition is good, he that is suspected to have committed the Felony may be tried upon the Inquisition, as well as upon an Indictment. [See 4 Ed. 1. St. 2. 3 H. 7. ch. 1. and 2 Ph. & Mar. ch. 13. where the Duty of a Coroner is set forth at large.]

^b The Coroner ought to sit upon the Body of every Prisoner, that dies in Prison.

[See *Greenwood's judicial and ministerial Office of Coroners*; and *Hawke's Pleas of the Crown*, B. 2. ch. 9.]

By Articuli super Chartas, or 28 Ed. 1. ch. 3. *In Case of Death within the Verge, the Coroner of the County shall act with the King's Coroner.*

By 33 H. 8. ch. 12. §. 1. & 3. *All Inquisitions upon View of Persons slain within any of the King's Palaces, or Houses, or any other House or Houses, at such Time as his Majesty shall happen to be there abiding in his Royal Person, shall be taken by the Coroner of the King's Household without the Assistance of any other Coroner of any County.*

By 3 H. 7. ch. 1. The Coroner is to have upon an Inquisition found of Murder 13 s. 4 d. of the Goods of the Murderer. If he hath nothing, then of the *Amerciements* of the Township for the Escape, if there was an Escape in the Day-Time. [See West. 1. ch. 10.]

By 1 H. 8. ch. 7. *When one is slain by Misadventure, The Coroner shall execute his Office without Fee, on Pain of 40 s.*

By 25 Geo. 2. ch. 29. For every Inquisition, not taken upon View of a Body dying in a Gaol, which shall be taken by any Coroner in any Place contributory to the Rates directed by 12 Geo. 2. ch. 29. the Sum of 20 s. and for every Mile which he shall be obliged to travel 5 d. shall be paid to him out of the Money arising by such Rates.

And for every Inquisition taken upon View of a Body dying in a Gaol by any Coroner, so much, not exceeding 20 s. shall be paid to him, as the Justices at Sessions shall think fit, out of the Money arising by the said Rates.

Provided that over and above such Recompence, the Coroner upon an Inquisition upon the View of a Body slain or murdered, shall have the 13 s. and 4 d. as granted by 3 H. 7.

Coroner

Coroner taking more than as above limited, guilty of Extortion.

No Coroner of the Household and Verge, of the Admiralty, Durham, London, Southwark, or any Franchise belonging to the City of London, nor of any City, Borough, Town, Liberty, or Franchise, not contributory to the said Rates, or within which such Rates have not been usually assessed, shall be intitled to any Fee or Recompence given by this Act. But all such Coroners may take such Fees and Allowances as they are intitled to by Law, or as shall be given or allowed them by the Persons by whom they are appointed.

If any Coroner, not appointed by annual Election or Nomination, or whose Office is not annexed to any other Office, shall be convicted of Extortion, wilful Neglect of Duty, or Misdemeanor in his Office, the Court before whom he shall be convicted may adjudge him to be removed from his Office, and thereupon, if chosen by Freeholders, a Writ de Coronatore amovendo & Eligendo shall issue.

If not chosen by Freeholders, then the Person or Persons intitled to the Nomination and Appointment of any such Coroner, shall upon Notice of such Judgment of Amoval, nominate and appoint another Person to be Coroner in his stead.

[See 4 & 5 W. & M. ch. 22. Concerning the Pleading of Grants to an Inquisition returned by a Coroner. And see of the Coroner, B. 1. ch. 7. ante.]

Of the Court
of the Clerk
of the Market.

4 Inst. 273.
See p. 109,
212. & 451.
ante.

Of the Court
of Pie-Pow-
ders.

2 Inst. 220,
221, 231.
4 Inst. 272.
6 Rep. 12.
10 Rep. 73.

XX. The Court of the Clerk of the Market is to enquire of Weights and Measures, whether they are according to the King's Standard or no.

XXI. The Court of Pie-Powders (*Curia Pedis Pulverizati*, because for Contracts and Injuries done in the Fair or Market, Justice shall be done as speedily as the Dust can fall from the Foot) is incident to every Fair and Market, for by Grant of the Fair or Market it shall pass.

It is a Court of Record, to be holden before the Steward of the Court, who is the Judge there.

As to the Jurisdiction.

1. The Cause of Action (for Contract, Slander, or Injury) must arise in the Fair or Market, and not before, nor in a former Fair or Market, nor after the Fair or Market. 2. It must be for some Matter concerning the same Fair or Market, and done, complained of, heard, and determined the same Day. 3. It must be within the Precinct of the Fair or Market. 4. The Plaintiff, or his Attorney, must take an Oath according to 17 Ed. 4. ch. 2. 1 Ri. 3. ch. 6. That the Contract, &c. was made during the Time of the Fair or Market, and within the Jurisdiction. But that concludeth not the Defendant in pleading to the Jurisdiction. The Trial is by Merchants and Traders in the Fair, and the Judgment against the Defendant shall be *Quod Amercietur*. A Writ of Error lies upon an erroneous Judgment.

But this Court is growing out of Use.

There may be a Court of Pie-Powders by Custom or Prescription without Fair or Market, which may hold Plea of Obligations, by Prescription.

4 Inst. 272.
1 Roll. Abr.
545.
2 Salk. 604.

XXII. The

XXII. The Court of the Commissioners of *Sewers*, (from *Sewer*, Of the Court
a Passage or Channel for Water) is by Commission under the Great of the Com-
Seal, according to 23 H. 8. ch. 5. where there is the Form of their missioners of
Commission and of their Oath. This Commission is granted by ^{4 Inst. 275;}
the Lord Chancellor, Lord Treasurer, and the two Chief Justices,
or any three of them, whereof the Lord Chancellor to be one.
This Commission may last ten Years, unless repealed before that
Time; and all Laws made by Virtue thereof shall continue in Force
one whole Year after the said ten Years; and the Justices of the
Peace of the County have Power to execute the Commission and the
Laws for that Year, unless a new Commission issueth forth in the
mean Time.

By 3 Ja. 1. ch. 14. *All Walls, Banks, Ditches, Gutters, Sewers,
Gates, Causeys, Water-Courses, Bridges, and Streams, within two
Miles of London, falling into the River Thames, shall be subject to
the Statutes and Commissioners of Sewers.*

Their *Business* is to repair Sea-Banks and Walls, to survey Ri- ^{10 Rep. 141;}
vers, publick Streams, Ditches, Bridges, and other Defences, by ^{142, 143.}
the Coasts of the Sea and Marsh-Grounds. But they cannot inter-
meddle, unless in Cases where there is a publick Prejudice. For
if they decree a Stream to be straitned, so that the Meadow of a
particular Person is overflowed; an Action will lie. Neither can
they make a new River, or try new Inventions, at the Charge of
the Country.

They may make a Tax or *Rate* according to the Quantity and ^{3 Rep. 100;}
Quality of the Lands and Rents at their Discretions, upon all that ^{10 Rep. 139.}
are in Danger; even where one only ought to repair, if he is not ^{140.}
able to do it, or where no Fault was in him, the Damage happening ^{2 Str. 1127.}
by Reason of the extraordinary Rage of the Waters. And if any
Person refuses to pay it, the Commissioners may grant a Warrant to
distrain his Goods and sell them. Lands also may be sold for the
Tax or Rate.

Tho' by the Act the Commissioners have Authority to do ac-
cording to their *Discretions*, ⁴ yet they are bounded by the Rules of ^{3 Rep. 100;}
Reason and Law. For Discretion is to *discern* betwixt Right and ^{2 Inst. 56,}
Wrong. ^{298;}

By 7 Ann. ch. 10. *Any six of the Commissioners may decree the
Sale of Copyhold Lands.*

See 7 Ann. ch. 9. For giving the Commissioners of Sewers of
London the same Powers, as Commissioners for Counties have.

The Commissioners may proceed by Jury, View, and Discretion,
bound by the Rules of Law, to enquire of any Annoyances, and
to remove them, to enquire who have neglected to repair, &c. and
the Jury may amerce for Neglects. The Commissioners may pu-
nish by Fine for Contempts in Court, or where their Officers neg-
lect their Duty, &c. But they cannot imprison for disobeying ^{1 Sid. 145.}
their Orders, as they may do for a Contempt in their Presence.

[See 23 H. 8. ch. 5. 13 El. ch. 9. But the Commissioners ^{1 Vent. 67;}
and their Proceedings are subject to the Jurisdiction of the King's ^{1 Mod. 44.}
Bench, notwithstanding the Clause in the Statute of 13 El. ch. 9. ^{1 Sid. 145.}
^{1 Ed. Ray 469.}

* *Discretio est discernere per legem, quid sit justum.* 2 Inst. 56, 298.

which has altered the 23 H. 8. *ch.* 5. whereby the Commissioners were obliged to certify their Proceedings into Chancery.]

Of the Court
of Commis-
sioners of
Bankrupts.

XXIII. For the Court of Commissioners upon the Statutes of Bankrupts, see of Bankrupts, p. 310. *ante*.

Of the Court
of Commis-
sioners to ex-
amine Wit-
nesses.

^a 4 Inst. 278.
⁹ Rep. 70, 71.

XXIV. The Court of Commissioners for ^a Examination of Witnesses is by Virtue of a Commission out of the Chancery, Exchequer, or the Court of the Dutchy of Lancaster, in Cases of Equity, to examine such Witnesses, as are not able to come to be examined, or that live remote from the Court. The Commissioners are named by both Parties in Suit; yet they ought to be indifferent, and endeavour to find out the Truth. For this End they are not bound to the Letter of the Interrogatory. They ought not to discover to either Party, or to any other, the Depositions, or any Part of them, before Publication is granted by the Court. Neither, after the Examination is begun, ought a Commissioner to confer with either Party, to take new Instructions. If he doth, an Information will lie against him, and he may be punished by Fine and Imprisonment, when the Witnesses have been examined.

Of the Fo-
rest Courts.

^b 1 Inst. 1. b.

2. a.

⁴ Inst. 314.

^{315, 319.}

^c See p. 210.

ante.

XXV. ^b The Forest-Courts were instituted for the Government of the Forests. A Forest has been before described.

The Laws of the Forest are established by Act of Parliament; and for the most part are contained in the Statutes of *Charta de Foresta*, 9 H. 3. and *Ordinatio de Foresta*, 34 Ed. 1. *St.* 5.

I shall speak of the Officers of the Forest, and the several Courts belonging to a Forest.

1. Of the Officers.

^d 4 Inst. 291.

The ^d Chief Justices in Eyre (*Itinerantes* from *Iter*, one for the Forests on the South Side of the River Trent, the other for those on the North Side) are created by Letters Patent under the Great Seal. [See 27 H. 8. *ch.* 24.]

^e F.N.B. 164.

⁴ Inst. 291.

^{292, 293, 317.}

^f 4 Inst. 316.

The ^e Regarder is a Ministerial Officer, whose Office is to view the whole Forest, to certify all Trespasses and all Offences concerning the Vert and Venison. Vert is every Thing that grows, and bears green Leaf within a Forest, that may cover a Deer. ^f Venison (*à Venatione*) is any Beast of the Forest, fit for the Food of Man; as Deer, Wild-Boar, and Hare. He is also to certify all Defaults of Officers of the Forest. He cannot present any Thing but upon his own View. He is appointed either by Letters Patent of the King, or by the Chief Justice, or to be chosen by Writ to the Sheriff.

^g 4 Inst. 292.

^{293, 317.}

The ^g Verderors (*Viridarii à Viridi*, Vert) are Officers, whose chief Business is to look to the Vert or Green. They are Judicial Officers, chosen in full County by Force of the King's Writ, as they may be discharged by Writ. They are to keep the Laws of the Forest, to inrol Attachments and Presentments of Trespasses of the Vert and Venison, and to do Right and Justice. There are commonly four Verderors in each of the King's Forests.

^h 4 Inst. 293.

^h Agistors are those that take Beasts to Agistment, (*i.e.*) To depasture within the Forest, where there is any Pannage or Pannage, (*i.e.*) Mast

(i.e.) Mast of Beech, Acorns, &c. These Officers are constituted by Letters Patent.

Foresters are Woodward and Watchers over the Vert and Venison. They are to present all Manner of Trespasses done within the Forest, to their Knowledge, &c.

Rangers are those who are to rechaſe the Wild Beaſts from the Purlieu into the Forest, and to prevent Offences within the Purlieu and the Forest, &c. But where there is no Purlieu, there are no Rangers. 4 Inf. 304;
305.
See p. 2101
ante.

A *Bedel*, (*Bedeau*, a Bailiff or Apparitor) is to warn the Courts of the Forest, execute Proceſſes, and make all Proclamations, as well within the Courts as without. 4 Inf. 313;

Officers of the Forest ſhall not be ſworn on *Juries* out of the Forest. 4 Inf. 293;
319.

2. Of the Courts.

There are ſeveral Courts; of which three, (*viz.*) the Court of Attachments, Swainmote, and Juſtice-Seat, are incident to a Forest.

1. The Court of *Attachments*, or the *Woodmote-Court*; which is to be kept before the Verderors every forty Days throughout the Year, and is therefore called the *Forty-Day Court*. [See 9 H. 3. ch. 8.] 4 Inf. 289;
298.

This is a Court of Record. At this Court the Foreſters bring in Attachments, and Preſentments of Offenders againſt Vert and Veniſon; and the Verderors do inroll the ſame. But this Court can only enquire, and not convict. No Man is to be attached by his Body for Vert or Veniſon, unleſs he is taken in the Act within the Forest; otherwiſe the Attachment muſt be by his Goods. [See 7 Ri. 2. ch. 4.]

2. The Court of *Regard*, or *Survey of Dogs*, is holden every third Year, for Expedition or laming of Maſtiff Dogs. [See 9 H. 3. ch. 6.] 4 Inf. 289;
298, 308.

Expedition is derived of *Ex* and *Pede*, becauſe the Dogs are to be lamed in the Foot.

3. The Court of *Swainmote*, alias *Swainmote*; (from *Swain*, a Sax. a Country Swain; and *Mote* or *Gemote*, a Court) is a Court of Record, holden before the Verderors as Judges, by the Steward of the Swainmote, thrice in the Year. [See 9 H. 3. ch. 8.] The Foreſters ought to preſent their Attachments at the next Swainmote-Court; and the Freeholders within the Forest are to appear at the Swainmote, to be upon the Inqueſt of Jury. It may inquire of all thoſe, that owe Suit to it; of *Aſſarts*, (from *effarter*, to grub up) or Wood-Ground converted to Tillage; of *Purpreſures*, Incloſures, and Incroachments within the Forest; of taking away or removing Bounds; of making Mines or Clay-pits, or of Turfs for Fuel, to the Prejudice of the Commoners; of levying Mills, Houſes, &c. without the King's Licence; if there are more Foreſters or Walkers within the Forest than uſual; of Oppreſſions and Extortions by Officers; of ſurcharging Common, or of thoſe that put in the Common more Beaſts than they ought; of burning Heath or Fern; of mowing ſeveral Land by Foreſters; of cutting Vert or felling Wood; of the Abuſes concerning Pannage or Pawnage; of hunting or deſtroying the Deer, Fox, Hare, Coney, or any Beaſt or Fowl of 4 Inf. 289;
Crompt. Jur.
180, 181, 182, 183.
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of Warren without Authority; of hunting in the Parlieu without Authority; of Agistments, Rents, &c.

If at the Swainmote the Presentment of the Foresters is found true by the Jury concerning Vert or Venison, the Offender standeth thereof convict, ^a and cannot traverse the same.

^a 4 Inst. 290. This Court may inquire and convict, ^b but cannot give Judgment.
^b 4 Inst. 289. Therefore a Swainmote without a Justice-Seal is of no Force.
^c Belf. 298.

^c 4 Inst. 291, 298, 319. 4. The Court of ^c Chief Justice, Justice in Eyre, or Justice-Seal, is a Court of Record, and hath Authority and Jurisdiction to hear and determine by themselves or Deputies [See 32 H. 8. ch. 35.] all Pleas and Causes of the Forests, Parks, Chases, and Warrens within the Forest; as well concerning Vert and Venison, as other
^d 4 Inst. 317. Causes whatsoever within the said Forest, &c. ^d The Jurisdiction is local, extends not to Out-dwellers, [See 9 H. 3. ch. 2.] and therefore the Receipt of an Offender out of the Forest cannot be punished there. ^e This Court is to be held every third Year, and is to be summoned forty Days before the Sitting; and then it may hear and determine all Trespasses, Claims of Privileges and Liberties within the Forest, Claims of Leets, Hundreds, Felons Goods, Waifs, Strays, Fugitives, &c. It may proceed upon the Presentments or Verdicts in the Swainmote. [See 9 H. 3. ch. 16.] It may be summoned to be held within the Forest; ^f but afterwards the Chief Justice may adjourn it to any Place within the County. He may take a Recognizance in any Place. ^g Here a Presentment or Indictment found by the Jury, (and not found in the Swainmote) may be traversed, because it is found but by one Jury.
^h 1 Roll. Abr. 534.
ⁱ Cro. 409.
^j 4 Inst. 290, 291.

The Proceedings are *de Hora in Horam*, and the Defendant must plead presently. If there is an erroneous Judgment at the Justice-Seal, the Record may be removed by ^k Writ of Error into the King's Bench (which Court is above all Eyres) and be remedied there.

^l 4 Inst. 715. A Felony committed within the Forest, must be inquired of before the Judges of the Common Law, not before the Chief Justice of the Forest. [See *Manwood of Forest Laws, per Tot.*] By 34 Ed. 1. St. 5. ch. 6. The Justice, or his Deputy, may take Fines and Amerciaments for Trespasses.
[See the Laws relating to the Game, p. 453, &c. ante.]

Of the Ecclesiastical Courts. XXVI. The ^m Ecclesiastical Courts, (*Curia Christianitatis*, Courts-Christian, or the Spiritual-Courts) are those which are held by the King's Authority as Supreme Governor of the Church, for Matters which chiefly concern Religion. ⁿ Other Causes were given to them by the Favour of Princes. These Courts are not Courts of Record.
^o 1 Inst. 488, 601, 602.
^p 4 Inst. 321.
^q 2 Roll. Abr. 217.
^r 1 Inst. 488, 491.
^s Dav. 51, 97.

The Laws and Constitutions whereby the Church of England is governed, are, 1. Divers immemorial Customs, [See 25 H. 8. ch. 21. §. 1.] which may properly enough be called the Common Law. 2. Our own Provincial Constitutions collected by Lyndwood, and the Canons made in our Convocations of later Times, especially the Canons made in the Year 1603, in the Reign of King James I. 3. Statutes or Acts of Parliament concerning the Affairs of

of Religion, or Causes of Ecclesiastical Cognizance; especially the *Rubricks* (*a Rubro colore*, because antiently writ in red Letters) in our *Common Prayer Book*, founded upon our *Statutes of Uniformity*, (*viz.*) 5 & 6 Ed. 6. ch. 1. 1 El. ch. 2. 13 & 14 Car. 2. ch. 4. 4. The *Articles of Religion* drawn up in the Year 1562, and established by 13 El. ch. 12. (*Qu.*) 5. The general *Canon Law*, where all others fail. 4 Inst. 323.

By 25 H. 8. ch. 19. §. 7. *Such Canons, Constitutions, Ordinances, being already made, which be not contrary to the Laws, Statutes, and Customs of this Realm, nor to the Damage of the King's Prerogative, shall be still used and executed, as they were before the making of this Act.*

The 25 H. 8. ch. 21. §. 1. is pursuant to this Act. [See of the Court of Convocation, *infra*.]

Archbishops, Bishops, some Deans and Chapters, Archdeacons and some Prebendaries, (or Vicar-Generals, Chancellors, Commissaries, and Officials appointed by them) are the *Judges* in these Courts; and the Proceedings are in their Names, tho' they are the King's Courts. For tho' every Leet, &c. holden by a Subject, is kept in the Subject's Name, yet it is the King's Court.

By 37 H. 8. ch. 17. *A Doctor of the Civil Law, married or unmarried, lawfully deputed, may exercise Ecclesiastical Jurisdiction, and Censures thereof, tho' a Layman.*

But this Statute is said to be only affirmative, and not restrictive, and therefore, as at Common Law, those that were under the Degree of a Doctor might exercise Ecclesiastical Jurisdiction, in that Respect the Statute has made no Alteration. [See 13 Car. 2. ch. 2.] 1 Cro. 314; 315.

The Censure of *Excommunication* is pronounced by one in Holy Orders by the Authority of the Lay-Judge.

The *Jurisdiction* of these Courts is either *voluntary* or *contentious*. 1. *Voluntary*, or where there is no Opposition; which consists in visiting Churches, the Clergy and Churchwardens of the several Parishes or Districts; in granting Sequestrations, Institution, and Induction to Benefices, Licences and Dispensations, ordering real Compositions, granting Probates of Wills, Letters of Administration, Letters *ad Colligendum*, &c. 2. *Contentious*, or where there is a Plaintiff and Defendant; which consists in hearing and determining the following Causes, (*viz.*) Apostacy, Blasphemy, Idolatry, Heresy, Schism, Breach of Faith, or Perjury in an Ecclesiastical Cause, Profanation of the Lord's Day and Holidays, not frequenting the publick Prayers, neglect of Sacraments, neglect of Duty in Ministers, Disturbance of Divine Service, laying violent Hands upon a Clerk, providing Books and decent Ornaments for the Celebration of Divine Service, Rights of Matrimony, Jactitation of Marriage, Divorces, Alimony, Restitution of conjugal Rights, general Bastardy, Substraction and Right of Tithes, Oblations, Obventions, Mortuaries, Pensions, Synodals, Procurations, Dilapidations, Rights to Seats in the Church, or to a Place in a Seat, Reparation of Churches and publick Chapels, and of Churchyards, and Rates and Accounts for such Repairs, Quarrelling or Fighting in a Church or Churchyard; also of the Bounds of Churchyards and of Parishes, if they come in Question *collaterally* in a Suit for a spiritual Matter [but not otherwise, and then the Courts of Common Law will enforce them] 2 Inst. 488, &c. 599, 600, 601, &c. 4 Rep. 20. 5 Rep. Cawdrie's Case. 5 Rep. 67. 6 Rep. 23. 7 Rep. 44. 2 Roll. Abr. 218, 219, 224. 2 Str. 1056, 960. 1 Str. 666. 2 Inst. 608, 613. 2 Str. 1013. 1 Ld. Ray. 221. 2 Salk. 547.

them to admit such Evidence as the Common Law would allow.]

Testaments and Codicils proved by Witnesses, Legacies, Administrations, Suits for examining Inventories and Accounts of Executors or Administrators, Simony, Incest, Adultery, Fornication, or violent Suspicion or 'Fame thereof, Sollicitation of Chastity, [Qu. if accompanied with Force^b] Defamations in charging with Offences merely spiritual, common Swearers and Drunkards, Filthy Talkers; Money upon Commutations of Penance, which may be sued for in the Ecclesiastical Court, if Payment is refused; ^c Fees of Judges, Advocates, Proctors, Registers, Apparitors, &c. [Qu. ^d if a Prohibition will not lie to such Suits.] Wages for a Curate or a Parish-Clerk^e. (Qu.) Rights of naming a Church-Warden, a Parish-Clerk^f, &c.

By 13 Ed. 1. Stat. De Circumspecte Agatis, * A Prohibition lieth not for Penance corporal or pecuniary [but see Articuli Cleri, infra] enjoined for deadly Sin, as Fornication, Adultery, or the like; also for not fencing the Church-yard, or not repairing the Church, or sufficiently adorning it, nor for Oblations, Tithes, Mortuaries, Pensions, laying violent Hands upon a Clerk, Defamation, where Money is not demanded, nor for Breach of Faith.

By the Articuli Cleri, or 9 Ed. 2. For Tithes (not where the Right ariseth from the Rights of Patronage, and the Tithes amount to the fourth Part, &c.) Oblations, Obventions, Mortuaries, Commutation of corporal Penance for Money, but not for a pecuniary Penance, laying violent Hands upon a Clerk, Defamation, Tithes of a Mill newly erected, no Prohibition shall be granted.

[See for the Exposition of this Statute 4 Rep. 20. 2 Inst. 619, &c. and see the Complaint of the Clergy, 3 Ja. 1. and the Answers to the Complaint, 2 Inst. 601, &c. in what Cases the Ecclesiastical Jurisdiction is allowed, and in what disallowed. See also F. N. B. and 2 Roll. Abr. Tit. Prohibition, per Tot.]

As in Temporal Causes the King by his Judges doth hear and determine the same by the Temporal Laws; ^a so in Cases Spiritual or Ecclesiastical, the King by his Ecclesiastical Judges doth determine the same by his Ecclesiastical Laws. Therefore where the Right is Spiritual, and the Remedy only by the Ecclesiastical Law, the Cognizance doth belong to the Ecclesiastical Court. But where the Common or Statute Law giveth Remedy (whether the Matter be Temporal or Spiritual) the Cognizance belongs to the King's Temporal Courts; and tho' the Matter is Spiritual, it shall be tried by a Jury; and the Court, being assisted by learned Advocates in that Profession, may instruct the Jury in the Ecclesiastical Law, as they usually do in the Common Law. Thus it is, unless the Jurisdiction of the Ecclesiastical Court is allowed or saved by Statute. [And in some Cases the Spiritual and Temporal Courts have a ^b concurrent Jurisdiction; and where the general Matter of the Suit is within the Cognizance of the Spiritual Court, and a collateral Matter of a temporal Nature arises, they may determine that also^c; but then they must admit of such Evidence as the Temporal Courts would allow.] ^d If the Ecclesiastical Court gives Sentence, in a Matter of which they have Cognizance, though against the Reason of the Common Law, the Judges ought to give Credit to it, and believe it to be consonant to the Law of the Church.

So

^a 5 Rep. in Cawdrie's Case.

¹ Inst. 96.

^a & b.

² Inst. 488.

611, 612, 614,

618, 632.

¹ Mod. 132.

133.

^a 1 Ld. Ray. 323.

¹ 1 Ld. Ray.

221.

² Salk. 547.

⁴ 4 Rep. 29.

⁵ Rep. 7. in

Cawdrie's

Case.

⁷ Rep. 43.

¹ Roll. Abr.

526.

² Roll. Abr.

219.

² Str. 960.

So much of the *Laws* and *Jurisdiction* of these Courts in general. It remains that I set forth, 1. The Ecclesiastical Courts *particularly*.
2. Their Proceedings, Censures, and Punishments.

1. Of the Ecclesiastical Courts in *particular*.

1. The Court of *Convocation* of the Clergy (assembled by Virtue of the King's Writ in a National Synod) consists of the whole Clergy, either present in Person or by Proxies. The Clergy of the two Provinces of *Canterbury* and *York* do sit at the same Time, and act by mutual Consent. There is an *Upper House*, where the Archbishops and Bishops sit; and a *Lower House*, where Deans, Archdeacons, and Proctors for the Chapters and diocesan Clergy do sit. In the Province of *York* two Proctors are sent to the Convocation, for every Archdeaconry; but in the Province of *Canterbury* two only for every Diocese. As there are two Houses of Convocation, so there are two Prolocutors or Speakers; one of the Bishops sometimes in the Upper House, chosen by that House; another in the Lower House, chosen there and presented to the Upper House. The Archbishop is the President, and prorogues and dissolves it at the Direction of the King. For the Convocation is under the Power and Authority of the King.

The *Jurisdiction* of the Convocation may be exercised, in making Canons with the King's Licence and Assent, in examining and censuring heretical or schismatical Books or Persons. But then an Appeal does lie to the King in *Chancery*, or to his Delegates; as hath been lately resolved. It is the legislative Power in the Church, and the Canons that are made concerning the Church with the Royal Assent, bind the Clergy but not the Laity.

By 25 H. 8. ch. 19. §. 1. *The Convocation shall be assembled by the King's Writ, and the Clergy shall not, in their Convocations, attempt, alledge, claim, or put in Ure any Constitutions or Canons, or enact, promulge and execute any such Canons, unless they have the King's Assent and Licence, to make, promulge, and execute the same, upon Pain of Imprisonment and Fine.*

This Statute is declaratory of the Common Law.

By 8 H. 6. ch. 1. *The Clergy of the Convocation, their Servants and Families, shall have such Privilege in coming, tarrying, and going, as the Commons called to Parliament.*

By 24 H. 8. ch. 12. *When a Cause, or Suit, concerns the King, the Party grieved may appeal from any Ecclesiastical Court to the Prelates assembled in Convocation, to be finally determined.* [See 1 El. ch. 1.]

2. The *Prerogative Court* of the Archbishop of *Canterbury* is held at *Doctors Commons* in *London*, wherein all Testaments and last Wills are proved, and Administrations upon the Estates of Intestates granted, where the Party dies beyond Sea, or dies within his Province, leaving *Bona Notabilia*. *Bona Notabilia* are when one dieth leaving Goods and Chattels at the Time of his Death, of the Value of five Pounds or more, lying in another *Diocese*, or *peculiar Jurisdiction*, within the Province, besides that in which he lived and died [*sed vide infra*.] If one hath a Debt upon a Specialty, as upon a Statute, Recognizance, or Bond, &c. (for these are Goods

^b 12 Rep. 72.

² Roll. Abr.

226.

Moor 783.

Godb. 163.

Vaugh. 327.

² Ventr. 44.

Salk. 672.

^c 4 Inst. 323.

^d 4 Inst. 335.

¹ Roll. Abr.

908.

^e Can. 93.

⁴ Inst. 335.

^f Dyer 305.

¹ Roll. Abr.

908, 909.

and

and Chattels) lying in another Diocese, he is allowed to have *Bona Notabilia*; and the Probate of the Will, or Administration of the Goods of the Intestate, belongs to the Archbishop of the Province, as Ordinary by his Prerogative; or *Sede Vacante* to the Dean and Chapter, as Guardians of the Spiritualities. The *Bona Notabilia*

^a 4 Inst. 335. are regularly valued at five Pounds. But in the Diocese of London, it is ten Pounds by Composition. If the Penalty of a Bond, &c. is only of the Sum of five Pounds, and not the Condition, though the Bond is forfeited, this ought not to be taken for *Bona Notabilia*. If the Goods are under five Pounds, [2u.] or if they are above five Pounds, and the two Dioceses, or the peculiar Jurisdictions, are not subject to the same Archbishop, (viz.) when one is under the Archbishop of Canterbury, and the other under the Archbishop of York, there must be several Probates, or Administrations, granted for the Goods in each Jurisdiction. And so it is when a privileged Person in one of our Universities dies possessed of Goods and Chattels within the University, and also within a particular Diocese, the Probate or Administration must be taken before the Chancellor of the University, and the other Ordinary. If one dies in a Journey in another Diocese, and hath more than the Value of five Pounds about him, this is not to be reckoned *Bona Notabilia*^b, but the Testament is to be proved, or the Administration is to be granted, by the Ordinaries of each Place. [2u.]

^b Can. 92. See Can. 92. By 93 Canon of James the 1st, *Bona Notabilia* are to be accounted at five Pounds at least (if not by Composition at a greater Sum) lying in another Diocese or peculiar Jurisdiction, within the Province, besides that wherein one died. It being decreed and declared, that he who hath not Goods in diverse Dioceses to the said Sum or Value, shall not be accounted to have *Bona Notabilia*.

^c 1 Roll. Abr. 909, 910. I mention this Canon, because our Law doth take Notice of it inasmuch as Probates of Testaments, and Administrations, belong to the Ecclesiastical Law.

[But notwithstanding this Canon, which seems in the first Branch of it to favour the Notion that the Place of the Party's Residence and Death gives the Ordinary a Jurisdiction, which Notion seems also to be in some Measure countenanced by some Dictums in the old Books above referred to, the later Determinations have now established the Law^d in this Case to be, That the Residence or Death of the Party does not give any Jurisdiction, but only *Bona Notabilia*, or personal Effects, to the Value of five Pounds or more, being at his Death within diverse Dioceses, as is expressly declared by the last Branch of the above Canon, and that therefore the Death of the Party beyond the Seas, or upon the high Seas, doth not give the Archbishop any Jurisdiction; but in that Case, as well as where the Party dies in England, the Administration or Probate must be granted by the Ordinary of the Diocese or Peculiar where his Effects are (without any respect to the Place of his Death); or if he hath *Bona Notabilia* in more than one, then by the Metropolitan. And indeed, in order to make the two Clauses of the above Canon consistent, it must be intended that the Makers thereof took it for granted that the Party must have Goods to the Value of five Pounds within the Diocese wherein he died, if he had to that Value in any other, and the old Books seem to go upon the same Supposition.]

But

But the Forms of the Probates out of this Court recite the Party's having Goods and Chattels to the Value of Five Pounds, or *Bona Notabilia*, in diverse *Dioceses* and *Jurisdictions* generally; so that it is insisted, that it is sufficient to make *Bona Notabilia*, if the Party left Goods to the Value of five Pounds in diverse Archdeacons, or ^a Peculiars, though within the same Diocese. If the Archbishop grants Probate of a Will, or Letters of Administration, when it does not belong to him to do it, it is not ^b void, but voidable only by Sentence; because the Metropolitan hath Jurisdiction over the whole Province. Whereas if there are *Bona Notabilia*, and the Will is proved, or Administration is granted, by an inferior Ordinary, in whose Jurisdiction Part of the Goods lie, this is void in itself without any Reversal by Sentence, as hath been said, because the inferior Ordinary hath no Pretence to Jurisdiction in another Diocese.

The Probate of every ^c Bishop's Testament, or granting Administration of his Goods, doth belong to his Archbishop, though he hath not *Bona Notabilia*.

By 4 Ann. ch. 16. Probate of Wills and Letters of Administration of the Goods of Workmen in Yards and Docks, shall be granted in the Diocese where they die, and Wages for Work done shall not be accounted *Bona Notabilia*.

In this Court are tried all Causes of Instance for proving or revoking such Wills, or for granting or revoking such Administrations; [See 23 H. 8. ch. 9.] And all Causes concerning Accounts upon the same; as also Causes concerning ^d Legacies bequeathed in such Wills. But of late such Legacies are suffered by this Court to be sued for in the inferior Ecclesiastical Court, under whose Jurisdiction the Executor dwells. The Executor may be sued in the Court where he proves the Will, though he does not live in that Diocese. [See for the Fees of the Probate of Wills and Administrations the H. 8. ch. 5. and 31 G. 2. ch. 10. as to Seamen's Wills.]

By 25 H. 8. ch. 19. The Appeal from this Court is to the King in Chancery; who appoints Delegates by Commission to hear and determine the Appeal. [See of the Court of Delegates, *infra*.]

Therefore if the Delegates revoke a Will, ^e they cannot grant Letters of Administration; for their Power is to hear and determine the Appeal.

The Archbishop of York hath the like Court.

3. ^b The Court of Arches (*Curia de Arcubus*) because it was anciently held in Bow-Church, (or in the arched Church of St. Mary's in Cheapside, London) is the next Ecclesiastical Court. The Judge is called the Dean of the Arches; though properly the Dean of the Arches is the Judge of a Deanery consisting of thirteen peculiar Parishes, exempted from the Bishop of London; whereof Bow-Church (*Ecclesia de Arcubus*) is the Chief. These Peculiars are annexed to the Officialty. The Jurisdiction throughout the Province more properly belongs to the principal Official.

The Persons concerned in this Court are the Judge, Advocates (All Doctors of the Civil Law) Registers, Proctors, &c.

The Judge hath extraordinary Jurisdiction in all Ecclesiastical Causes, except what belongs to the Prerogative Court. Also all Manner of Appeals whatsoever from any Bishops or their Chancellors, Commissaries, Deans and Chapters of Cathedral or Collegiate Churches,

Churches, Archdeacons or their Officials, first or last, are directed hither. Also all Appeals from the Commissaries of the Archbishop of Canterbury are made to the Judge of the Court of Arches. [See the 24 H. 8. ch. 12.] But he cannot cite any Person out of the Diocese of another, unless it be on Appeal, &c. [See 23 H. 8. ch. 9.]

The Archbishop of Canterbury hath his Court of Audience; the Auditor whereof hath in all Things like Jurisdiction with the principal Official or Dean of the Arches. He has antiently been Vicar General of the Archbishop in Things spiritual, by Virtue of a special Commission. But these Offices are usually united in one Person, who keeps his Court in Doctors Commons, as Vicar General, Principal Official of the Arches and Audience, though the Offices of principal Official and Vicar General are distinct, as before observed, and may be given to different Persons. As Vicar General, he may execute by himself or Commissaries all Ecclesiastical Jurisdiction in every Diocese becoming vacant within the Province of Canterbury, and visit the same, and punish such Offences as are presented to him. There is something like a Court of Audience kept within the Archbishop's Palace; but he meddles there only with Matters of voluntary Jurisdiction, as Confirmation, Election and Consecration of Bishops, granting the Guardianship of the Spiritualities of Bishops *Sede Vacante*, Admission and Institution to Benefices, &c.

The Archbishop of York hath likewise his Court of Arches and Audience.

By 25 H. 8. ch. 19. The Appeal from the Arches is to the King in Chancery.

^b 4 Inst. 337. 4. The Court of ^b Faculties belongeth to the Archbishop of Canterbury, and the Judge is called Master of the Faculties. He holdeth no Plea of contentious Jurisdiction. But his Power lies in granting Dispensations; as to marry, to eat Flesh on Days prohibited (and every Diocesan may make the like Grants;) [See 5 El. ch. 5. 3 Car. 1. ch. 4.] to be ordained Deacon under Age; that the Son may succeed the Father in a Benefice; that one may have two or more Benefices incompatible, &c. In this Court are registered the Certificates of Bishops and Noblemen granted to their Chaplains to qualify them for Dispensations for Pluralities and Non-Residence.

By 25 H. 8. ch. 21. The Archbishop of Canterbury may grant Dispensations to the King, and likewise Licences to all others, of Things that formerly used to be licensed. Howbeit, of Causes not used to be licensed, no Dispensations shall be granted, without the Approbation of the King and Council.

Licences of Things whereof the Tax did heretofore extend to 4l. shall be also confirmed by the King's Great Seal, and inrolled in Chancery. But all others may be granted by the Archbishop without such Confirmation, unless the Party desires to have it so confirmed, and then the Fee for the Seal shall be 5s. and not above. And all Acts done by Virtue of such Licences, shall be good in Law.

This Act shall not inhibit the Archbishop of York, nor other Bishops, to dispense, as they are wont to do, by the Common Law, or Custom.

During the Vacation of the See of Canterbury, the Guardian of the Spiritualities shall grant Dispensations.

[See

^a Lyndwood
De Sequest.
Poff. & Fruct.
cap. Fre-
quens, v. Vi-
carius Gene-
ralis.

[See 21 H. 8. ch. 13. Concerning *Pluralities*, and *Non-Residence*, &c. and of an *Archbishop*, B. 1. ch. 3. ante.]

5. The Court of *Peculiars* of the Archbishop of *Canterbury*, is that which hath a peculiar Jurisdiction in several Parishes in the City of *London*, and in other Dioceses, &c. within his Province; in all fifty-seven. They are called *exempt* Jurisdictions, not because they are under no Ordinary, but because they are not under the Ordinary of the Diocese, &c. for the Jurisdiction is annexed to the Court of *Arches*; and the Judge thereof may originally cite in these *Peculiars* belonging to the Archbishop.

By 25 H. 8. ch. 19. Appeals from *Places* exempt, which were before to the See of *Rome*, shall be henceforth into the *Chancery*, and shall be determined before *Commissioners* or *Delegates* appointed under the *Great Seal*.

Note, That there are *Royal Peculiars* and *Free Chapels*, as well as *Archbishops Peculiars*. There are also some peculiar Ecclesiastical Jurisdictions belonging to the King which belonged to some *Monasteries*, and *Religious Houses*.

From these peculiar Courts the Appeal lies immediately to the King in his *Chancery*. [See 25 H. 8. ch. 19.]

There are some *Peculiars* belonging to a *Dean* and *Chapter* or *Prebendary*, exempt from *Archdeacons* only. This extraordinary Power was derived from the Bishop, of antient Composition. These may be visited by the Bishop in his primary or triennial Visitation. In the mean Time an *Official* of the *Dean* and *Chapter* or *Prebendary* is the Judge.

From hence the Appeal lies to the Bishop of the Diocese.

6. The *Consistory Courts* of the *Archbishops* and of the *Bishops* of every Diocese are held in their Cathedral Churches for hearing of all Ecclesiastical Causes within the Diocese. The Bishop's Chancellor is the Judge, supposed to be skilled in the Civil and Canon Law. The Causes are managed by *Proctors*, a Register taking the Minutes or Acts of Court. In Places of the Diocese far remote, and distant from the Bishop's Consistory, the Bishop appoints a *Commissary* (*Commissarius Foraneus*) to judge in all Causes within a certain District, and a Register to enter his Decrees. He is said to be a superfluous Officer. (24.)

The Bishop has of Common Right the Power of Institution into Benefices, of dispensing in common Cases, and of a primary and triennial Visitation over his whole Diocese. These he exercises in Person, or by his Chancellor. [See of a Bishop, B. 1. ch. 3. ante.]

By 24 H. 8. ch. 12. From the Bishop, or his Chancellor, or Commissary, the Appeal is to the Archbishop of either Province respectively.

[See of the Jurisdictions of some *Deans* and *Chapters*, p. 30. ante.]

7. The Court of the *Archdeacon* is the most inferior Court; and is holden in such Places as the *Archdeacon*, either by Prescription or Composition, hath Jurisdiction in spiritual or ecclesiastical Causes within his *Archdeaconry*.

The Judge of this Court is called the *Official*.

The

[See

The Archdeacon, (or the Official in his Name) may visit annually (and by Custom twice in a Year) the Clergy and Laity within his Jurisdiction. He *commonly* hath the Power of granting Licences and Faculties, Probate of Wills, and Power of granting Letters of Administration, either concurrently with the Bishop, or exclusively. He has the Custody and Sequestration of all vacant Benefices, and the Right of Induction of all Incumbents, &c. But these Powers are usually transferred to his Official by Patent.

It is questioned whether an Archdeacon, as an Archdeacon, hath any original Jurisdiction; or any Jurisdiction without Title by Prescription or Covenant. [See of an Archdeacon, B. 1. ch. 3. ante.]

By 24 H. 8. ch. 12. From the Archdeacon's Court the Appeal is to the Bishop or Dioceſan. But when the Cause is commenced before an Archdeacon of any Archbishop, or his Commissary, the Appeal must be to the Court of Arches. From thence to the Archbishop himself. But by 25 H. 8. ch. 19. to the King in Chancery.

^a 4 Infl. 339.
² Roll. Abr.
232, 233.

8. The *Court of Delegates* is so called, because the Judges are *delegated*, and sit by Force of the King's Commission under the Great Seal upon Appeals to the King in three Cases. 1. When a Decree or Sentence is given in an Ecclesiastical Cause by the Archbishop or any of his Officials. 2. When any Decree or Sentence is given in any ecclesiastical Cause in Places exempt, or Peculiars, belonging to the King or to an Archbishop. 3. When a Sentence is given in the Court of Admiralty according to the Civil Law. [See 25 H. 8. ch. 19. 8 El. ch. 5.]

^b 4 Infl. 327.

If the Delegates in Ecclesiastical Causes are spiritual Persons, they may proceed to Excommunication. If they are all Laymen, the Fault is not in the Law, but in the Nomination.

Note, That all Appeals from a *definitive* Sentence must be within fifteen Days by 24 H. 8. ch. 12. 25 H. 8. ch. 19. If the Appeal is from an *interlocutory* Decree, it ought to be made within Ten Days by the Canon Law: but Appeals from a Sentence given in the *Court of Chivalry*, or *Court Martial*, in a Cause of Arms, are not within these Statutes.

^a 4 Infl. 341.
¹ Cro. 571.

9. There is a *Court of Commissioners of Review*; which Commission the King may grant as supreme Head, to review the definitive Sentence in the Court of Delegates, notwithstanding the 24 H. 8. ch. 12. and 25 H. 8. ch. 19. for there are no Words in those Statutes to restrain him; and the Pope, as Supreme Head by the Canon Law, used to grant a Commission of Review after such a definitive Sentence. [See 26 H. 8. ch. 1. 1 Eliz. ch. 1.] Besides a Commission of Review may be granted; because though the King grants Jurisdiction in Ecclesiastical Causes to his Subjects by Virtue of a Statute, he does not deprive himself of his own original Power.

² Wms. 300.

This Commission is not a Matter of Right, but purely in the Discretion of the Crown. It has been often refused to be granted.

2. The *Proceedings and Punishments* in the Ecclesiastical Courts are different from the Proceedings and Punishments in the Temporal Courts, and for different Ends and Purposes. Therefore I shall give some Account of them.

As

As to the Proceedings in the Ecclesiastical Courts.

The Proceedings in the Temporal Courts are according to the Common and Statute Laws. But the Ecclesiastical Courts proceed according to the Course of the Civil and Canon Laws, by *Citation*, [See 23 H. 8. ch. 9.] *Libel* or *Articles*, [See 2 H. 5. ch. 3. and 2 Inst. 616.] *Answer* upon Oath, Proof by *Witnesses* and *Presumptions*, [See 2 Inst. 608. 1 Ventr. 291. In what Cases one Witness ought to be allowed.] A *definitive Sentence* without a Jury; and after that for Contempt of the Sentence by *Excommunication*; and if the Sentence is disliked, by *Appeal*.

An Appeal (*Appellatio*) is a removing of a Cause in an Ecclesiastical Court to a superior Ecclesiastical Court. Hereby the Sentence is suspended, 'till the Appeal is heard and determined.

All Acts done after the said Appeal, in Prejudice of the Appellant, are to be reversed. And though one is excommunicated, while the Appeal is depending, he may bring Actions at Common Law.

In criminal Causes, the Proceedings of the Ecclesiastical Courts are by *Inquisition*, or *ex Officio Mero*; or by *Accusation*, or *ex Officio Promoto*; or by *Denunciation*, or Presentment of Churchwardens in Visitations, &c.

As to the Punishments in the Ecclesiastical Courts.

The Temporal Courts inflict Punishment upon the Body, or by pecuniary Mulcts, or by Forfeiture of Lands and Goods. But the Ecclesiastical Courts inflict Censures and Punishments *pro salute Animæ*, and to reform the inward Man. The Ecclesiastical Punishments are Purgation, publick Penance, Excommunication, Interdict, Suspension, Deprivation, and Degradation.

1. Purgation is the clearing one's self of a Crime, whereof he is generally suspected, and of the same accused before a Judge; as upon a common Fame of Incontinency, &c. If the Party denied the Fact, the Judge enjoined him Purgation, or to clear himself by his own Oath, [See *infra*.] and by the Oath of four, five, or six credible Neighbours, more or less. The Oath of the Person suspected, was to assert his own Innocency, and the Oath of his Compurgators that they believed what he swore to be true. If he purged and cleared himself after this Method, he was to be dismissed, and declared innocent. If he failed in such Purgation, by refusing to make Oath of his own Innocency, or could not find the Number of Compurgators enjoined, he was to be punished by publick Penance, as if he had been duly convicted by Confession or Witnesses. *Wager of Law* by the Defendant and eleven of his Neighbours, is something like it. But now,

By 13 Car. 2. ch. 12. It shall not be lawful for any Persons exercising Spiritual or Ecclesiastical Jurisdiction, to tender or administer unto any Person the Oath *ex Officio*, or any Oath, whereby he may be charged or compelled to confess, or accuse, or to purge himself of any criminal Matter or Thing, whereby he may be liable to Censure and Punishment. [See 16 Car. 1. ch. 11.]

So that by this Statute the Oath, as to the Party accused, is taken away. But this is only as to that Part of the Form and Method of Purgation; for the Statute breaking in upon the Canon Law, or an Ecclesiastical Custom, cannot fairly be extended further. Here is

still a *Legal Purgation* left, tho' not the *Canonical*. For it remains that the Party accused should declare his Innocency *without Oath*; and that the Compurgators may still swear as to their *Belief*, that what he says is true or false. Though some maintain, the *Oath* being taken away, the Foundation of the whole Proceedings, that all the Proceedings of Purgation upon common Fame do fall too.

But subsequent Practice, since the Statute, at Archiepiscopal, Episcopal, and Archidiaconal Visitations (contemporary Expositions upon the Meaning of the Statute) shews the contrary Opinion, of those that could best judge of the Intent and Design of our Legislators. Besides, if this Branch of the Ecclesiastical Discipline should be taken away, and common Fame is of no Force to ground a Prosecution, many shameless Lewdnesses, and scandalous Immoralities must go unpunished, and be suffered to reign and triumph. *Ideo*

2 Inst. 657. * If in a Penal Law the Jurisdiction of the Ordinary is saved, a Clerk or a Layman shall not be compelled to take an Oath, because it may be an Evidence against him at the Common Law upon the penal Statute.

2. Publick *Penance* is a Punishment imposed for a Crime, by standing in some publick Place, and making an Acknowledgment of it, to satisfy the Church for the Scandal given by an evil Example. In the Case of Incest, Adultery, &c. the Sinner is usually injoin'd to do publick Penance in the Cathedral or Parish Church, or publick Market, barefoot and bareheaded, in a white Sheet, and to make an open Confession of his Crime in a prescribed Form of Words, &c. For smaller Faults a publick Satisfaction or Penance is to be made in the Court, or before the Minister and Churchwardens, or some of the Parishioners, as in Cases of Defamation, &c.

Penance may be changed into a Fine, or Sum of Money, to be given to pious Uses, which is called *Commuting*. But the Judge ought not directly or indirectly to take any Thing hereof to his own Use; or for the Afflictment thereof, or entring the publick Act. If he doth, it is Extortion. *Quære*, If he takes only his customary Fees,

37. **Excommunication** is an Ecclesiastical Censure, by which a Christian is excluded from the Communion of the Church in sacred Rites and Privileges, and from the Company of the Faithful; or at least from receiving the Sacraments. The first is called the *Greater Excommunication*, the *second*; (*viz.*) an Exclusion from the Sacraments only, is the *Lesser Excommunication*, which is seldom put in Practice. In either Case the Offender is disabled to do any judicial Act, as to sue, to be a Witness, &c. though he may be sued. But every Excommunication does not disable one. For if a Mayor and Commonalty, or any other Corporation Aggregate, bring an Action, an Excommunication of the Mayor, &c. shall not disable them, because they sue and answer by Attorney [and in their corporate Capacity.] Otherwise it is of a sole Corporation. If

¹ Defendant, an Excommunication by the same Bishop against the Plaintiff, shall not disable him; for it shall be intended for the same Cause, if another is not shewn. An Excommunication against an ² Appellant, while the Appeal is depending, is void, as before observed.

^b If the Ordinary excommunicates one for any Thing where he hath not Cognizance of the Cause, the Party hath his Action against him, or the Ordinary may be indicted.

In some Cases Offenders incur Excommunication, *Ipso Facto*, by Act of Parliament, ^c but it takes no effect till they be convicted at Law, and the Conviction is transmitted to the Ordinary. [But *Ipso Facto* does not mean that he shall be excommunicate without any Sentence or Denunciation, and a Conviction at Law may be a good Ground for the Spiritual Court to go upon, but is not necessary where it was a Crime, before the Statute, connusable in the Spiritual Court, and the Case above referred to hath been since denied to be Law ^d.]

An Excommunication is generally pronounced for Contempt, in not appearing upon Summons; or after Admonition, for not obeying a Decree, &c. It is published in the Church by Virtue of an Instrument under the Seal of the Court by the Minister; ^e and then if the Offender does not submit within forty Days after the said Publication, he may be imprisoned by Virue of the Writ of *Significavit* or *Capias Excommunicatum*, upon the Certificate of the Bishop, &c. to the King in Chancery. Upon this Writ one may have an *Alias* and *Pluries*; and if they are not answered, an Attachment against the Sheriff may go, directed to the Coroners, returnable in the King's Bench. This is by the Common Law. [See *3 El. ch. 13. infra*.] And the Excommunication and Imprisonment shall continue, till the Party is reconciled to the Church, and discharged by Absolution, and the Writ *De Excommunicato Deliberando*, upon the Certificate of the Bishop, &c. to the King in Chancery, that the Party hath made his Satisfaction to the Church.

None can certify Excommunication but the Bishop, unless the Bishop is beyond Sea, or in *Remotis*; or unless the Certificate is by one that hath ordinary Jurisdiction, and is immediate Officer to the King's Courts; as the Archdeacon of *Richmond*, or a Guardian of the Spiritualities when the See is vacant. If the Bishop certifieth the Excommunication under Seal, and dieth before it is received, it is nothing worth. But his Successor ought to certify it. And tho' the Bishop is in his Diocese, the Certificate of the Chancellor or Vicar General, of a Contumacy or Contempt to the Church, directed to the King in his Chancery, and reciting that the Bishop is in *Remotis*, shall not be traversed. But the Court may insist to be informed of it by Writ out of the Chancery, and not depend wholly on the Surmise of the Party. The Bishop may certify an Excommunication made by his Commissary; for the Commissary acts in the Right of the Bishop. But in the Certificate of an Excommunication, the Cause of the Excommunication, must be specially shewn or set forth. It is not sufficient to say, that it was denounced for *manifest Contempt*, &c. the Judges will see by it whether the Ecclesiastical Court hath Cognizance of the principal Cause.

A Bishop elect, after Confirmation, and before his Consecration, may certify an Excommunication; for the Power of the Guardian

⁴ Inst. 340.

² Roll Abr.

²³³

¹ Dr. & Stud.

¹ Dial. 2. ch. 32.

² Inst. 527.

⁶²³.

^c Dyer 275.

¹ Vent. 140.

⁴ 2 Ld. Ray.

⁸⁵⁰.

¹ Wilson v.

¹ Graves

¹ K. B. Hil. T.

³⁰ G. 2.

¹ F. N. B. 62.

⁶³.

² Inst. 189.

⁸ Rep. 68.

¹ F. N. B. 62.

⁶⁴.

⁸ Rep. 68.

¹ Inst. 134. a.

of the Spiritualities ceases after his Election by the King's Conge d'Elire, and Confirmation.

^a 1 Inst. 134. 2. An Excommunication certified under the Seal of the ^a Commissary or Official, will not be allowed. An Excommunication may be certified by the ^b Delegates of Appeals. [See of the Courts of the Universities, *ch. 2. post.*]

^b 4 Inst. 327. If the Sheriff doth deliver Offenders committed upon the Writ of *Significavit*, without Order of Law; upon Complaint of the Bishop, &c. into Chancery, a Writ shall be awarded to the Coroners, to apprehend the Party excommunicated, and an Attachment, to cause the Sheriff to appear and answer the Contempt.

^c Dyer 371. By 5 El. ch. 23. *Writs De Excommunicato Capiendo shall issue out of the Court of Chancery in Term-Time, and be returnable in K. B. &c.*

^c F. N. B. 64. If in the *Excommunicato Capiendo* the excommunicated Party hath not a sufficient Addition, according to 1 H. 5. ch. 5. Or if in the *Significavit* it is not contained, that the Excommunication proceeds upon a Cause or Contempt, of some original Matter of Heresy, refusing to have his Child baptized, to receive the Sacrament, to come to Divine Service, or for Error in Matters of Religion or Doctrine, Incontinency, Usury, Simony, Perjury in the Ecclesiastical Court, or Idolatry; he shall not incur the Penalties in this Act, (*viz.*) For his Contempt in not rendering himself Prisoner upon the *Capias*, &c. [See the Act at large.]

^a 2 Inst. 661. So that this Statute does not require the *Capias* with Proclamations and the Penalties in other Cases besides the ten Cases mentioned in the Statute. But the Court hath insisted, that the Crime must be specified in the Writ; and even in a Cause of Defamation, that the defamatory Words should be recited; that it may appear to the Judges, whether the Spiritual Court hath Cognizance of the Cause, upon which the Party was excommunicated. For no Excommunication can be pronounced for a Temporal Cause, but by Act of Parliament.

³ Cro. 196, 197, 199. Those that die under the Sentence of Excommunication, cannot receive Christian Burial. [See the Rubrick in our Liturgy.]

² Inst. 615, 623. 1 Ld. Ray. 619. 1 Str. 43, 76. 1 Roll. Abr. 883. 2 Ld. Ray. 817. 2 Str. 946, 1067. 2 Inst. 527. 4. An *Interdict* is an Ecclesiastical Censure, by which Persons are prohibited to hear Divine Service, or to have the Sacraments administered to them, or Burial; or when Divine Service is forbidden to be had in such a Place or Places. An *Interdict of Person* followeth the Persons, where-ever they remove. An *Interdict of Place* is only with regard to such a Church or Place; and then the Persons may be received into another Church, but not into their own. There is also a *mixt Interdict*, when both the People, and the Church, &c. are subjected to this Censure.

But this Censure hath been of long Time disused.

5. *Suspension* is a Censure, whereby Ecclesiastical Persons are forbidden to exercise their Office, or to take the Profits of their Benefices, or where they are forbidden both of them, in Whole or in Part, for a certain Time or for ever. Hence it is said, there is a Suspension *ab Officio* or *Beneficio*, or *ab Officio et Beneficio*, Clergymen are only liable to this Censure. But there is a Suspension, which relates also to the Laity, (*viz.*) A Suspension *ab Ingressu Ecclesie*,

Ecclesia, or from the hearing of Divine Service there. [See 5 & 6 Ed. 6. ch. 4.]

Irregularity is a Canonical Impediment, arising from some infamous Crime, or Defect of Body or Mind, to take Orders; or if already in Orders, to minister in the same. This Censure is out of Use, tho' it is inflicted by a late Canon.

6. *Deprivation* is an Ecclesiastical Censure, by which a Clergyman is deprived of his Benefice.

7. *Degradation* is an Ecclesiastical Censure, whereby a Clergyman is deprived of his Orders. It is otherwise called *Deposition*. A Sentence may not only be given for this Purpose, but the Clerk may be solemnly stripped of his Clerical Habit.

From all these Punishments *Appeals* may be made to higher Courts, as in other Ecclesiastical Cases.

Thus much of the several *Kinds* of Courts of the *largest* Extent; or of those that are dispersed throughout the Kingdom.

CHAP. II.

Of the several *Kinds* of Courts that are *particular*, *limited*, or *exempt* Jurisdictions, (*viz.*) Of the *Marshalsea*, Of the *Lord Steward*, &c. to enquire of *Felony* by *Confederacy*, &c. Of the *Lord Steward of the King's House* concerning *Treasons*, *Felony*, *Bloodshedding*, &c. Of the Courts within the *Principality of Wales*, Of the *Duchy-Chamber of Lancaster*, Of the Courts of the *Counties Palatine*, Of the Court of the *Bishop of Ely*, Of the Courts of the *Cinque Ports*, Of the Courts of the *Stannaries*, Of the *Mayor of the Staple*, Of the Courts within or near the City of *London*, Of the Courts in *other Cities*, *Towns Corporate*, *Boroughs*, &c. Of the Courts of the *Universities of Oxford and Cambridge*.

THE *particular* Courts and *limited* Jurisdictions, or those which are not dispersed throughout the Kingdom, are, The Court of the *Marshalsea*, The Court of the *Lord Steward*, &c. to enquire of *Felony* by *Confederacy*, &c. Of the *Lord Steward of the King's House* concerning *Treasons*, &c. The Courts within the *Principality of Wales*, Of the *Duchy-Chamber of Lancaster*, Of the *Counties Palatine*, Of the *Bishop of Ely*, Of the *Cinque Ports*, The Courts of the *Stannaries*, Of the *Mayor of the Staple*, The Courts within or near the City of *London*, The Courts in *other Cities*, *Towns Corporate*, *Boroughs*, &c. The Courts of the *Universities of Oxford and Cambridge*.

a 2 Inst. 548:

Of these particular Courts, let it be again observed, That such Jurisdictions, derogating from the General Courts of the Common Law, are always to be taken strictly.

Of the Court
of the Mar-
shalsea, &c.

b Crompt. Jur.

102.

2 Inst. 548,

549.

4 Inst. 130.

6 Rep. 20, 21.

10 Rep. 71,

72, 73, 74,

75, &c.

Kitch. 199,

&c.

I. The Court of the ^b Marshalsea is a Court of Record at Common Law, ordained to hear and determine Suits betwixt those of the King's Household and others within the Verge (so called a *Virga*, a Rod, which the Marshal carries) or within twelve Miles of the King's Lodgings. Tho' the King goeth out of the Bounds of the Verge for his Recreation, if the Household continues where they were, this is no removing. When the King goeth in Progress, there the King moveth with his Household. [See 13 Ri. 2. St. 1. ch. 3.]

This Court is held in Southwark, and hath a Prison belonging to it, called the *Marshalsea*. This *Marshalsea* is to be understood of the Household, not of the King's Marshalsea; for that belongeth to the King's Bench.

The Judges of this Court are the Steward of the Court, and Marshal of the King's Household. Their Offices are for Life. And though the Marshal be one of the Judges, he sees too that the Execution be done.

As to the Jurisdiction of this Court, it is settled by Statute. For,

By Articuli super Chartas, or the 28 Ed. 1. ch. 3. The Steward and Marshal of the King's House shall not hold Plea of Freehold, neither of Debt, nor of Covenant, nor of any Contract, but only of Debts and other Things of the People of the same House; Of Contracts and Covenants that one of the King's House shall have made with another of the same House, and in the same House; Of Trespas done within the House, and of other Trespasles done within the Verge.

c 2 Inst. 548.
10 Rep. 74.
75.

This is the proper Jurisdiction of this Court. So that they cannot hold Plea but of three Actions, (*viz.*) Debt, Covenant, and Trespasles. In Debt and Covenant both the Parties must be of the King's Household. In Trespasles it is sufficient if one of the Parties is of the King's Household. But though the Act speaketh generally of Trespasles, yet Trespasles *Vi et Armis* are only to be understood; as Battery, taking away Goods; not Trespasles *Quare Clausum fregit*, Trespas and Ejectment, Trespas upon the Case, nor any other personal, nor any real or mixt Action.

By 5 Ed. 3. ch. 2. and 10 Ed. 3. St. 2. Error here shall be amended in the King's Bench.

The Court of the King's Palace at Westminster was erected by King Charles the First by Letters Patent, and made a Court of Record; the Liberty whereof extends twelve Miles round Whitehall. The Jurisdiction was since confirmed by King Charles the Second.

But this Court is now held by Virtue of Letters Patent of King Charles the Second, dated the 4th Day of October in the 16th Year of his Reign.

The Judges are the Steward of the King's House, and the Knight-Marshal, and the Steward of the Court, who is always a Lawyer.

In

In this Court twelve Miles round *Whitehall* they have *Jurisdiction*, to hold Pleas of all Manner of personal Actions whatsoever; as Debt; Trespass, Battery, Slander, Trover, Actions on the Case, &c.

The *Proceedings* of this Court are by Attachment or *Capias* (which may be had at several Places within the Liberty) upon which the Defendant is to give Bond with Sureties for his Appearance at the next Court; and upon his Appearance he must put in Bail, to answer the Condemnation of the Court. The rest of the Proceedings are according to the Course of the Common Law. If the Cause is considerable, it is usually removed into the King's Bench or Common Pleas by an *Habeas Corpus cum Causa*; otherwise a Cause is brought to Trial in four or five Days.

For the *Fees* of the *Marshalsea* or *Palace-Court*, See the *Com-pleat Solicitor*, p. 389.

II. The Court of the *Lord Steward, Treasurer, and Comptroller* of the King's Household, to enquire of Felony by Confederacy, Conspiring, and Imagining (by the King's sworn Servants under the Degree of a Lord) to murder the King, or any Lord, or other of the King's Privy Council, or the Steward, Treasurer, or Comptroller of the King's Household, is held by Virtue of 3 H. 7. ch. 14.

Of the Court of the Lord Steward, &c. to enquire of Felony by Confederacy. 2 Inst. 133. 3 Inst. 38. See p. 353. ante.

III. The Court of the *Lord Steward of the King's House*, or, in his Absence, of the Treasurer and Controller of the King's House and Steward of the *Marshalsea*, hath *Jurisdiction*, to enquire of, hear, and determine all Treasons, Misprision of Treason, Murders, Manslaughters, Bloodshed, and other malicious Strikings, whereby Blood shall be shed, in any of the Palaces and Houses of the King, or in any other House, where his Royal Person shall abide, held by Virtue of 33 H. 8. ch. 12.

Of the Court of the Lord Steward of the King's House, &c. 2 Inst. 549. 4 Inst. 133. 3 Inst. 140. See p. 420. ante.

IV. The Courts within the *Principality of Wales*, and their Jurisdiction, are settled by Acts of Parliament. The *Principality* consisteth of twelve Counties, besides the Shire of *Monmouth*, and other Lordships and Manors united to *Salop*, *Herefordshire*, and *Gloucestershire*.

Of the Courts within the Principality of Wales.

By 34 & 35 H. 8. ch. 26. There are General or Quarter-Sessions in each County, County-Courts, Hundred-Courts, Turns, Leets, Courts-Baron, Corporation-Courts, &c.

There shall be kept a Sessions twice every Year in every of the twelve Counties of Wales; which Sessions shall be called The King's Great Sessions of Wales. The Justices of those Courts shall have their Offices by Letters Patent under the Great Seal, to be executed by themselves or Deputies. And these Justices may hold Pleas of the Crown in as large a Manner as the King's Bench, and also Pleas of Assizes, and all other Pleas and Actions, real, personal, and mixt, in as large a Manner as the Lord Chief Justice and Justices of the Common Pleas, &c. They shall also bear and determine all criminal Offences whatsoever committed within their several Limits, according to the Laws of England. Also Recoveries and Fines may be taken before the said Justices, of Lands within their Authority, as is used before the Chief Justice of the Common Pleas.

Errors and Judgments before any of the Justices in the Great Sessions in Pleas real or mixt, shall be redressed by Writ of Error out of the Chancery of England returnable before the Justices of the King's Bench, as other Writs of Error are in England.

No Execution of any Judgment given in any Base Court shall be staid by any Writ of False Judgment. But if upon Pursuit of the said Writ, the Judgment shall be reversed, the Party shall be restored to all that he lost by the said Judgment, according to the Laws of England.

[See the Statute at large, by which the Jurisdiction of the Courts are plainly declared and established, and their Proceedings ordered to be according to the Laws of England. See also 27 H. 8. ch. 26. 18 El. ch. 8. and 11 & 12 W. 3. ch. 9. For preventing frivolous Suits in the Principality of Wales.]

The King's Writ ought not to go into this Principality, tho' a Quo minus out of the Exchequer is often sent thither. [But see Of Arrests, ch. 4. post. and see 1 Ed. 6. ch. 10. 5 El. ch. 23. §. 11.]

Of the Court
of the Duchy
of Lancaster.
* 4 Inst. 206,
212.

V. The Court of the Duchy-Chamber of Lancaster is held at Westminster.

The Officers of the Duchy-Court are the Chancellor, who keeps the Seal of the Duchy at Westminster; the Attorney-General, four Counsellors, a Receiver-General, Clerk of the Council, Auditors, Surveyors, Messenger. There is an Attorney of the Duchy in the Chancery, and another in the Exchequer.

b 2 Danv. Abr.
286.

The Jurisdiction of this Court is for or concerning Lands holden of the King in Right of his Duchy, within or without the County-Palatine of Lancaster; [See 1 Ed. 4.] or concerning Bonds and Assurances of the same; or concerning the Revenue of the Duchy.

* Hardr. 171.
* Hob. 77, 78.
1 Vent. 157.
158.

But whatever belongs to the Jurisdiction of the Duchy, may be determined in the Court of Exchequer. Where the Duchy claims Jurisdiction in respect of the Persons, as because the Suitors dwell within the County-Palatine; or where the Duchy retains Bills concerning Lands lying out of the County-Palatine, or within the Precincts of the Duchy, but not holden of it; a Prohibition may be awarded.

* Plowd. 72.
Crompt. Jur.
134.
4 Inst. 206.

The Proceedings in this Court are as in the Court of Chancery by English Bill, &c. and by Decree. But this Court is not a Mixt Court, as the High Court of Chancery. In some Cases this Court claims its proper Customs, and admits a small Mixture of the Common Law.

By 1 H. 7. The Duchy is separated from other Inheritance of the Crown, and settled in H. 7. and his Heirs.

f Plowd. 222.
4 Inst. 206,
209, 210.

Note, That the Act says *his Heirs*, without saying Kings of England, [See 37 H. 8. ch. 16. 2 & 3 Ph. & M. ch. 20.]

By 32 H. 8. ch. 20. 1 Ed. 6. ch. 14. 1 El. ch. 4. §. 38. (The Statutes of Monasteries and Chantries) All Lands, &c. Parcel of the Duchy given to the King, are within the Survey of the Duchy.

[See 16 Car. 1. ch. 10. 16 & 17 Car. 2. ch. 9.]

Of the Courts
of the Coun-
ties Palatine.
* Crompt. Jur.
137. a.
2 Inst. 557.
4 Inst. 205.
Dav. 60.

VI. A County-Palatine is an exempt Jurisdiction, where the King's Writ runneth not. [See 5 El. ch. 23. §. 11.] It is so called à Comitatu et Palatio Regis, because the Owners thereof were Companions of the King in his Palace, and had *Jura Regalia*, or King-like

like Rights and Authority. For they might pardon Treasons, Murders, Felonies, and Outlawries thereupon. But many of these Rights are taken away from those that have Counties Palatine, and are annexed to the Crown. * Counties Palatine probably were erected at ^{21 Vent. 155.} first, because they were adjacent to the Enemies Countries heretofore; as *Lancaster* and *Durham* to *Scotland*, and *Chester* to *Wales*; ^{4 Inst. 204.} that the Inhabitants might have Administration of Justice at home, and remain there to secure the Country from Incurfions. In the erecting of them these Things were to be observed, (*viz.*) to have a Chancery, Writs under Seal, to depute Justices, as well touching Pleas of the Crown, as all other Pleas touching the Common Law, Execution of Writs, making Officers, and all other regal Rights belonging to a County-Palatine.

^b The King may make a County-Palatine by his Letters Patent ^{4 Inst. 204.} without Parliament. ^{Crompt. Jur. 139. b.}

By 27 H. 8. ch. 24. *None but the King shall have Power to pardon Treasons or Felonies, or Outlawries for the same, to make Justices of Assise, Peace, or Gaol Delivery, notwithstanding any Grant or Prescription. [But see of the County-Palatine of Lancaster, post.] And all Writs, Indictments, and Processes in every County-Palatine, or other Liberty, shall be made in the King's Name, Teste the Owner of such County-Palatine or Liberty. And in every Writ or Indictment, the Offence shall be made and supposed to be done only against the King's Peace.*

See 11 & 12 W. 3. ch. 9. For preventing frivolous and vexatious Suits in Counties Palatine.

All Pleas of Lands, &c. and all Contracts, Causes, and Matters arising within the County-Palatines, are to be heard and judicially determined within the said County-Palatines, except in Case of Error, foreign Plea, or foreign Voucher. * But the Plaintiff in the Courts at *Westminster* may alledge Things transitory to be done in any County, though actually done in a County-Palatine, and the Defendant cannot plead to the Jurisdiction of the Court, that they were done within the County-Palatine. Yet if the Plaintiff supposes the transitory Cause of Action to be in the County-Palatine, that may be pleaded to the Jurisdiction. Otherwise it is of Things local. ^{4 Inst. 213.}

^a No Inhabitant of the said County-Palatine ought to be compelled by any Writ or Process to appear or answer out of the same in any Cause; except for Treason or Error. [But see of Arrests, ch. 4. post.] ^{4 Inst. 212, 213. Salk. 500.}

The County-Palatine shall have Forfeitures of Lands and Goods for High Treason by the Common Law, not such as are given by Act of Parliament after the Erection of the County-Palatine. ^{4 Inst. 205; Crompt. Jur. 139. a.}

Where a Statute is general, County-Palatines shall be bound by it.

There are three Counties-Palatine, and three Courts to exercise the Jurisdiction which belongs to them, (*viz.*) The Court of the County-Palatine of *Lancaster*, the Court of the County-Palatine of *Chester*, the Court of the County-Palatine of *Durham*. These are reckoned amongst the superior Courts. Besides which there is a like Court belonging to the Bishop of *Ely*, who hath royal Jurisdiction within the Isle of *Ely*, which is in some Statutes called the County-Palatine of *Ely*; [but it is now generally agreed ^b not to be a County-Palatine, and that the Court there is only in the Nature of an inferior Court.] I shall speak of them singly, though ^{4 Inst. 220. 2 Ld. Ray. 837.}

what I shall say of one, may often give Light to understand the Nature of others.

^a 1 Vent. 157. ^b 1 The County-Palatine of *Lancaster* is by Act of Parliament. ^c In the County-Palatine of *Lancaster* there is a Court of Equity. ^d 2 Lev. 24. The Chancellor is the Judge of it. ^e The Chancellorship both of the County and Duchy have a long Time been in one Person, but they have distinct Capacities; so that it is the same Thing, as if they were in two different Persons.

^f 1 Vent. 155. ^g 2 Danv. Abr. 286. ^h Lands held of the Duchy of *Lancaster*, and lying in the County-Palatine may be sued for in the Court of Equity.

ⁱ 4 Inst. 204. ^j There are also Courts of Law for Civil Actions and Pleas of the Crown, and Justices therein appointed. ^k Recoveries of Lands in the County-Palatine are to be had in the Court of the County-Palatine, and cannot be had at *Westminster*.

^l 4 Inst. 205. ^m If Issue is joined in the King's Bench, or Common Pleas, triable in the County-Palatine of *Lancaster*, it shall be tried in the County of *Lancaster*, and remanded thither. ⁿ And where Part of an Action ariseth at Common Law, and Part in a Franchise, the Common Law shall be preferred.

By 27 H. 8. ch. 24. The Justices of Assize and Gaol Delivery and of the Peace, for the County-Palatine of *Lancaster*, are assigned by Commission under the Seal of *Lancaster*.

[See concerning the Duchy of *Lancaster* the 2 & 3 Ph. & M. ch. 20. And concerning Writs of Significavit and Excommunicato Capiendo, 5 El. ch. 23. f. 11.]

^o 4 Inst. 211. ^p 212, 213, 215. ^q 2 The County-Palatine of *Chester* is by Prescription. And the King's Writ ought not to come, or be allowed, within the said County-Palatine, but under the Seal of the said County-Palatine, except Writs of Proclamation. [See 1 Ed. 6. ch. 10.]

^r 1 Danv. Abr. 750. ^s In the Court of Exchequer at *Chester* (the Chancery Court for the County-Palatine) the Chamberlain of *Chester* (who hath the Jurisdiction of a Chancellor) is Judge in Equity and in Matters of the Common Law, within the said County. For this Court of Chancery is a mixt Court, as the High Court of Chancery at *Westminster*. He is also a Conservator of the Peace by Virtue of the said Office. There is also a Vice-Chamberlain, who is the Chamberlain's Deputy. But the Chamberlain, or his Deputy, cannot decree any Cause wherein he himself is Party, but he may complain in the High Court of Chancery. If a Defendant dwells out of the County-Palatine, one of the County-Palatine may complain in the High Court of Chancery of England, for Matter of Equity touching Lands or Goods. For when particular Courts fail of Justice, the general Courts shall give Remedy.

^t The Justice of *Chester* hath also a Court and Jurisdiction, to hear and determine Matters of the Crown and Common Pleas within the said County-Palatine. [See 18 El. ch. 8. And of Fines and Recoveries levied, as well within the County-Palatine of *Chester*, as the City of *Chester*. 2 & 3 Ed. 6. ch. 28. 27 El. ch. 9. 43 El. ch. 15.] [See 4 Inst. 213, 214. Concerning Writs of Error directed to the Chamberlain in the Exchequer, for any Matter wherein he proceedeth according to the Course of the Common Law, or to the Justice of *Chester*. But see also 32 H. 8. ch. 43. and 2 Salk. 500. and see 5 El.

5 *El. ch. 23. f. 11.* concerning Writs of *Significavit* or *Excommunicato Capiendo*.]

3. ^a The County-Palatine of *Durham*, being Parcel of the Bishop-^a 4 *Inst. 216,*
rick [and called the Bishoprick] of *Durham*, is by *Prescription*, where^{219.}
the King's Writ runneth not; for it is a royal Franchise. ^{1 Roll. Abr. 540.}

The Jurisdiction of the Bishop of *Durham* extends to all Places betwixt the Rivers *Tine* and *Tee*; and to the Manors of other Men, as well as to the Demesnes of the Bishop. [See 17 *Ed. 2. St. 1. ch. 1.*]

In the County-Palatine of *Durham* there is a Court of ^b *Chancery*,^{4 Inst. 219.} and a Chancellor. It is a mixt Court both of Law and *Equity*; but ^{Crompt. Jur. 138.} it differeth from other Courts herein, that if an erroneous Judgment is given, either in *Chancery* upon a Judgment there according to Common Law, or before the *Justices* of the Bishop, a Writ of Error shall be brought before the Bishop himself. [The Justices are now the King's Justices, and the Writ of Error must be returnable in the *King's Bench*.] And if he gives an erroneous Judgment thereon, a Writ of Error shall be sued out, returnable into the King's Bench. If the Bishop (who ought to do Right to others) does Wrong within his County-Palatine, Justices shall be assigned to hear and determine the Case; for he cannot be Judge in his own Cause.

Fines may be levied here, [See 5 *El. ch. 27.*] and *Recoveries* suffered. [See 27 *El. ch. 9.*]

By 27 *H. 8. ch. 24.* The Bishop of *Durham*, and his Temporal Chancellor of the County-Palatine, are *Justices of the Peace* within the said County-Palatine.

See 5 *El. ch. 23. f. 11.* Of Writs of *Significavit* and *Excomm. Capiendo*. Also 31 *El. ch. 9.* for Writs upon Proclamations and Exigents, &c.

4. ^c The Royal Franchise of *Ely* is called the County-Palatine of *Ely*, in several Acts of Parliament. [See 33 *H. 8. ch. 10.* 5 *El. ch. 23.*] King *Henry 1.* granted to the Bishop of *Ely* and his Successors ^{4 Inst. 220.} *Jura Regalia* within the Isle of *Ely*. This Bishop hath this Royal Jurisdiction by *Prescription*, grounded upon the said Grant, as well in Pleas of the Crown, as in Common Pleas before his *Justices*.^{Dav. 61.}

By 27 *H. 8. ch. 24.* The Bishop of *Ely*, and his Steward, are *Justices of Peace* within the Isle of *Ely*.^{2 Ld. Ray. 837.}

See 5 *Eliz. ch. 23. f. 11.* Concerning the Writs of *Significavit* and *Excommunicato Capiendo*. In which Statute the County-Palatine of *Ely* is called an exempt Jurisdiction as well as *Wales*; the Counties-Palatine of *Lancaster*, *Chester*, *Durham*, and the *Cinque Ports*, where the King's Writ doth not run, &c.

VII. ^d The *Cinque Ports*, within the County of *Kent*, have each Of the Courts of them Franchises and Liberties; and the King's Writ doth not of the Cinque Ports. run there, as before affirmed. But this is said to extend no farther than to Civil Causes between Party and Party. And yet a *Qua* ^{Crompt. Jur. 134, 137.} *Minus* lies to the Cinque Ports. [And see of Arrests, chap. 4. post.] ^{1 Cro. 911.} The Inhabitants thereof have these Privileges in respect of their *Attendance* in the Ports, for the Defence of the Kingdom. ^{2 Cro. 543.} ^{Hard. 475.}

The

^a 2 Inst. 557.
⁴ Inst. 222,
 223.

The first privileged Ports were but ^a three, (*viz.*) *Dover*, *Sandwich* and *Rumney*. Afterwards two Ports more were added to them (*viz.*) *Hastings* and *Hythe*. Of this Number of five these Ports were called the *Cinque Ports*. But two more, (*viz.*) *Winchelsea* and *Rye* were added to these five; and though now there are seven Ports or Havens, yet they hold their former Name of the *Cinque Ports*.

Within the *Cinque Ports* there are several *Courts*. One before the Constable of the Castle of *Dover*, and other *Courts* within the Ports themselves held before the Mayors and Jurats; and another called *The Court of the Cinque Ports at SHEPWAY*.

^b 2 Inst. 556,
 557, 558.
⁴ Inst. 223.
 F. N. B. 240.
 Crompt. Jur.
 139.

^b There is a *Lord Warden* or Keeper of the *Cinque Ports*; who is also *Admiral*, and hath the Jurisdiction of the Admiralty; and is exempt from the Admiralty of *England*. He is also *Constable* of the Castle of *Dover*, and hath Jurisdiction to hold Plea by Bill concerning the Guard of the Castle, &c. according to Common Law. So that the Constable and Lord Warden hath two Jurisdictions. His Jurisdiction as *Constable*, is limited by *Articuli super Chartas*, or 28 Ed. 1. ch. 7. For he hath no general Jurisdiction within the *Cinque Ports*. The Constable of *Dover* and Lord Warden is the immediate Officer to the King's Courts, for the Execution of the King's Writs within the *Cinque Ports*. The King's Courts write to him, and he is to certify the King's Courts of the Record which is before the Mayor and Jurats upon their Certificate to him. So if one hath Judgment in the King's Courts, and the Defendant hath no Lands or Goods but in the *Cinque Ports*, the Plaintiff shall have a Writ directed to the Constable of *Dover*, to make Execution.

^c 4 Inst. 224:

^c The Jurisdiction of the *Cinque Ports* is general, and extends to personal as well as real and mixt Actions, which touch the Freehold. But if Part of the Land is within the *Cinque Ports*, and Part without, the whole Writ shall abate. And so in like Cases.

^d 4 Inst. 224.

^d All ^d Plaints against the Mayor and Jurats of the *Cinque Ports* ought to be determined at *Shepway*, before the Warden of the *Cinque Ports*.

^e 2 Inst. 557.
⁴ Inst. 224.
 Crompt. Jur.
 138.

^e If an erroneous Judgment is given in the *Cinque Ports* before any of the Mayors or Jurats, it shall be redressed according to the Custom, by Bill, in the Nature of a Writ of Error, before the Constable of *Dover*, and Warden of the *Cinque Ports*, at the Court of *Shepway*; and the Mayor and Jurats shall be fined, and the Mayor removed from his Place, though the Court is a Court of Record.

[See 5 El. ch. 23. f. 11. Concerning Writs of *Significavit* and *Excommunicato Capiendo*.]

^f 2 Inst. 557.
⁴ Inst. 223.
² Cro. 692.
³ Cro. 247,
 248.

^f Note, ^f That there is a great Difference between the *Principality of Wales*, the *Counties-Palatine*, and the *Cinque Ports*. For though in the *Cinque Ports* the King's Writ doth not run, yet they have not *Jura Regalia*, and are Parcel of the County of *Kent*. So that if a Writ is brought against one for Land within the *Cinque Ports*, and he appears and pleads to it, and Judgment is given against him in the Court of Common Pleas, this Judgment shall bind him; for the Land is not exempted out of the County, and the Tenant may waive the Benefit of his Privilege. But if such Judgment is given in the Common Pleas in a *Præcipe*, of Lands that lie in *Wales* or in the *Counties Palatine* of *Lancaster*, *Chester*, or *Durham*, though the Tenant did admit the Jurisdiction of the Court in such a Case,

a Case, the Judgment against him, as to such Lands is void: For *Wales* was originally no Part of *England*, and the Counties *Palatine* are exempted from the Jurisdiction of the King's Courts, have *Jura Regalia*, and plenary Jurisdiction, and so are known to the King's Courts. For they take Notice of all the Counties in *England* for the Directions of Writs. In the Cinque Ports the Privilege extendeth only to certain particular Towns, whereof the King's Courts cannot judicially take any Notice. Therefore the Privilege ought to be pleaded to the Writ. For there is a Difference betwixt a Franchise to demand Cognizance, * and a Franchise where the King's Writ runneth not. In the first Case the Defendant shall not plead it, but the Lord of the Franchise must demand Cognizance, but in the last Case the Defendant must plead.

2 *Ld. Ray.*
836, &c.
See p. 209,
ante.

VIII. ^b The Courts of the *Stannaries*, or the *Stannary-Courts*, Of the Courts in *Cornwall* and *Devonshire*, are so called *a Stanno*, from the *Tin* of the *Stannaries*. in those Counties; and the *Tinners* are called *Stannatores*. The Privileges of the *Tinners* are declared, limited, and expounded by an Act of Parliament (not printed) made the 50th *Ed. 3.*

4 *Inst.* 229.
232, &c.

All ^c *Labourers* in and about the *Stannaries* are to have the Privilege of the *Stannary-Court*, while they work there; and are not to be impleaded in any other Court, for any Cause arising within the *Stannaries*, except for Pleas of Land, Life, and Member.

4 *Inst.* 231,
232, 233, 234.

The Officers of this Court are the Lord Warden, the Under-Warden, and the Steward.

The Jurisdiction of this Court is guided by special Laws and Customs, and by Prescription; and is fully settled by 16 *Car. 1. ch.* 15. Here the Words *In locis ubi operantur* are expounded.

4 *Inst.* 229.

They have no Jurisdiction of any local Action arising out of the *Stannaries*. Transitory Actions betwixt Tinner and Tinner, though not concerning the *Stannaries* or arising therein, if the Defendant be found within the *Stannaries*, may be brought in these Courts, or at Common Law. But if one Party only is a Tinner, such transitory Actions, which concern not the *Stannaries*, nor arise therein, can not be brought there.

4 *Inst.* 231.

4 *Inst.* 229.

230, 231.

Plowd. 327.

12 *Rep.* 9.

1 *Roll. Abr.*

No Writ of Error lieth upon a Judgment in the *Stannary-Courts*. But Judgment shall be reversed by Appeal to the Steward of the *Stannary-Court* where the Matter lieth; from the Steward of the *Stannary-Court* to the Under-Warden of the *Stannaries*; and from him to the Lord-Warden of the *Stannaries*; and from him to the King's [or Prince of *Wales's* when there is one] Privy-Council. [See 16 *Car. 1. ch.* 15. at large.]

745.

IX. The Court of the Mayor of the *Staple* is appointed to keep the Peace, arrest the Offenders in *Staples* for Debt, &c. and to imprison and punish them after the Law of the *Staple*. So that the Court in the *Staple-Market* is incident to that Market. It is guided by the *Law-Merchant* in a Summary Way, which is the Law of the *Staple*.

Of the Court of Mayor of the *Staple.*

4 *Inst.* 237,

238.

A *Staple-Court* is held at the *Wool-Staple* in *Westminster*, the Bounds beginning at *Temple-Bar*, and extending to *Tutbill*.

In other Cities and Towns, the Bounds are within the Walls: Where there are no Walls, the Bounds of the *Staple* shall extend through all the City or Town.

* 4 Inst. 237. * The Officers of this Court are the Mayor, and two Constables. [See 27 Ed. 3. St. 2. ch. 21. for the Jurisdiction of this Court.]

By 36 Ed. 3. ch. 7. Merchant-Strangers may either sue before the Mayor of the Staple, according to the Law Merchant, or at the Common Law.

These Courts are much out of Use.

[See Of Estates by Statute Merchant and Staple, B. 2. ch. 1. And of Statutes, B. 2. ch. 3. ante.]

Of the Courts within or near the City of London.

X. The Courts within or near the City of London, are the *Hustings*, the *Sheriffs Courts*, the Lord Mayor's Court of Equity, the Court of the Mayor and Aldermen, the Court of Requests, the Court of Orphans, the Court of Common Council, the Court of Wardmote, the Court of Hall-mote, the Court of the Chamberlain for Apprentices, the Court of the Conservator of the Water and River of Thames, &c. The Court for Policies of Assurance, the Court of the Tower of London, the Court at Whitechapel, the Court at St. Martin's le Grand, the Court of the President, Censors and Commonalty of the College of Physicians.

b. 2 Inst. 322.
4 Inst. 247.
Terms of the Law v. Hustings.

1. The ^b *Hustings* (from *Hus*, Sax. for a House, and *Dbing* for Things, Causes, or Pleas, (so that it is the House of Causes) is the highest Court of Record, holden at *Guildball* for the City of London before the Lord Mayor and Sheriffs (or in the Sheriff's Absence by six Aldermen) of all Pleas, real, personal, and mixt. It is as it were distinguished into two Courts; one Week the Judges sit upon Pleas real, and the next Week upon personal or mixt Actions. But real Actions are grown out of Use. [See Statute of Gloucester or 6 Ed. 1. ch. 11. and ch. 4. post. Of an Action.]

Judgment of Outlawry in the *Hustings*, is not given by the Mayor who is Coroner, but by the Recorder.

* F. N. B.
23, 24.
1 Roll. Abr.
745.

2 Saund. 228. to do Right.

If an ^c erroneous Judgment is given in the *Hustings*, the Party who thinks himself grieved, may sue a Commission out of Chancery directed to some Persons to examine the Record, and thereupon

d 4 Inst. 247,
248.

2. The ^d two *Sheriffs* do each of them keep a Court of Record within the City by Prescription. These Courts are kept at *Guildball*, and in each Court a Steward is the Judge. They have belonging to these Courts two Prisons, called *Counters*. The one in *Wood-street*, the other in the *Poultry*.

They have Jurisdiction to hold Plea in all Personal Actions.

The Process in these Courts is by Summons, Arrest, Foreign Attachment (or by Attachment of Foreigners Goods or Money found within the City in the Hands of the Plaintiff or of a third Person) to make the Defendant appear, and give Bail to answer the Condemnation. He in whose Hands the Goods are attached, is called the *Garnishee*, because he has had *Garnishment*, (from *Garnir*, to instruct) or Warning not to part with the Goods or Money, but to appear and answer the Creditor's Suit. If the Foreigner appears and pleads, he is called the *Enterpleader*. If the Defendant does not appear, the Goods or Money may be condemned. There may be also a *Sequestration*, upon an Action of Debt, of Goods in a House, Shop, or Warehouse, when there is no one within, by hanging a Padlock

Padlock upon the Door, and making a Return thereof. Here the Proceedings are almost the same as upon Foreign Attachment. [See *Of the Sheriff's Court in London*, and for the Practice there, especially upon *Foreign Attachment* and *Sequestration*, *The Compleat Attorney*, and *The Compleat Solicitor*.]

Besides their particular Customs, the Proceedings are according to the Rules of the Common Law. An Action is usually tried here in Four Court Days; and if either Party shall have a Witness that cannot stay in *London* till the Day of Trial, his Deposition may be taken in Writing, and allowed.

A Cause may be removed by *Habeas Corpus* to *Westminster-Hall*.

* But if an *erroneous* Judgment is given, the Cause may be removed by Writ of Error to the *Hustings* before the Lord Mayor and Sheriffs. F. N. B. 22.
4 Inst. 247,
248.

3. The ^b Lord Mayor's Court of Equity, wherein the Proceedings are much like those in the High Court of Chancery. There is a Practice called *marking* a Cause before the Lord Mayor, as thus—4 Inst. 248.
The Compl.
Attorney,
p. 74. 75. After a Verdict given for the Plaintiff in the Sheriff's Court, the Defendant may get the Cause mark'd before the Lord-Mayor (being like an Injunction) to stay Judgment and Execution, 'till the Matter is examined in Equity. Also the Custom is, that if a Plaint of Debt is entered in the Sheriff's Court, upon Suggestion of the Defendant, the Lord Mayor may send for the Parties, and for the Record, and examine the Parties upon their Plea, and if he finds that the Plaintiff is satisfied, he may award that the Plaintiff should be barr'd, but not after Judgment.

4. The Court of the Lord Mayor and Aldermen is a Court of Record, and is held in *Guildhall*, the Recorder being Judge thereof. But the Lord Mayor and Aldermen may sit as Judges with him.

The Proceedings are by Action and Arrest, or else by an Attachment of the Defendant's Goods.

The two Counters are the proper Prisons, as well for this as for the Sheriffs Court.

5. The Court of Requests, commonly called the Court of Conscience, is kept at *Guildhall*, and is established for recovering Debts not exceeding 40 s.

By 3 Ja. 1. ch. 15. Every Citizen and Freeman of London, and every other Person inhabiting there, being a Tradesman, Victualler, or Labourer, who hath a Debt due to him, not amounting to 40 s. (See the next Statute) by any other Citizen, may cause the Debtor to be summoned to the Court of Requests at *Guildhall*, to appear before the Commissioners there, or any Three of them; who, if the Party does not appear, may order him to be committed to one of the Counters. But if he appears, they may proceed summarily, and examine the Parties and Witnesses upon Oath, and forthwith make an Order, which the Plaintiff and Defendant must obey, under Penalty of Commitment to the Counter, 'till they shall perform such Order. If any such Person commence any Suit elsewhere for any such Debt against any other such like Person, upon the Defendant's Oath or other sufficient Testimony, that he was, at the Time of the Action brought, an Inhabitant in the City of London, or the Liberties thereof, as aforesaid, and it shall appear that

that the Debt sued for amounts not to 40 s. The Judge of the Court shall not allow to the Plaintiff any Costs of Suit, but shall award to the Defendant his ordinary Costs.

This Act shall not extend to any Debt for Rent upon Lease, or other real Contracts, or concerning Testaments, Matrimony, or any Thing belonging to the Ecclesiastical Court.

By 14 Geo. 2. ch. 10. It shall be lawful for every Citizen of London, and every other Person inhabiting within the said City, or the Liberties thereof, and every Person who shall rent or keep any Shop, Shed, Stall, or Stand, or seek a Livelibood in the said City, or Liberties thereof, which shall have any Debt owing unto him, not exceeding 40 s. by any Person inhabiting, or seeking a Livelibood within the said City, or Liberties thereof, during their respective inhabiting within the said City or Liberties thereof, or seeking a Livelibood as aforesaid, to cause such Debtor to be summoned by any of the Officers of the said Court of Requests for the time being, by Writing left at the Dwelling-house, Lodgings, Shop, Shed, Stall, or Stand, or any other Place of seeking a Livelibood, of such Debtor, or by any other reasonable Notice to be given to the said Debtor, to appear before the Commissioners of the said Court of Requests, holden in the Guildhall of the said City, and that the said Commissioners, or any three of them, or more, shall, after such Summons as aforesaid, have Authority by this Act, from time to time, to set down, or cause to be set down such Orders between such Party, Plaintiff, and his Debtor, Defendant, touching such Debt not exceeding 40 s. in Question before them, as they shall find to stand with Equity and good Conscience; all such Orders to be registered in a Book as they have been accustomed to be; which Orders so made, as well the Plaintiff, as the Defendant, shall perform and keep in all Points.

And if any Person shall contemptuously affront, insult, or abuse all or any of the Commissioners of the said Court, during the Time of their sitting, it shall be lawful for the Commissioners then sitting, or any three of them, to certify under their Hands and Seals the Name of the Person so offending, and the Nature of his Offence, to the Lord-Mayor of the said City, for the time being, who is required to summon such Person so offending before him; and upon his Appearance, and the Fact alledged being proved upon the Oath of one credible Witness, or in Default of his Appearance, the said Lord Mayor shall proceed to punish the Person so offending as aforesaid, by Fine or Imprisonment, or both; provided that the Fine on any one Person do not exceed 20 s. and that the Imprisonment be for no longer than ten Days. And upon the Non-payment of the said Fine, it shall be lawful for the said Lord Mayor to issue a Warrant under his Hand and Seal, for levying the said Fine on the Goods of the Offender, and to cause Sale to be made thereof in case they shall not be redeemed in five Days, rendering to every such Person the Overplus (if any there be) upon Demand, after deducting the reasonable Charges of such Distress and Sale; which Fine, when levied or received, shall be paid into the Hands of the Church-wardens, or Overseers of the Poor of the Parish, wherein every such Offender shall inhabit, towards the Support of the Poor.

a 4 Inst. 248,
249.
2 Danv. Abr.
311. Tit. Cu-
stoms of Lon-
don.

6. The Court of Orphans, a Court of Record, is established for the Care and Government of Orphans. The Lord Mayor and Aldermen have the Custody of Orphans (under Age and unmarried) of Free-

Freemen or Free-women of *London* that die; though they did not inhabit in *London*; and the keeping of all their Lands and Goods. And if they commit the Custody of an Orphan to another Man, he shall have the Writ of Ravishment of Ward, if the Orphan is taken away, or the Mayor and Aldermen may imprison the Offender, 'till he produces the Infant.

Executors and Administrators are to exhibit true Inventories, before the Lord Mayor and Aldermen in this Court, and must give Security to the Chamberlain by Recognizance for the Orphan's Part; which if they refuse to do, the Court may commit them to Prison till they obey. And if any Orphan sue in the Ecclesiastical Court or elsewhere for a Legacy, Account, or Duty due to him by the Custom, a Prohibition will lie. But an Infant may waive the Benefit of suing in the Court of Orphans, and file a Bill in Equity against any one for Discovery of the personal Estate.

If any one without the Consent of the Court of Aldermen marries such an Orphan under the Age of twenty-one, tho' out of the City, they may fine him, and imprison him for Non-payment.

[See of a *Guardian*, B. 1. ch. 6. ante. Of Corporations, B. 1. ch. 8. ante. Concerning the Chamberlain of *London*, and 2 *Darr.* Abr. 311, 312. and see 5 *W. & M.* ch. 10. An Act for the Relief of Orphans of the City of *London*.]

7. The Court of *Common Council* consists of the Lord Mayor, Aldermen, and such as are chosen in every Ward out of the Commonalty, to represent the whole Commonalty of *London*.

In this Court they make Acts for the better Government of the City, for the better Execution of the Laws of the Kingdom, or for the Publick Good, and for the Advancement of Trade; But these Laws must not be contrary to the Publick Laws and Statutes. Such Laws being made by the Lord Mayor, Aldermen and Commonalty, do bind within the City and Liberties thereof.

8. The Court of the *Wardmote* (Ward-Court) resembles the Country Leets. Every Ward being as a Hundred, and the Parishes as Towns. There are twenty-six Wards, divided for the Government of them amongst the Aldermen of the City.

In every Ward there is an Inquest of twelve Men, or more, sworn every Year to inquire of and to present Nuisances, and such Persons as have not paved or amended the Streets and Lanes, &c.

9. The Court of *Hall-mote* (Hall-Court) is the Court which every Company in *London* keeps in their Hall, for the better Regulation of their Company.

10. The Court of the *Chamberlain* for Apprentices is for the Inrollment of Indentures of Apprentices. For an Apprentice may refuse to serve, if his Indentures are not inroll'd; and may sue out his Indentures in this Court, [2y. If not in the Mayor's Court] and be discharged of his Master. And here Apprentices are made free. One may be free of *London* by Service of an Apprenticeship; by Birthright, being the Son of a Freeman; by Redemption, by Order of the Court of Aldermen.

The Chamberlain is Judge in all Complaints, either of the Apprentice against his Master, or of the Master against the Apprentice; and punisheth the Offenders at his Discretion.

• 4 Inst. 250. 11. There is the Court of the ^a *Conservator* of the *Water and River of Thames*, &c. wherein the Lord Mayor of London hath the Rule and Government of the Water and River of *Thames*, and the Issues, Breaches, and Lands overflown, &c. from *Stains-Bridge* to the Water of *Yendal* and *Medway*; and hath Authority to punish such as use unlawful Nets, or other unlawful Engines in Fishing, or take Fish under Size unseasonably, &c. [See 4 H. 7. ch. 15. 3 Jac. 1. ch. 14. 7 Ann. ch. 9. and of the Court of the Commissioners of Sewers, ch. 1. ante.]

• 4 Inst. 250. 12. The Court for ^b *Policies of Assurances* [not now in Use] is founded upon Acts of Parliament. For,

By 43 El. ch. 12. and 13 & 14 Car. 2. ch. 23. The Lord Chancellor or Lord Keeper shall award a standing Commission (to be renewed yearly or oftner) for the bearing and determining all such Causes, as arise from Policies of Assurances, that are enter'd in the Office of Assurance of London. The Commissioners, or the greater Part of them, shall have Power to summon the Parties, examine Witnesses upon Oath, to bear and decree all such Causes in a brief and summary Way, and commit to Prison such as disobey their Decrees. But the Party grieved by such Decree may, within two Months after, exhibit his Bill in Chancery for the Re-examination thereof, so as he first satisfies the Decree, &c.

• 4 Inst. 251. 13. The Court of the ^c *Tower of London* is holden within the Precinct of the Tower of London before the Steward, by Prescription, of Debt, Trespas, and other Actions of any Sum. Part of the Tower-Liberty is within the City of London, and Part in the County of Middlesex. It hath Authority over several Hamlets in the County of Middlesex. There is also another Court at St. Catherine's for that Liberty, which is also a Royal Jurisdiction for Ecclesiastical Causes; and therefore an Appeal lies from thence to the King in his Chancery.

14. The Court of Stepney at White-Chapel, (commonly called White-Chapel-Court) is a Court of Record. Writs to this Court are directed thus: *Seneschallo Curia nostra de Recordo infra Manerium de Stepney et Hackney in Com. Middlesex. Hamlettas et Libertates eorundem, necnon Capitali Ballivo Praeonorabilis Manerii sui de Stepney praedict. et eorum Cuilibet Salutem.* This Direction is double, because there is a Gaol for Defendants arrested in that Liberty by Writs of Superior Courts, [2y.] as well as by Process of this Court. [This Court is not within the City of London, but in the County of Middlesex.]

15. The Court for St. Martin's le Grand by Aldersgate, is a Court of Record for the Trial of all Personal Actions. It is a Liberty within the Deanery of Westminster, and subject to the Liberty thereof, and hath a peculiar Jurisdiction within itself.

16. For the Court of the President, Censors and Commonalty of the College of Physicians within the City of London; and seven Miles compass, see the Letters Patent of Incorporation in 14 & 15 H. 8. ch. 5. See also 1 Mar. Sess. 2. ch. 9. and Dr. Bonham's Case, 8 Rep. 107, 108, &c.

See 3 H. 8. ch. 11. For appointing Physicians and Surgeons in the City of London, and Precinct of seven Miles, 34 & 35 H. 8. ch. 8. For empowering any Persons to administer outward Medicines, or to cure outward Sores, or give Drinks for the Stone, Strangury, or Agues.

There are other Courts within the City of London, but they are mentioned in other Places; or are not much to our Purpose; as the Court of the Governors and Corporation for the Bounty of Queen Anne, for the Augmentation of small Livings; of the East-India Company, Bank, South-Sea, &c. [See of the Court of the Coroner, of the Sessions of Oyer and Terminer and Gaol-Delivery for Newgate, held at Justice-Hall in the Old-Bailey, &c. ch. 1. ante.]

Note, That by 27 Eliz. (not printed) The two chief Burgeses of Westminster may hear, determine and punish (according to the Laws of the Land and lawful Customs of the City of London) Matters of Incontinency, common Scolds, Inmates, common Nuisances, and likewise commit such Persons as shall offend against the Peace.

There is also a Court of Record kept Weekly in the Borough of Southwark for the Liberty thereof.

XI. There are Courts holden in other Cities, Towns Corporate, and Boroughs throughout England, together with many Courts belonging to Castles, &c. But because these are private and sufficiently known, I shall only say something in general of inferior Courts.

Where a Power to hold Pleas, &c. is granted by Letters Patent to a Corporation, proper Officers and Process are incident to the Grant; for they cannot hold a Court without them.

It ought to appear by the Stile of the Court, by what Authority it is held, whether by Custom or by Letters Patent.

Nothing shall be intended to be within the Jurisdiction of an inferior Court, but what is expressly alledged to be so.

If an Obligation is made out of the Jurisdiction of the Court, though the Action brought upon it is transitory as to other Courts, as the Courts at Westminster which have a General Jurisdiction, yet inferior Courts have not any Jurisdiction of any Thing that arises out of the Jurisdiction, and therefore have not Power to hold Pleas thereof. So if Payment at the Day is pleaded to a Bond, it must be alledged to be within the Jurisdiction. For an inferior Court cannot inquire of those Things, which are out of its Jurisdiction. But the common Practice of such Courts is otherwise. [See Westm. 1. or 3 Ed. 1. ch. 35.]

If Part of the Cause arises within the inferior Jurisdiction, and Part without, the inferior Court ought not to hold Plea.

The Courts at Westminster will not, *ex Officio*, take Notice of the Customs of inferior Courts.

Of the Courts
in other Ci-
ties, Towns
Corporate,
Boroughs, &c.

1 Roll. Abr.
797.
1 Cro. 489.
Hob. 63.
1 Sid. 331.
1 Lev. 104.
1 Ld. Raym.
1310.
1 Saund. 74.
1 Inst. 229.
1 Roll. Abr.
145, 546, 547.
2 Roll. Abr.
317.
2 Danv. Abr.
299, 300, 301.
1 Ld. Ray.
211.

1 Lev. 104.
1 Vent. 72.

• Skinn. 350.
Salk. 674.
Carth. 274.

[See

[See of a Liberty to hold Pleas, and to have Cognizance of Pleas, B. 2. ch. 2. ante.]

By 4 & 5 Ann. ch. 16. *All the Statutes of Jeofails shall be extended to Judgments, which shall be enter'd upon Confession, Nihil dicit, or Non sum informatus, in any Court of Record.*

Of the Courts
of the Uni-
versities.

* 4 Inst. 227.

Prynn's Ani-
madv. on 4
Inst. p. 156.

* 9 Rep. 30.

XII. The Courts of the Universities of Oxford and Cambridge are of a particular Nature. They are granted by Charters, and are confirmed by Authority of Parliament. For,

By 13 El. ch. 29. it is enacted, 1. *That each of the Universities shall be incorporated by a certain Name, tho' they were antient Corporations before.* 2. *That all Letters Patent and Charters hitherto granted shall be good, effectual and available in Law, as amply, fully and largely, as if the said Letters Patents were recited verbatim in the said Act.* 3. *That the Chancellor, Masters and Scholars of either of the said Universities should enjoy all Manors, Lands, Tenements, and Hereditaments, all Liberties, Franchises, and Privileges, View of Frank-Pledge, Law-days, and all other Things, which either of the said corporated Bodies have enjoy'd, or of Right ought to have enjoy'd, according to the Intent of the said Letters Patents.* 4. *That all Letters Patents of the Queen's Highness, or of any her Progenitors or Predecessors, and all Liberties, Franchises, and all other Things whatsoever, therein expressed, given, or granted, shall be established and confirmed, any Statute, Law, Usage, Custom, or Construction to the contrary notwithstanding; saving the Right of all others than of the Queen's Majesty, her Heirs and Successors.*

By Letters Patents (not confirmed by Act of Parliament) dated the 30th of March, 11 Car. 1. and granted to the University of Oxford, old Privileges are explained, and larger granted.

The Courts are called the Chancellors Courts, who are usually Peers of the Realm, and are appointed over the whole University. But the Courts are kept by their Vice-Chancellors, their Assessors, or Deputies. The Causes are managed by Advocates and Proctors.

These Courts have Jurisdiction in all Causes Ecclesiastical and Civil (except Mayhem, Felony, and Freehold) where a Scholar, Servant, or Minister of the University is one of the Parties in Suit. [But see the Grant of H. 4. in Prynn's Animadv. p. 368, 369.]

c 3 Cro. 73.
Hedl. 25.
Hardr. 505.
508.

Their Proceedings are in a summary Way according to the Practice of the Civil Law; and the Judges in their Sentences follow the Justice and Equity of the Civil Law; or the Laws, Statutes, Privileges, Liberties and Customs of the Universities; or the Laws of the Land, at their Discretion.

If there is an erroneous Sentence in the Chancellor's Court of the University of Oxford, an Appeal lies to the Congregation, thence to the Convocation; and from thence to the King in Chancery; who nominates Judges Delegates, to hear the Appeal. The Appeal is of this Nature in Cambridge.

The Chancellor of the University of Oxford, or his Vice-Chancellor, may inflict Ecclesiastical Censures of the greater Excommunication on Offenders, even for temporal Offences; and certify the Excommunication into the High Court of Chancery, to obtain the Writ *De Excommunicato Capiendo*, as if the Offender had been ex-

communicated

communicated in an Ecclesiastical Cause, and certified by a Bishop. The University of Cambridge hath also this Privilege.

Note, The following Resolutions concerning the Privileges of the Universities.

They have no Privilege in Causes that concern or relate to a Freehold, ^a or for Recovery of the Possession of a ^b Term without claiming Title to the Freehold. ^a 1 Vern. 212. ^b 3 Cro. 87, 88. ^c Danv. Abr. 169.

^c By Charter confirmed by Act of Parliament, Cognizance is granted to the University, of all Suits arising any where, in Law or Equity, against a Scholar, Servant, or Minister of the University, depending before the Justices of the King's Bench, Common Pleas, and others therein mentioned, and before any other Judge, tho' the Matter concern the King. If an *Indebitatus Assumpsit* is brought by *Quo Minus* in the Exchequer against a Scholar or other privileged Person, the University shall have Conusance. For the Court of Exchequer is included in the general Words. *Qu.* If those Words extend to a Court of ^d Equity for mere Matters of Equity; as to execute Agreements in *Specie*; because the University can only imprison or excommunicate? Or whether in other equitable Cases, the Claim must not be put in by Way of *Plea*? ^d Hard. 506, 509. ^e Vent. 362. ^f 1 Vern. 212. ^g 2 Vern. 484. ^h Chan. Cases 237. ⁱ Contra Cary's Rep. 65. ^j 3 Cro. 73.

A Scholar, &c. cannot ^k waive his Privilege, and have a Prohibition in the Courts of *Westminster*; for the University has the Right of the Conusance of the *Plea*, where one is a privileged Person; and a Stranger is forced to sue a privileged Person in their Courts, by Reason of that Right vested in them. ^k 3 Cro. 73.

^l If a Debtor and Accountant to the King sues a Scholar by Bill in Equity in the Exchequer; or if an ^m Attorney sues a Scholar by Writ of Privilege, it is said that the University shall not have Conusance, for a general Grant shall not take away the special Privilege of any Court. (*Qu.*) ^l Hard. 189. ^m Lit. Rep. 304. ⁿ Leon. 149. ^o Danv. Abr. 164.

A Scholar, &c. ought to be only ^p one of the Parties in Suit. If another that is not privileged, is joined with him (as Obligor or Obligee in a Bond, &c.) he shall not have Privilege. ^p 1 Ld. Ray. 342. ^q Heil. 28. ^r 1 Vent. 298.

^s The Privilege of the University is not to be allowed to a Townsman, on purpose to excuse him from an Office in the Town, if he keeps a Shop and follows a Trade, though he is matriculated as Servant to a Scholar. For this seems to be fraudulent. ^s 2 Vent. 106.

It hath been disputed, whether the Wife ^t of a Head of a College or Hall, or his Children should have the Benefit of the Privilege of the Husband or Father, though it will be allow'd to his Servant. But both Cases seem to stand upon the same Reason. *Quare,* If the Privilege will be allowed in an Action against a ^u College? ^t 3 Cro. 73. ^u Roll. Abr. 580. ^v 1 Mod. 163.

Cognizance may be demanded by *Certificate* only, without special Pleading, upon an *Indictment* of a privileged Person for an Assault or Battery. This hath been allow'd at the Oxford Assizes upon my Motion. ^v 164.

^w The Vice-Chancellor (as well as the Chancellor) by his Attorney or Deputy, appointed by Writing, may by his Certificate demand Cognizance, tho' the Vice-Chancellor himself is but a Deputy. For a Bailiff may properly demand Conusance; and upon Notice of the Patent, the Court ought to supersede. ^w Hard. 505. ^x Danv. Abr. 174. ^y Str. 810.

^z If Conusance of Pleas be granted to one *Licet ipsemet sit pars*, he shall not have Cognizance in an Action in which he himself is Party; because he shall not be his own Judge. But if it be granted ^z 8 Rep. 118. ^{aa} Roll. Abr. 492. ^{bb} Hob. 37.

further, that if he is Party, he may make another Judge, or that another shall be the Judge where he is Party, the Conuſance ſhall be allowed.

Tho' I have ſaid, that particular Jurifdictions derogatory to the general Courts of Common Law are to be taken ſtrictly; yet it ſeems reaſonable, that ſuch Privileges, as are granted for the Advancement of Religion and Learning, ſhould have a favourable Conſtruction, and be excepted out of the general Rule.

And yet the Courts at *Weſtminſter* will not take Notice, unleſs it be ſhewn, that the Courts of the Universities proceed according to the Rules of the Civil Law; but will intend that their Proceedings are agreeable to the Rules of the Common Law.

It is ſaid, that the Universities have only *Cuſtodiam Affize Paris et Cervisie, et correctionem et punitionem eorundem*; not *Affizam ipſam* (i. e.) not Authority to appoint another Affize than what is ſet down by Statutes; but to ſee that the Statutes be executed, and to puniſh Offences againſt the ſaid Statutes. [See 51 H. 3. St. 1. & 6. 31 Ed. 1. 7 Ed. 6. ch. 5. 2 W. & M. Seſſ. 2. ch. 14. 11 & 12 W. 3. ch. 15. 12 & 13 W. 3. ch. 11. §. 19. In which laſt Statute the Right of marking Meaſures for Ale and Beer is acknowledged to be in the two Universities.]

The University of *Oxford* hath by a Grant of 29 Ed. 3. The Affize and Eſſay of Wine and Ale, as well as the Cuſtody of it.

By the Charter granted 14 H. 8. The Chancellor, his Commiſſary, and his Deputy (i. e. The Pro-Vice-Chancellor) are Juſtices of the Peace for the Vill of *Oxon*, and Counties of *Oxon* and *Berks*. So that their Authority does not depend only upon the common Commiſſion; they being Juſtices of the Peace by Virtue of their Offices.

I have now finiſhed the Account of general and particular Jurifdictions. I ſhould therefore proceed to give a ſhort Scheme of the Proceedings in our Courts. But becauſe a Man may oftentimes have a Remedy without going to Law, ſomething muſt be ſaid firſt concerning ſuch Remedies.

[There have been of late Years ſeveral Courts erected for the more eaſy and ſpeedy Recovery of ſmall Debts upon the Plan of the Court of Requeſts held at *Guildhall*; as by 22 G. 2. ch. 47. For the more ſpeedy and eaſy Recovery of ſmall Debts within the Town and Borough of *Southwark*, &c. 23 G. 2. ch. 27. and 24 G. 2. ch. 42. Within the City and Liberty of *Weſtminſter*, &c. 23 G. 2. ch. 30. Within the *Tower Hamlets*. 24 G. 2. ch. 16. Within the City of *Lincoln*, &c. 25 G. 2. ch. 34. Within the Town of *Birmingham*. ch. 38. Within the Borough of *St. Albans*. ch. 43. Within the Town of *Liverpoole*. ch. 45. Within the City of *Canterbury*. 26 G. 2. ch. 7. Within the Borough of *Boston*, &c. 31 G. 2. ch. 23. and 32 G. 2. ch. 6. Within the Hundred of *Brixton* in the County of *Surry*. And 31 G. 2. ch. 24. Within the Borough of *Great Yarmouth*, and its Liberties. And ſee 23 G. 2. ch. 33. For the preventing Delays and Expences in the Proceedings in the County Court of *Middleſex*; and for the more eaſy and ſpeedy Recovery of ſmall Debts in the ſaid Court.]

CHAP. III.

Of Remedies without Suit in Courts. As 1. By Act of Law in Things personal and real, wherein of a Remitter. 2. By Act of one of the Parties, in Things personal and real, wherein of Entry, Descent, and Discontinuance. 3. By Act of all Parties, wherein of Accord, Arbitrement, and Umpirage.

THERE is oftentimes a Remedy to be had without applying to the Courts of Justice; and this may be obtained by Act of Law, by an Act of one of the Parties, and by the Act of all Parties.

1. By Act of Law the Party may have Remedy without Suit in Court. 1. In Things *personal*, as if the Debtor makes the Debtee Executor, He may Detain so much of the Goods and Chattels, as will pay his Debt. 2. In Things *real*, as where one's Entry is taken away by Descent or Discontinuance, if he comes to the Possession without Folly or Covin, he shall be remitted. A Remitter is where a Man hath two Titles to Lands or Tenements, and is seised of them by his later Title, which proving defective, he is restored to the former or surer Title by Operation of Law. A Remitter must be to a precedent Right. For regularly to every Remitter there are two Incidents (*viz.*) an ancient Right, and a defeasible Estate of Freehold, coming together.

2. By the Act of one of the Parties. 1. In reference to Things *personal*; as if one does wrongfully take or detain my Wife, Child, Servant, or Goods, wherein the Property is not altered by Sale in a Fair or Market-Overt, I may lawfully retake them, though not in a riotous Manner. But an Inn-keeper or Ale-house-keeper may justify the detaining of a Horse or other thing from me, 'till I have paid him his Reckoning. [But see 11 & 12 W. 3. ch. 15.] So a Taylor may detain my Clothes, 'till he is paid for the making. 2. In reference to Things *real*; as I may remove a Nuisance done to my Freehold, if it can be done without Riot. So I may distrain Goods or Cattle upon my Estate for Non-payment of the Rent, or Cattle *Damage-feasant* upon it. I may also maintain Possession of my Lands against one that would turn me out; or I may regain my Possession by Entry, when I have a Right of Entry or Title to Lands, and my Entry is not taken away by Law (*viz.*) by Descent or Discontinuance. 1. By Descent, as where a Disseisor dieth seised in Fee or Fee-tail of Houses or Lands (for a Dying seised for Term of Life doth not take away an Entry) and the Law casteth the

* *Quod prius est, verius est.* 1 Inst. 347. b.

Houses or Lands upon his Heir. Here by Reason of the Descent (which is much favoured) the Right of Entry is taken away, and the Disseisee, or he that hath Title, is driven to his Action.* So then, to take away an Entry there must be a Dying seised either in Fee-simple or Fee-tail, and also a Descent. [See 32 H. 8. ch. 33. whereby the Title of *Descents* to take away *Entries* and *continual Claim* is made almost useless.] 2. By *b Discontinuance*, where an Alienation is made or suffered of Lands or Tenements by Tenant in Tail, or by any one that is seised in Fee-simple, Fee-tail, or for Life in another's Right, whereby the Issue in Tail, or the Heir or Successor, or those in Remainder or Reversion, are driven to their Action, and cannot Enter. This happens, because the Person made a larger Estate of the Land, than he ought. A Discontinuance may be five Ways (*viz.*) By Feoffment, Fine, Recovery in a *Præcipe*, Release with Warranty, Confirmation with Warranty. And this was to the Prejudice of Wives, Heirs, Successors, or those in Reversion or Remainder. So that where the Entry is taken away by Law, one cannot be his own Judge, but must have Recourse to the Law. But many Persons are restrained by Statutes from making a Discontinuance. For,

* 2 Danv. Ab. 579, 580. By 11 H. 7. ch. 20. *c A Wife is restrained to make certain Alienations of the Lands of her deceased Husband.*

* 3 Rep. 50. 2 Inst. 681. 8 Rep. 71. By 32 H. 8. ch. 28. *d The Husband is restrained from Alienations of the Wife's Inheritance or Freehold.*

* 2 Danv. Ab. 581. See of Leases, B. 2. ch. 3. ante. By 1 El. ch. 19. 13 El. ch. 10. 1 Ja. 1. ch. 3. *All Ecclesiastical Persons, Deans and Chapters, Masters and Fellows of Colleges, Masters of Hospitals, &c. are disabled to alien or discontinue their Estates.*

Of Things that lie in Grant, there can be no Discontinuance; nor by Exchanges, or Letters Patent; because they do not require Livery of Seisin.

The Titles of *Discontinuance* and *Reverter* were great and large Titles in our old Law Books; but now they are made very narrow by these Statutes, and 27 H. 8. ch. 10. of Uses as to Reverters; and some *Affurances*, that at the Common Law were Discontinuances are now made Bars, as Fines with Proclamations by 4 H. 7. ch. 24. and 32 H. 8. ch. 36. as to the Issue in Tail; tho' still they are Discontinuances in some Cases as to him in Remainder or Reversion.

3. By the Act of all Parties there may be a Remedy without Suit. As by their own immediate *Accord*, or by referring the Controversy to the Determination of Neighbours and Friends by *Arbitrament* or *Umpirage*.

* Terms of the Law, verb. Accord.

* 4 Rep. 1. 6 Rep. 44. 9 Rep. 78. 79, 80.

1. *c Accord (Concordia)* is an Agreement between two at least, to give and accept something in Recompence for a Trespass, &c. done by one to the other. If this Agreement is executed, it is a good Bar in Law, in some Cases of personal Injuries, to any Action for the same Trespass or Injury. Accord with Satisfaction is a good Plea in personal Actions, where Damages only are to be recovered; not in real Actions. Therefore a Right or Title to Freehold Lands cannot be barr'd, by Acceptance of any collateral Satisfaction or Recompence. It must be by Release, Confirmation, &c. But be-

cause the Action of *Ejectione Firme* and Trespass are so woven together, that they cannot be parted, as an Accord is a good Plea in Trespass, it must be so in Ejectment. [2y.]

* If one is bound in an Obligation, to deliver Goods, or to do any collateral Thing, the Obligee cannot, by Accord betwixt them, give Money in Satisfaction thereof; for the Contract being made by Writing, to do such a collateral Act, it cannot be altered without Writing. But when one is bound to pay Money, he may give Goods or any other valuable Thing in Satisfaction; because all Things are estimated and valued by Money, and not Money by Things. If a Contract without Deed is to deliver Goods, or to do any other collateral Thing, there Money may be paid by Accord, in Satisfaction of such a Contract. For as a Contract upon Consideration may commence by Words, so by an Agreement by Words, for any valuable Consideration, the Contract may be dissolved.

Note, That the best and safest Way to plead an Accord, is to plead it by Way of Satisfaction, and not by Way of Accord. For if it be pleaded by Way of Accord, a precise Execution thereof in every Part must be pleaded: But by Way of Satisfaction you need not say any more, but that you paid the Plaintiff so much in full Satisfaction of the same Trespass, which the Plaintiff received in Satisfaction. In all Cases where Arbitrament is a good Plea, Accord with Satisfaction is a good Plea.

2. ^a *Arbitrament* (*Arbitrium, Laudum, Compromissum*) or an Award, is the Determination of two or more Persons at the Request of two Parties at least, who are at Variance, for ending the Controversy without publick Authority. Five Things are incident to every Arbitrament or Award, (*viz.*) *Matter of Controversy, Submission, Parties to the Submission, Arbitrators, an Arbitrament or a Giving of the Award.*

1. *Matter of Controversy*, either of Fact, or of a Right in Things and Actions personal and uncertain; but so as no Freehold, though the Submission is by Deed, nor Lease of Years of Land, may be adjudged from one to another. Thus Debts due on Record, or upon Bill, or on certain Contract, Matters concerning Matrimony, or criminal Offences, cannot be made Matters of Arbitrament. But in such Cases if Men enter into Bond with Condition (as is usual) to stand to the Arbitrament or Award, the Bond may be forfeited for Non-performance of the Condition, or of the Award. [And 2y. whether, if there is no Bond, an Action will not lye upon the mutual Promises, according to the later Determinations: or the Party may be compelled in a Court of Equity to perform his Part, tho' it relates to Freehold, if he has accepted any Part of the Satisfaction awarded to him for it. ^b.]

2. *Submission* of the Controversy to Arbitrators is necessary, by giving them Power to pronounce a Sentence betwixt the Parties.

This Submission may be either *General*, as of all Demands whatsoever; or *Special*, of some certain Matters in Controversy. It may be also by *Word* or *Writing*, *absolute* or *conditional*. If the Parties give a Bond to each other, it must be Word for Word alike on both

Sides, only changing the Names, &c. The Submission may be, with *Covenants* to perform the Award, if the Parties please.

^a Well's 3. There must be *Parties* to the Submission, and ^{*} two at the
Symb. 2 Part. least, one of one Side and one of another Side, of *Capacity* to com-
p. 163, §. 7. promise or to make mutual Promises, to submit to the Award.
8, 9, 10, &c.
¹ Danv. Abr.

^{549.} 4. ^b *Arbitrators* are requisite, who are private extraordinary
⁵ Well's Judges, chosen by the Parties, to give Judgment between them, to
Symb. 2 Part. end the Debate. Neither natural nor legal Disabilities do hinder
p. 164, §. 21. any one from being an Arbitrator. If they are incompetent Judges,
the Fault is in those that chuse them. They are called *Arbitrators*,
because they have an *arbitrary Power*, if their Judgment be accord-
ing to the Submission. If they observe the Submission, and keep
within their Jurisdiction, their Sentence is definitive; from which
there lies no Appeal. [But see *infra*.] They cannot ^c assign their
^{*} Well's Power, for they have but a bare Authority.
Symb. p. 167.
§. 41.
5 Rep. 78.
¹ Roll. Abr.

^{251.} 5. ^d *Arbitrament* is the Sentence or the Decree, pronounced by
⁴ Well's the Arbitrators, and published, when they have heard all Parties.
Symb. 2 Part. But now as all Submissions are usually by Bond conditionally, *So as*
p. 163, §. 1. *the Award be made in Writing, and ready to be delivered to the*
p. 167, §. 43. *Parties, or to such of them as shall require the same*, the Parties
² Ld. Ray. having so bound themselves, are obliged to take Notice of the
989. Award at their Peril; ^e unless the Words of Submission are, *So*
^{*} 5 Rep. 103. *that the Award be delivered to each Party by such a Day*. For then
it must be delivered to each Party accordingly.

^{*} Well's In making an Arbitrament or Award, ^f five Things must be ob-
Symb. 2 Part. served. 1. That it be according to the very *Submission*, in respect
p. 167, §. 44. of the Persons and the Things submitted. For to award a Thing
5 Rep. 78. to be done by a Stranger, and sometimes to a Stranger, who is not
10 Rep. 131. Party to the Submission, or to make an Award upon another Thing,
132. that is not submitted, is void. But where the Award is of several
¹ Roll. Abr. Things, Part within the Submission, and Part out of it, it is voidable,
242, 243, for that which is out of the Submission, and good for the Residue.
244, 245, [If they are Matters or Clauses distinct and independent of each
247, 248, other.] 2. It ought to be *equal*, and not on one Side only; for it
249, 252, must appoint either Party, to give or do something beneficial or
253. advantageous. 3. The Performance of the Award must be *possible*
¹ Inst. 206. and *lawful*. 4. There must be a *Means* by Law, ^g to attain unto the
a. & b. Thing awarded. This is chiefly meant, where Submission is with-
Noy's Max. out Bond. 5. It ought to be *certain* and *final*, and make an End
110. of all Controversies submitted; or if it is good only in Reference to
¹ Ld. Ray. Part of the Things submitted, it must be final as to that Part, or
123. else it will be void.
² Ld. Ray. 1040, 964.

^a 1 Chan. These Things being observed, an Award shall not be unravelled
Rep. 279. or set aside in a Court of ^b Equity, [or set aside in a Court of Law ¹,
² Chan. Rep. where the Submission is made a Rule of Court] unless there was
140. Corruption [or gross Misbehaviour ^k] in the Arbitrators [or a plain
¹ 2 Ld. Ray. Mistake of the Arbitrators, either as to the Law, or a Matter of Fact,
857. appearing upon the Face of the Award ^l. *Qu.*] [See 9 & 10 W. 3.
² 3 Wms. 361. *ch.* 15. *infra*.] If all Things are done *Bonâ Fide*, the Arbitrament
² Vern. 251, shall be expounded according to the ^m Intent of the Arbitrators, if
514. agreeable to Law, and not literally.
² Vern. 705.
^m 10 Rep. 57.
Yelv. 98.
^e Ld. Ray. I
1076, 1142.

An

An ^a *Umpirage* is where there is but *one* Arbitrator; and is usu-^a 1 Roll. Abr. ally, when the Parties submit themselves to the Arbitrament or Award of certain Persons, and if they cannot agree, or are not ready to deliver their Award in Writing before such a Time, then to the Judgment of another as *Umpire*. This is often the Effect of the Bond of Submission.^{261, 262.}

Note, That ^b Submission to an Award by Bond may be counter-^b 8 Rep. 82; manded by Deed. Such Authorities in their own Nature are revocable; as a Letter of Attorney, &c. though made irrevocable by express Words. But then the Bond is forfeited. If it had been without Obligation, &c. * one might revoke and forfeit nothing. ^c *Sed* ^d *Qu.* As it is now held that an Action will lye on the mutual Promises; and the Cases of a Submission to Arbitration, and a Letter of Attorney seem to be very different.]

^e Where an Accord with Satisfaction may be pleaded, an Award^c 6 Rep. 44; may be pleaded.

By 9 & 10 W. 3. ch. 15. *The Parties may agree, that their Submission to the Award, or Umpirage of any Person or Persons, shall be made a Rule of any of His Majesty's Courts of Record; and may insert such their Agreement in the Condition of their Bond, or other Submission. And a Rule of Court shall thereupon be made, that the Parties shall be concluded by such Arbitrement or Umpirage. And in Case of Disobedience thereto, the Party neglecting or refusing, shall be subject to all the Penalties of contemning a Rule of Court; as if he was a Suitor or Defendant in such Court, and the Court on Motion shall issue Process accordingly, which Process shall not be stopped or delayed by any Order or Process of any other Court, unless it shall be made appear to such Court on Oath, that the Arbitrators or Umpire misbehaved, or that such Award was corruptly and unduly procured. In which Case it shall be set aside by any Court of Law or Equity, so as Complaint be made thereof in the Court where the Rule was made before the last Day of the next Term after the Award published to the Parties.*

This Statute extends only to such Submissions as relate to Matters for which there is no other Remedy but by Personal Action, or by Suit in Equity.

Where one of the Parties to an Award made on a Submission in Pr. in Chan: Court, pursuant to this Act, dies before the Money paid, no *Sci.*²²³ *Fa.* can issue against his Heir or Executor, to enforce Payment: For^a Vern. 444. the Award, though established by the Court, is not in the Nature of a Judgment or Decree to be prosecuted; but in the Nature of a Contempt, which dies with the Person.

If there be an Award to pay a Sum of Money, a Tender and^a Ld. Ray; Refusal has been formerly held no Performance, without actual⁹⁶⁴ Payment: But it has been adjudged otherwise since.

* *Ex nuda submissione non oritur actio.* 8 Rep. 82.

C H A P. IV.

Of the Proceedings in Suits or Civil Causes in our Courts, (viz.) Of Actions (wherein of the several Sorts of Actions, as Actions of the Case, Detinue, Covenant, Debt, Trespass Vi et Armis, Ejectment, Quare Impedit, Waste, Replevin) Writs, and of the several Sorts of Writs, and of the Arrest, Outlawry, Appearance and Bail, Of the Declaration, Pleas, Issues, Trial, (wherein of Jury, Challenges, Evidences, Verdict, &c.) Judgment, Execution, and Lastly of Writs in the Nature of Appeals.

TO shew the Practice in Civil Causes, I shall only take a general View of the Proceedings in the Court of Common Pleas; because the Common Pleas Court is of the largest Extent for Civil Actions. For though every Court at Westminster, has sometimes a particular Course of Proceeding, which is the Law of that Court, and of which the Judges ought to take Notice, tho' not of the Course of the inferior Courts; yet by giving an Account of the Common Pleas Court, you may have a general Account of the Proceedings of the Court of King's Bench and Exchequer, (though I shall take Notice by the Way of any considerable Differences amongst them) as also of the inferior Courts of Common Law, unless they are directed by particular Customs.

Where the Remedy is to be by Suit in Court, the general Parts of the Suit may be these, (viz.) The Action, Writ and Arrest, Outlawry, Appearance and Bail, the Declaration, Pleading, Issue, Trial, Judgment, Execution, and a Writ in the Nature of an Appeal.

Of Actions.

1. An ^a Action is a Right of prosecuting in a Court of Justice, for that which is one's Due; or a legal Demand of one's Right.

^a 1 Inst. 285. a.

² 1 Inst. 40.

⁸ Rep. 151.

^b 1 Inst. 100. a.

^c Stamb.

^{Præc.} 42, 73.

^{Plach} 255,

^{256.}

² 1 Inst. 187.

An Action lies ^b *Quia Timet* in some Cases before Molestation. A ^c *Petition* must be made to the King in Chancery, in the Place of an Action; whereupon Process shall go against a Grantee, to maintain his Title. But whilst personal Things, seized for the King, remain in the Officer's Hands; the Party that hath Right, may traverse the Record, that intitles the King, and have his Goods again; or one may disturb the Officer, from taking the Profits, or sue him for the Goods.

¹ 1 Inst. 289. a.

^d Lit. 689.

¹ 1 Inst. 361. b.

^e 1 Inst. 284.

^{b.} 285. a.

² 1 Inst. 40.

The Action continues till the Judgment is given. Actions are either ^d *false* or *faint*. *False*, where the Words of the Writ are false. *Faint*, where the Words of the Writ are true, yet there is no Cause or Title to recover by that Action.

* Actions are either *Criminal* or *Civil*. *Criminal*, as Appeals of Death, Felony, or Mayhem. *Civil* are either *real*, *personal*, or *mixed*.

Real

* *Real* are those, whereby the Demandant claims Title, to have a Freehold in any Lands or Tenements, Rents or Commons, in Fee-simple, Fee-tail, or for Life. Every Action real is either *Possessory*, i. e. of his own Possession or Seisin, or *Ancestrel*, i. e. of the Seisin or Possession of his Ancestor.

But real Actions are much out of Use. For in most Cases at this Day they are supplied by other Actions, which yield an easier and quicker Method to try Titles; as Actions on the Case, Trespass, Replevin, Ejectment, &c.

Personal Actions are those which the Plaintiff may have against the Defendant by Reason of any Debt or Contract for Goods and Chattels, * or for Damage done to his Goods, or to his Person.

Mix'd Actions are those which one may have, to recover the Thing demanded, and also Damages for the Wrong.

^b He that brings an Action *real*, is called the *Demandant*; and he against whom it is brought, is called the *Tenant*. In Actions *personal* and *mix'd*, they are called *Plaintiff* and *Defendant*.

There are several *Sorts* of personal and mix'd Actions. Therefore I shall shew, how they are *divided*; and then, who are *incapable* to bring such Actions, and *against* whom such Actions may be brought; *where* such Actions must be *laid*; and within what *Time* they must be brought.

1. How *personal* and *mix'd* Actions are *divided*.

Personal or *mix'd* Actions, that are of common Use and Practice, are *divided* into Actions of *Trespass* upon the *Case*, *Detinue*, *Covenant*, *Debt*, *Trespass Vi & Armis*, *Ejectment*, *Quare Impedit*, *Waste*, *Replevin*.

Before I describe these particular Actions, let me premise, that an Action of *Account* lies, against those that ought to render an Account, and refuse to give an Account. Auditors are appointed by the Court, to settle the Accounts in such Actions. But Actions of *Account* are almost laid aside. * However none can be charged in Account by the *Common Law* but as Guardian in Socage, Bailiff, or Receiver.

A *Bailiff* is a Servant who has the Administration of Lands, or Goods and Chattels, for the Owner's Benefit, and he is chargeable in Account, for the Profits he has raised, or reasonably might have raised, his Expences deducted. A *Receiver* is he that receives Money to another's Use, to render an Account without Allowance of Expences. For this Cause a Bailiff shall not be charged as Receiver, for then he would lose his Expences and Charges. In an Account against a Receiver, the Plaintiff must declare by whose Hands the Defendant received the Money; which he shall not do in Case of a Bailiff. But in Favour of *Merchants*, and for Advancement of Trade, if they jointly occupy their Stocks, one of them naming himself Merchant, shall have Account against the other, naming him Merchant, and shall charge him as Receiver; who

* *Actio personalis moritur cum persona.* 4 Inst. 315.

Pœnâ ex delicto defuncti hæres teneri non debet. 2 Inst. 198, 442.

In restitutionem, non in pœnam hæres succedit. 2 Inst. 198.

In hæres non solent transire actiones, quæ pœnales ex maleficio sunt. 2 Inst. 442.

shall have Allowance of his Expences, and shall Account for the Profits he received, or might reasonably receive. This is by the *Law of Merchants*. [See 21 *Ja.* 1. *ch.* 16. Of *Guardians*, B. 1. *ch.* 6. *ante*, and 1 *Danv. Abr.* Tit. *Account*.]

By 4 *Ann.* *ch.* 16. *Actions of Account may be brought against the Executors or Administrators of every Guardian, Bailiff, or Receiver, or by one Joint-Tenant, or Tenant in Common, his Executors or Administrators, against the other, as a Bailiff, for receiving more than his Share, or against his Executors or Administrators. And the Auditors shall examine the Parties upon Oath, &c.*

^a Terms of the Law, v. Action upon the Case.

1. ^a An *Action of Trespass on the Case* is a general and personal Action, brought against one for Wrong done without Force. And it is called an *Action of the Case*, because the whole Case is contained in the [Writ and] Declaration.

It lies for *Words* and for *Deeds*.

^b Finch, *ch.* 2. p. 185.
⁴ Rep. 15, 16, 17, 18, 19, 20.
¹ *Danv. Abr.* 80, &c.
¹ *Ld. Ray.* 610.
² *Ld. Ray.* 1185.

1. For ^b *Words* spoken to or concerning another, whereby one is defamed and *damified*. All scandalous Words are actionable, which may affect one's *Life, Limb, or Member, Liberty, Office, or Place of Trust, Trade, Preferment*; or Words which charge one with a foul and infectious *Disease*, whereby he ought to keep from the Society of Men, or disparage one's *Title* to his Estate, or where the Words tend to one's *Disinheriton*, as by calling one *Bastard*, that is an Heir to Land, or where they tend to one's *particular Damage*, and one is actually damaged thereby. All are actionable, whether spoken by way of Affirmation, Hearsay, adjectively, directly, obliquely, interrogatively, if the Words imply an Affirmation, in earnest, or seemingly in jest, in *English*, or any other Language, if the Words are understood, &c. ^c Words spoken *adjectively*, if they imply an Act done, as *J. S.* is a corrupt Judge, are actionable; not if they signify an Inclination only, as *J. S.* is a thievish Man.

^c 1 *Ld. Ray.* 236.

^d 1 *Ld. Ray.* 710.

^e *Str.* 471, 545, 555.

^f See p. 425. *ante*.

^g 2 *Str.* 1138.

But *Note*, That where the Slander doth concern one's *Life, Liberty, Member* (as Loss of Ears, &c.) or corporal Punishment, *Office, Trust, Trade*, or impute a foul *Disease*, ^d that might cause a Separation from the Society of Mankind, the Plaintiff need not aver any particular Damage, as he must in other Cases. Those Scandals which concern Matters merely Spiritual, and without any Temporal Damage ensuing, as to call one Adulterer, Fornicator, Heretick, Schismatick, Dilapidator, &c. are determinable in the Ecclesiastical Court. Yet by the Custom of *London* an Action of the Case lies for calling a Woman Whore, [or for Words tantamount ^e] because by Custom she might be carted, if the Words were true. But the Action is maintainable in the Courts of *London* only. Words of *Passion* are not actionable; as you have forsworn yourself, you are a Villain, Rogue, Varlet, Knave, &c. But if one calls an Attorney ^f, &c. Knave, the Words are actionable; if spoken with Rela-

^b *Verba accipienda sunt in mitiore sensu.* 4 Rep. 13, 17, 20, 25.

Benignior sententia in verbis generalibus, seu dubiis, est praeferenda. 4 Rep. 15.

Sensus verborum ex causa dicendi accipiendus est. 4 Rep. 13, 14.

Sermo relatus ad personam intelligi debet de conditione personae. 4 Rep. 16.

tion to his Profession, whereby he gets his Living. To charge one with an *Intention* to kill, &c. is not actionable; as the Purpose and Intent without Act is not punishable.

[For the Action *De Scandalis Magnatum*, See p. 43. ante. For Defamation by Deed, See p. 444. ante, and for Authorities in all the Cases abovementioned, 1 *Darv. Abr.* p. 80 to p. 172.]

* It is to be further observed, That the Declaration must set forth in certainty, the Person who is scandalized; for if the Person is uncertain, no Action lieth; and an *Innuendo* cannot make that certain, which was uncertain before. So it must set forth the very Words that were spoke; for if the Witness varies but a little from them, the Cause is lost. Therefore it is best to charge the Defendant with speaking the Words several Ways at several Times, that you may with more certainty hit upon the very Words, or the Substance thereof. For it is not here to be allowed, as it is in the Ecclesiastical Court, to lay the Words, and say, 'or the like, or to the like Effect.' An *Innuendo* cannot alter the Words, or add to them, to make them actionable. The Scandal must be apparent by the Words themselves.

2. For *Deeds*, as for an *Assumpsit*, *Nuisance*, *Deceit*, *Trover* and *Conversion*, and upon *Statutes*.

1. Upon an *Assumpsit*, which is a voluntary Promise, made by Word, or supposed to be made by Word, whereby one upon valuable Consideration assumeth, or undertaketh, to perform or pay something to another. Therefore,

An *Assumpsit* is either *express* by direct Agreement by Word, or Note in Writing without Seal (for that is all one in Law) or *implied* by the Law.

Express, as for not making a good Estate of Land sold according to Promise, not paying Money upon a Bargain and Sale according to Promise; for not delivering Goods upon Promise upon Notice or Demand. This *express Assumpsit* may relate to one's real or personal Estate, or to one's Person. Where an *Indebitatus Assumpsit* is brought for Goods sold and delivered, there you must prove a Price agreed on, otherwise the Action will not lie.

Implied; thus an Action on the Case will lie on an implied *Assumpsit* for a *Quantum meruit* for one's Labour, as where I employ any Person, to work for me, carry Goods, &c. Where a *Quantum meruit* is laid, you need not prove any Price agreed on; but only that the Work was done, and what you deserve for the same. So that in an Action for Work done, it is the best Way to lay a *Quantum meruit* with an *Indebitatus Assumpsit*. For if you fail in the Proof of an *express* Price agreed, you will recover the Value. So an Action on the Case will lie on an implied *Assumpsit* for a *Quantum Valebant*, where an Inn-keeper, &c. furnishes another with Meat, Drink, &c. or where a Tradesman delivers Goods at no certain Price: And in an Action for Goods sold, it is the best Way to lay a *Quantum Valebant* with an *Indebitatus Assumpsit*, for the Reason above. Also an Action on the Case on an implied *Assumpsit* will lie, for receiving Money to my Use, as Bailiff or Receiver, or both as Bailiff and Receiver, which supplies the

a 2 Str. 916.
Moses v.
Macfarlan,
K. B. East. T.
33 G. 2.

b 2 Ld. Ray.
1035, 1542.
See p. 284.
ante.

the Place of an Action of Account; [or where he has received Money of me by Mistake, or wrongfully *] upon an *Infinimul Computasset* for Money due upon Account stated, supposing that the Parties have come to an Account; upon a Bill of *Exchange* by the Custom of Merchants; and if a Merchant to whom it is directed subscribes the Bill, it is an *Assumpsit* in Law. [24. If you must not declare upon the Custom and not generally *.] [See 9 & 10 W. 3. cb. 17. Concerning inland Bills of Exchange. 3 & 4 An. cb. 9. For giving like Remedy upon promissory Notes, as upon Bills of Exchange; and for the better Payment of inland Bills of Exchange.] In all these Cases it is implied by the Law, that one agreed to pay, though he made no express Promise to do it. And as such Actions on the Case upon an implied *Assumpsit* may be brought against the Parties themselves, so they will lie for or against *Executors* or *Administrators* upon the Contracts of their Testators or Intestates; and these implied Promises may also relate to one's real or personal Estate, or to one's Person.

The Statute of 29 Car. 2. cb. 3. Concerning *Agreements to perform*, or *pay*, must always be remembered. I have before mention'd some Parts of it; but it is necessary to remind you again as to some Particulars.

By that Statute [An Act for Prevention of Frauds and Perjuries] No Action shall be brought to charge an Executor or Administrator on a special Promise, to answer Damages out of his own Estate, or to charge the Defendant upon any Promise, to answer for the Debt, Default, or Miscarriage of another; or to charge any one upon an Agreement in Consideration of Marriage; or on any Contract or Sale of Lands, Tenements, or Hereditaments, or any Interest concerning the same; or upon any Agreement, that is not to be performed within a Year after the making thereof; unless the Agreement upon which such Action shall be brought, or some Memorandum or Note thereof, shall be in Writing, signed by the Party to be charged therewith, or some other Person authorised by him.

No Contract for the Sale of any Goods for the Price of 10l. or upwards shall be good, except the Buyer shall accept Part of the Goods so sold, and actually receive the same, or give something in Earnest, to bind the Bargain, or in Part of Payment, or except some Memorandum or Note in Writing of the said Bargain be made, and signed by the Parties to be charged by such Contract, or their Agents thereunto lawfully authorized.

c 3 Lev. 363.
364.
Skin. 347.

d 1 Salk. 27.
6 Mod. 248.
S. C.

1 Ld. Ray.
224.
2 Ld. Ray.
1085.

e 2 Ld. Ray.
838, 842, 982.
9 Rep. 93.

f 2 Ld. Ray.
1087.
2 Str. 873.

* A Promise to pay, if another does not, being made at the same Time, that the Bargain was made, is not a collateral Promise for the Debt of another; but the Promise of both Parties makes one original and entire Contract upon the Sale, &c. and both are chargeable, [but this hath been determined to be otherwise *]; for it is only a conditional Promise (if the other does not pay) which shews that the other is the original and proper Debtor; but if a Man says, deliver Goods to A. and I will pay you, or the like *, this is a good Promise, and not within the Statute, for A. is not liable, which is the Ground of the Distinction.] *Quare*, 'If a Promise by another to pay upon *Forbearance* of Suit till such a Time, is not a sufficient Consideration to create a new Contract, and to bring it out of the Statute. [It hath been held that it is not *.]

It

It is said, that the Clause concerning *Agreements on Consideration of Marriage* extends to a Promise to marry, as well as to Promises for Payment of Money upon Marriage. [But it hath been often held, and is now agreed, that it doth not extend to a Promise to marry.]

Any Interest concerning the same includes an Agreement to assign a Term in Being, as well as one created *de novo*.

By the Clause *Except some Memorandum or Note in Writing be made*, &c. a Promise by Letter is sufficient.

Note, That in Declarations upon many *Assumpsits*, it is necessary to shew a Notice, or a Request, or Demand.

2. This Action of the Case lies for a Nuisance, which is when any Thing is done or omitted by a Man upon his own Ground, or elsewhere, to the Annoyance and unlawful Hurt of another. It lies only for a Special Annoyance to some particular Person, not for a common Nuisance. Thus an Action of the Case may be for a Nuisance, for diverting, stopping, or corrupting the Plaintiff's Water; for diverting Water from the Plaintiff's Mill; for turning a Watercourse upon the Plaintiff's House, Meadow, &c. for inclosing and eating up the Common; for stopping up a Way leading from the Plaintiff's House to his Land; for suffering the next House to decay to the Damage of my House; for building upon a new Foundation, and stopping up ancient Lights, or hindring one to enjoy the wholesome Air; for setting up or making a Hogstie, House of Office, Lime-pit, Brew-house, Dy-house, Tan-house, Chimney, Chandler's or Butcher's Shop, &c. using it so near my House, that the Smell thereof doth annoy me, or hurt my Grass or Trees; by laying Carrion near my House, &c. But if one sets up a Brew-house, or keeps a Chandler's or Butcher's Shop near me, and lays stinking Heaps at his Door; though this be offensive to me, I cannot have this Action, unless the Annoyance is very great and very offensive to me, because it is a publick Nuisance.

If a Schoolmaster keeps a School so near the Study of a Lawyer by Profession, as to disturb him, an Action will not lie. Tho' one hath a Right to Air and Light in his Dwelling, yet for hindring one's Prospect, no Action lieth. For a Prospect is only for Delight, not of Necessity.

If two have Lands adjoining, and one of them builds a House on his own Land, and makes Windows and Lights looking into the other's Land, the other may lay or erect any Thing upon his own Land, and stop them.

Tho' one cannot have an Action of the Case for a common Nuisance, because it may be presented in the Turn or Lect; yet where the Inhabitants of a Town had by Custom a Watering Place for their Cattle, which was stopped by another, any Inhabitant may have an Action of the Case against him, for otherwise they would be without Remedy; because such a Nuisance is not common to all the King's People, and presentable in the Turn or Lect, or to be redressed by Presentment or Indictment in the Quarter-Sessions.

Upon Special Damage by a foundrous Way, an Action lies against a Corporation or private Person, that is bound to repair it; but if a Township not Corporate is bound to repair it, the Party, as to his special Damage, seems to be without Remedy.

^a Roll. Abr. 88. ¹ Danv. Abr. 173. If one digs a Ditch in the Highway, into which my Servant falls and breaks his Thigh, by which I lose his Service for a long Time, I shall have an Action of the Case against him for this Loss of Service. So for digging a Pit, by Reason whereof J. S. (for whose Life I held Lands) was drowned.

^b F. N. B. 95. ⁹⁶, ⁹⁷. ⁴ Rep. 18. 3. For *Deceit* of one to another to his Damages. There must be both Deceit and Damage.

^a 1 Rep. 87. ¹ Finch, B. 3. ch. 2. p. 188. ¹ Roll. Abr. 90, &c. ¹ Id. Ray. 593. Deceit is either *Judicial* or *Extrajudicial*. *Judicial*, where something about Suits at Law is done, not done, or done amiss, &c. as when an Officer of the Court uses Deceit in his Office. Thus the Sheriff, &c. is liable to an Action of the Case for Deceit, if he does not execute the King's Process, or makes a false Return of it. Thus a Counsellor or Attorney is liable, that betrays my Cause, or if he does not attend at the Trial, by which my Cause miscarries, &c. Thus one is answerable, that personates me in Court to my Damage. *Extrajudicial*; where one counterfeits Letters in my Name, and receives my Money; or cheats me with false Cards and Dice; or sells to me by false Weights and Measures; or knowingly sells to me unwholesome Victuals, Wine, or Drugs, to my Hurt and Damage; or sells me Goods that are none of his own, affirming them to be his own; or where a Taylor cuts my Clothes so scanty, that they will not be for my Use; or where a Smith pricks my Horse, or a Surgeon unskilfully sets one of my Bones that were broken. It lies also against all Shop-keepers for any Frauds or Deceits to the Damage of another; against all Persons upon express Warranties, or Warranties in Law. But observe in the Case of a Warranty upon Sale (which is the most usual Deceit) that the Warranty must be *Parcel* of the Contract; for if it is *after* the Contract at another Place (tho' an After-Warranty by Deed may amount to a Covenant) it is a void Warranty, and no Action of Deceit lieth upon it. Also a Warranty can reach but to Things in *Being* at the Time, not to Things to come; for a Warranty, that the Horse which you buy of me, shall carry you thirty Miles a Day, is a void Warranty. One may not warrant, that a Man shall live a Year, that a Ship shall return from such a Place, that a Horse shall continue sound for a Year; neither will a Warranty be good, of Things which I may plainly discern to be otherwise; as that the Horse is not lame or blind, when he is apparently lame or blind; that Cloths of a Murry Colour are Blue, unless the Buyer is blind. But where a Horse is warranted to be sound Wind and Limb, and he is broken-winded, or hath other secret Disease, or where Cloths are warranted to be of such a Length, and are not; there an Action of the Case for Deceit lieth: For these Things cannot be certainly known by Sight of unskilful Persons.

^a 2 Cro. 4. Every one will affirm, that his Wares are good, that the Horse, which he sells, is sound, yet if he does not warrant them to be so, tho' it was false, no Action lies.

^a Terms of the Law, v. Trover. 4. An Action of *Trespasse* upon the Case may be for *Trover* and *Conversion*, which lies against any Person that hath gotten into his Possession any of the Plaintiff's Goods, and doth refuse to deliver them upon Demand. It is a special Action of the Case, brought to recover Damages to the Value of the Goods. For you recover not the Thing detained, as you possibly may in an Action of *Detinue*.

Trover

Trover is a French Word, and signifies *to find*; so that in this Action the Plaintiff surmisseth, that he *lost* such and such Goods, and that the Defendant hath *found* them, and *converted* them to his own Use at such a Place. The losing is but a meer Suggestion, and not material. For if the Plaintiff delivered the Goods to the Defendant; or if the Defendant takes the Goods in his Presence, &c. this Action lies against him, if there is a *Conversion*. For that is the Point of the Action, and must be particularly alledged. If a Man finds Goods, he may take Possession of them, and no Action lies [that is, not till Demand by the Owner, and Refusal to deliver them]; but he ought not to abuse them, or use them; for therein lies the Offence. It may be brought against the first Finder, or against any other, that hath the Goods by Sale or otherwise. But it must be observed, That the Plaintiff in this Action must prove

1. A *Right or Property* in the Goods, or at least a lawful Possession or special Property for some Time, as in the Case of a Carrier. 1. Ld. Ray. 276.
2. A *Possession* in the Defendant.
3. A *Demand and Refusal* to deliver them [or bring other Evidence of a Conversion].

This Refusal or Denial is allowed to be good Evidence to a Jury, that he converted the same, till it appears to the contrary. 10 Rep. 56, 57, 91. 1 Danv. Abr. 20, 21.

It may be brought by any one in his own Right, or by an Executor or Administrator, for Goods which came to the Defendant's Possession after the Death of the Testator or Intestate.

This Action lies for Money out of a Bag [*2y.* for it seems to be the better Opinion that it will not, but that an Action for Money had and received, will lie against the Finder or Taker, as well as against the Receiver of another's Money] as well as in the Bag, because the Thing itself is not to be recovered, but Damages to the Value aforesaid; for Money deposited in a third Person's Hand upon a Wager [*2y. ut supra*]; for any *live* Goods, as Horses, Oxen, Sheep, Hens, Deer, and Hawks reclaimed, a Mastiff, Hound, Greyhound, Spaniel, Tumbler, as well as for Things *inanimate*, as Beds, Jewels, Rings, Plate, Carts, Timber, and Trees cut down, a Ship and its Tackle, a Bank Note, a Bond and other Writings. 1. Ld. Ray. 726. 1 Salk. 126. Miller v. Race K. B. Hill. T. 31 G. 2. It will not lie for Creatures *Fera Natura*, nor any Part of a *Freehold*, as for Lead upon a House, Doors, or Windows fixed; but if they are removed and converted, it will lie.

The Plea on the Defendant's Part is usually the general Issue, Not guilty, and the Special Matter may be given in Evidence, to prove the Plaintiff has no Cause of Action, or which intitles the Defendant to the Thing in Controversy. It is said, that there is no Plea in *Trover* but a *Release* or *Not guilty*. If the Defendant pleads a Special Plea, he must either confess and avoid the Title of the Plaintiff, or else traverse or deny it. 1. Salk. 654.

5. Actions of the Case may be upon Statutes. These are either *Private* or *Popular*. 1. *Private*, when an Action is given by a Statute to the King and to the Party *grieved* only; as for a Robbery upon 13 Ed. 1. Stat. 2. ch. 1. and 27 El. For fraudulent Conveyances on 13 El. ch. 5. 27 El. ch. 4. For Perjury on the 5 El. ch. 9. where the King only joins for Honour and Conformity, the Party *grieved* having all the Damages. [But this is not so in all the Statutes above cited, for by the three last-mentioned Statutes, one Moiety is to the King, and one Moiety to the Party *grieved*.] Or to the Party *grieved* only upon a penal Statute, as upon the Statute

1. Danv. Abr. 21, 22, 23.

1. Ld. Ray. 276.

10 Rep. 56, 57, 91.

1. Danv. Abr. 20, 21.

1. Danv. Abr. 20, 21.

1. Ld. Ray. 726.

1. Salk. 126.

Miller v. Race K. B. Hill. T. 31 G. 2.

1. Salk. 654.

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1. Salk. 654.

Statute of Gloucester, or 5 & 6 Ed. 1. ch. 5. For Waste. And here if the Action is given to the Party grieved, the King cannot discharge the same, nor proceed in it after the Death of the Party. 2. Popular, where an Action is given upon a Statute to the King, or to any one that will sue for the King and himself, by Action or Information, according as the Statute directs; as upon 31 Ed. 3. St. 1. ch. 12. where a Juror takes Money, to give his Verdict; the 3 H. 8. ch. 1. For practising Physick without Licence. In which Statutes the King is to have one Moiety of the Forfeiture, and any Informer (without limiting it to the Party grieved) the other Moiety. When any one hath begun to sue in this Action, no other

^a Crompt. Jur. 21, 38.
¹¹ Rep. 65, 66.
³ Inst. 154, 194, 195, 238.
² Ld. Ray, 1039.

can pursue it. If the King commences his Suit before the Informer, the King shall have the whole Forfeiture; and he may, before the Informer begins his Suit, release the Penalty to the Offender, and bar all others for ever; unless it be provided to the contrary by the Act. But if, after a popular Action is brought by the Informer, the King's Attorney will enter an *Uterius non vult Prosequi*, the Informer may prosecute for his Part. For by bringing his Action, he hath made the popular Action his private Action, which the King, or any other, cannot release, as to his Interest; and the Condemnation or the Acquittal of the Party at his Suit is a Bar against the King and all others. If the Informer *Qui tam pro Domino Rege quam pro seipso* dieth depending the Action or Information, the King's Attorney may prosecute the Suit for the King. For the Information by the Party shall serve for the King after his Death.

RULES concerning Penal Statutes.

^a 2 Inst. 118, 131, 163.
¹² Rep. 99.
² Cro. 134.

WHEN any Thing is generally prohibited by a Statute, tho' the Statute doth not give an Action, yet the Party grieved may have an Action, and the Offender for his Contempt of the Law, may be fined and imprisoned at the King's Suit.

^c 2 Inst. 55, 74, 118.

Every Statute made against an Injury gives a Remedy by Action, expressly or impliedly.

^a 1 Inst. 159.
² Inst. 650.
⁴ Inst. 84.

Where a Statute giveth a Forfeiture (without saying to whom) against a Wrong-doer, as upon 2 Ed. 6. ch. 13. For not setting out Predial Tithes, he that is grieved shall have the Action and Forfeiture, not the King. But where no particular Person is grieved, and the Forfeiture is given generally, the King shall have it.

^a 11 Rep. 60.

¹⁷ Rep. 37.

The Prosecution and Execution of any penal Statute cannot be transferred to any Subject; nor can the Forfeiture be transferred to any other before it is recovered, or vested in the King, by due Course of Law.

^a 1 Inst. 98. b.
⁴ Rep. 12.

He that reciteth a Statute in pleading is not bound to recite the very Words, so long as he keeps to the Substance. And yet the safest Way is to recite the very Words.

³ Cro. 135.

^b 2 Inst. 468,

^{479.}

³ Inst. 46.

H. P. C. 8.

Where Degrees of Punishment are inflicted by a Statute for the first, second, and third Offence, there must be several Convictions and Judgments.

Quod non apparet, non est. 2 Inst. 479.
De non apparentibus, et non existentibus, eadem est ratio. 4 Rep. 47.

• Penal

* Penal Statutes shall not be extended by Equity : The Words ^a Plow. 86. may be construed beneficially, according to the Intent of the Legislators ; but Things out of the Words shall not be taken by Equity.

By 4 H. 7. ch. 20. *Recovery (otherwise than by Verdict) in an Action popular by Collusion shall be no Bar in an Action sued for the same Thing Bona Fide.*

By 29 El. ch. 5. s. 21. *If any shall be sued on a penal Law in the King's Bench, Common Pleas, or Exchequer, he may appear by Attorney without Bail, if such Person isailable by Law.*

[See 18 El. ch. 5. and 31 El. ch. 5. ^b 21 *Ja. 1. ch. 4. where po-^b 3 Inst. 186,* pular Actions are to be laid ; and 21 *Ja. 1. ch. 3. Also see in what* ^{191.} *Time Actions must be brought infra ; and Of Informations, ch. 5. post.]*

The Statutes of *Jeofails*, or the Statutes that do remedy Overights in pleading, extend not to penal Prosecutions.

There are General Actions of the *Cafe* in many other Instances, ^{1 Roll. Abr. & 1 Dan. Ab. Tit. Actions on the Cafe.} as for Rescue of a Prisoner taken upon mean Process or Execution ; Rescue upon a Distress ; Entering Liberties or Franchises, and Arresting upon the Warrant of the Sheriff of the County, or for other Disturbances of the Liberty ; for Negligence in keeping Fire, whereby my Neighbour's House is burned ; for keeping a Dog knowingly accustomed to bite Passengers, or to kill Sheep, where one is hurt, or his Sheep killed ; for a Conspiracy to indict one falsely and maliciously ; against a Carrier for losing one's Goods ; against an Innkeeper for the Goods of his Guest, stolen in his House. Action of the *Cafe* may be for *not* doing, *misdoing*, or for *doing* that which should not be done ; or in other Words for *Non-feazance*, *Misfeazance* and *Male-feazance*. It is impossible to reduce all of them under particular Heads ; for they are almost infinite, daily increasing and continually receiving new Forms.

Note, That Quod Permittat, Assises for Commons, Ways, &c. Assises of Nuisances, and Secta ad Molendinum, are now turned into Actions of Trespass, and of the Cafe.

2. An *Action* of * *Detinue* (from *Detineo* to detain) lieth, where ^{c F.N.B. 138.} one comes by the Goods of another, either by *Delivery* or *finding*. ^{1 Inst. 286. b. 2 Danv. Abr. 510, 511.} It must be laid so certain, as the Thing detained may be known and recovered. For in this Action the Plaintiff shall recover the Thing detained. But if one cannot recover the Thing itself, he shall recover Damages for the Thing, and also for the Detainer. It lies not for Money out of a Bag, or Corn out of a Sack ^d, for here the ^{d Dy. 22.} Money or Corn cannot be known from other Money or Corn. In that Case the Party must have an Action of the *Cafe*, &c.

One may have an Action of *Detinue* for Charters, which concern the Inheritance of his Land, if he knows the *Certainty* of them. For *Detinue* ought to be always of a Thing in *certain*, of Goods *valuable*, wherein one hath *Property* or a *Right* ; and it must be once in the Possession of the Defendant. This Possession must not be altered by Act of *Law*, as Seizure, &c. nor must the *Defendan* have a *Right* or *Property* in them by Distress, &c. *Detinet* is a necessary Word in the Writ.

The *Bailment* (From *Bailler*, to deliver) or *Delivery* of Good or Writings, may be *simple*, as to keep for my Use ; or *conditional* as to be re-delivered, when Money is paid, &c. He that delivers

the Goods is termed the *Bailor*, he to whom they are delivered the *Bailee*. Upon Bailment or Delivery these Things are to be observed. ^a If Goods are delivered to a Man to be *safely kept*, or to be kept (which is all one in Law) and after these Goods be stolen from him; this shall not excuse him, because he undertook to keep them safely; but he shall be excused in this Case, if he undertook to keep them as he would his own. If Goods are delivered to one as a *Pledge*, and they are stolen from him, this Action lieth not against him, because he hath a Property in them; and therefore ought to keep them no otherwise than his own. [But as in common Cases the Bailee has no Right to use them, it should seem that if they are stolen from him during such Use, he is answerable for them; for he hath only a *special* Property in them.] But if he that pledged them tendered the Money before the stealing, and the other refused to deliver them, he shall be charged. If *A.* leaveth a Chest locked with *B.* to be kept, and taketh the Key with him, and does not tell *B.* what is in the Chest, and the Chest together with the Goods are stolen, *B.* shall not be charged therewith; because *A.* did not trust *B.* with them. And that which hath been said before of stealing, is to be understood of all other like inevitable Accidents. Therefore it is necessary for one that receives Goods to be kept, to promise only to keep them as his own, or to keep them at the Peril of the Owner. [^c But these Distinctions between taking the Goods upon a *general* Bailment, or specially to *keep as his own*, have been long since exploded. And whether it be the Case of a general Bailment, or a Taking to keep as his own, if the Party is to have no Reward for keeping, it hath been determined that the Bailee shall not be answerable for them when stolen, or for any other Loss or Damage, than what happens by *gross* Negligence; and *Qu.* if the Bailee is *any further* answerable, when he takes the Goods under a Promise to keep them *safely*.] The Case of a Carrier, Ferryman, Common Inn-keeper, is different; for they have their Hire, and thereby implicitly undertake the safe Delivery of the Goods intrusted with them; and therefore they shall answer the Value of them, if they are stolen from them. A common Carrier, Hoyman, or Master of a Ship, who have their Hire or Reward, are chargeable for the Goods intrusted to them against all Events, but Acts of God and Enemies of the King, though the Force be never so great; as if an irresistible Multitude of People shall rob him. For else these Carriers might undo them who deal with them, by clandestinely combining with Thieves. If a Man delivers a Box to a Carrier, in which there is a great Sum of Money, and the Carrier asks the Owner, what was in it, he tells him that it was filled with Silks, &c. upon which the Carrier takes it, and was robbed; adjudged liable to pay for the whole. A special Acceptance would have excused him. But though a Factor hath Wages and Salary, yet if he is robbed, he shall be allowed to discount for it; for his Duty is to merchandize as a Servant, in the best Manner that he can, and he is bound only to reasonable Care in the Execution of his Trust. [See *B. 3. ch. 1. Of Grand Larceny*.]

^d 10 Rep. 57. Actions of *Detinue* are not so frequently brought as formerly. Actions on the Case in *Trover* and *Conversion* are come into their Place, where the Conversion changes the *Detinue* to an Action of the Case. So that the tedious Proceedings as to Garnishment, and

^a 1 Inst. 89.
^a & b. 398. b.
⁴ Rep. 83, 84.
⁵ Rep. 13.
¹ Roll. Abr.
 338.
¹ Vent. 238.

^b 2 Ld. Ray.
 917.

^c Dr. & Stud.
 dial. 2. ch. 38.
² Ld. Ray.
 909.
² Salk. 522.
 S. C.
² Str. 1099.
¹ Ld. Ray.
 655.

Inter-

Interpleader are now out of Use. Besides in Detinue the Defendant may *wage* his Law, but he cannot in *Trover*.

^b 3. An *Action of Covenant* arises, where an Agreement is made by Deed, or Writing sealed, between two Persons at the least, each to perform certain Covenants on his Part. In this Case, he that is aggrieved, may have this Action.

An Action of Covenant is maintainable only upon a *Deed*, indented or poll; except it is otherwise by Custom, as in *London*. If there is only a Hand to the Writing without Seal, Covenant lieth not, but Case upon Agreement. [See 32 H. 8. c. 34.]

In this Action the Plaintiff recovers Damages for the Breach of the Covenant, besides Costs; and if the Defendant breaks the Covenant again, a new Action lieth. And though there is a Bond to perform Covenants, Damages only may be recovered: Pursuant to 8 & 9 W. 3. ch. 11. s. 8. *whereby in all Actions in Courts of Record upon any Bond or Penal Sum for Non-performance of Covenants, the Plaintiff may assign as many Breaches as he shall think fit, and the Jury at the Trial shall assess Damages for such Breaches so assigned, as the Plaintiff shall prove broken.*

If Judgment is given for the Plaintiff upon Demurrer, Confession, or *Nihil dicit*, the Plaintiff upon the Roll may suggest as many Breaches, as he shall think fit, upon which shall issue a Writ to the Sheriff to summon a Jury, to appear before the Justices of Assize or Nisi prius, to inquire of the Truth of every one of these Breaches, and to assess Damages accordingly, and the Justices of Assize, &c. shall make a Return thereof, to the Court from whence the same issued.

In Case the Defendant after such Judgment entered, shall pay into Court such Damages assessed and Costs of Suit, a Stay of Execution shall be entered on Record: Or if, by Reason of Execution executed, the Plaintiff shall be paid such Damages with Costs, the Body, Lands, and Goods of the Defendant shall be discharged, and the Satisfaction entered upon Record, yet shall such Judgment stand and be as a farther Security, to answer the Plaintiff his Executors, or Administrators such Damages, as shall be sustained, for further Breach of any Covenant in the same Deed or Writing contained. [And the Plaintiff may thereon have a *Scire facias* against the Defendant.]

At Common Law the Jury may find the Penalty, but Relief may be had in Equity.

4. An *Action of Debt* lies, where one oweth another a Sum of Money by Bond, Bill, Bargain upon a certain Contract, or upon a Lease for Life [See 8 Ann. ch. 14.] or Years reserving Rent, Judgment, Statute Merchant, Recognizance, &c. So that sometimes it is grounded upon a Writing, and sometimes it lies without Writing.

If Money is due upon any *Specialty*, an Action of Debt must be brought, and no other Action. Upon a Note without Seal, an Action of Debt may be brought, but the Defendant may *wage* his Law. But if it is by Action on the Case, on the Defendant's Promise to pay the same, which the Law implies, the Defendant cannot *wage* his Law. If I agree with a Taylor for a certain Price, to make me a Garment, the Taylor may have a general Action of Debt; but if the Price is not agreed on, there lies an Action of the Case only, or at most but a special Action of Debt upon a special Contract, which the Law may imply upon a *Quantum Meruit*. An Action of Debt

^a 1 Inst. 286. b.
² 95. a.

See Tit. Trial
post.

^c Terms of
the Law, v.
Covenant.

F. N. B. 145.
² Danv. Ab.

235. &c.
² Inst. 215. a.

& b.
⁵ Rep. 17. &c.

¹ Saund. 238,
&c.

See p. 232.
ante.

^c 1 Cro. 3.

¹ Roll. Abr.

^{591, 593, 597,}

^{598, 599, 600.}

² Danv. Ab.

^{484, &c.}

⁴ See of Trial
post.

⁴ Rep 93,

⁸ Rep. 147.

⁹ Rep. 89, 90.

Debt too is sometimes grounded upon an *Act of Parliament*; as upon 2 *Ed. 6. ch. 13.* for not setting out of Tithes; 27 *El. ch. 13.* against a Hundred for a Robbery; upon 9 *Ann. ch. 10.* for Money due for Letters to the Post-Office, &c. It also lies upon *Arbitrament, Escape, Amerciament* in a Court-Baron, and upon a *By-Law*.
 If Money is due to one in his own Right, the Action must be brought in the *Debet* and *Detinet*; but if it is brought by or against Executors, there it must be in the *Detinet* only. [See 32 *H. 8. ch. 37.*] ^c An Heir, as such, cannot have this Action. It is at the Election of the Obligee, to bring an Action of Debt against an Heir, bound by the Deed of his Ancestor, if he hath Assets by Descent, or the Executor, if he hath Assets. If the Executor hath not Assets, then against the Heir only. [See 3 *W. & M. ch. 14.*] [See *Payment of Rent, B. 2. ch. 2. Of Obligations, B. 2. ch. 3. ante.* Where an Action of Debt lies where one is bound to pay a Sum of Money at several Days.]

^{9 Rep. 87.} Note, This Action lies not against Executors upon a simple Contract made by the Testator. [See 32 *H. 8. ch. 37.*]

By 4 *Ann. ch. 16.* Where an Action of Debt shall be brought on a single Bill, or Action of Debt, or Scire facias on a Judgment whereon the Money hath been paid, the Defendant may plead such Payment in Bar of such Action. In an Action of Debt upon Bond, the Defendant may plead Payment in Bar, if at any Time before Action brought, he hath paid the Principal and Interest due by the Condition, or Defeazance, though such Payment was not strictly made at the Day and Place according to the Condition or Defeazance: and pending an Action on such Bond with a Penalty, the Defendant may bring in Principal, Interest and Costs expended in Law or Equity upon such Bond, and the Court shall discharge the Defendant from the same.

^{a F.N.B. 86. 87, 88, &c. Finch 198, 199, 201, 202, 203, 204. 2 Roll. Abr. 545, &c.} 5. Actions of *Trespass*, (*Transgressio*) are upon a Wrong, which is supposed to be done *Vi et Armis*, with Force and Arms, either against the Person of a Man, or against his Property. Arms signify any Thing that a Man striketh or hurteth withal.

1. Trespass against the Person may be committed. 1. By menacing or threatening bodily Hurt to him, whereby he dares not follow his Business. But threatening alone without Loss, maketh not the Trespass. 2. By Assault, where one doth attempt to beat another, but doth not; as by holding up his Cane at him within his Reach, or by drawing his Sword upon him; striking at one, &c. whereunto belongeth lying in wait, besetting one's House, and not suffering one's Servant to go in and out, &c. 3. By Battery, when one doth wilfully and unlawfully beat another. If one is carrying away my Goods, I may beat him to prevent him from carrying them away. This is no unlawful Beating. So one may beat another in Defence of his Person or Possession. 4. By Mayhem, when one doth by Violence take from another the Use of a Member proper for his Defence in Fight, by depriving him of his Finger, Foretooth, &c. not of a Grinding Tooth, Ear, Nose, &c. These are but Deformities, for which Trespass of Assault and Battery lies. For Mayhem, one may have this Action, or an Appeal of Mayhem, at his Election. 5. By Imprisonment, where one is any way restrained (whether in a Gaol, Stocks, House, or by holding one in his Arms in

^{f See p. 438, ante.}

^{g See p. 372, ante.}

^{h See p. 16, ante.}

in the High-street) to go about his Business, as at other Times, by an Imprisonment without Cause or Authority; or when one doth arrest another at a forbidden Time, or in a forbidden Place. But if the Imprisonment is upon a false or feigned Suit, as by suing Execution upon a Statute Merchant, when the Money is paid, &c. no Action lieth; [that is, not this kind of Action; but an Action on the Case will lie against the Party who sues, and causes another to be arrested when there is no Debt due.] because it is an Imprisonment by Course of Law, and in a legal Way.

2. Trespass against the Property of a Man may be, 1. Against his Wife, Children, Servants. 2. Against his House and Goods. 3. Against his Land, by carrying away one's Evidences and Writings concerning them, by cutting his Trees, breaking his Hedges, cutting or spoiling his Grass, digging in his Ground, &c. with Pretence of Title, or without such Pretence. For such Trespass done upon the Soil and Possession of the King, the Use is to have an Information of Intrusion for the King in the Court of Exchequer.

[By 21 Ja. 1. ch. 16. §. 5. To an Action of Trespass the Defendant may plead a Disclaimer of any Right to the Land, and that the Trespass was involuntary, and also Tender of sufficient Amends before the Action brought.]

Note, That when the Beasts of another commit a Trespass upon my Land, or do there feed, tread, or spoil my Corn, Grass, Wood, &c. without my Licence, I may distrain and impound them by Night or Day for this Trespass. And this is called *Distraining of Beasts Damage-feasant*, i. e. doing Damage.

But Note also, That when Entry, Authority, and Licence is given by Law, and one doth abuse it, he shall be a Trespasser *ab initio*; for the Law will judge by the subsequent Act, not what Intent he doth enter. As the Law giveth one Authority to enter into a common Inn, to a Lord to distrain, to the Owner of the Ground to distrain for Damage-feasant, &c. yet if in any of these Cases the Party doth commit a Trespass, the Law will judge, that he entered for that Purpose. [But see 11 G. 2. ch. 19. in p. 197. ante, as to Irregularity in Distress for Rent.] But where an Entry, Authority, or Licence is given to one by the Party, and he abuseth it, there he shall be punished for the Abuse, but shall not be a Trespasser *ab initio*. For when the Party giveth Licence, he cannot for any subsequent Cause punish that, which is done by his own Licence.

In all Trespasses *Vi et Armis* the Plaintiff shall recover Damages according to the Wrong done. But in Battery and Mayhem, the Court may increase the Damages upon View of the Record and the Person. The Defendant also in Strictness of Law is to pay a Fine to the King; because the Wrong is supposed to be done *Vi et Armis, et contra Pacem*, &c. [But the *Capias* for this Fine is taken away by 5 W. & M. ch. 12. and instead thereof the Plaintiff, on signing Judgment, is to pay six Shillings and Eight-pence; which is to be added to his Costs; and therefore the Words *Vi et Armis* have been since held to be unnecessary.]

See of Judgment, *post*, For the Statutes concerning Costs in Trespass, &c.

^a F.N.B. 220.

³ Leon. 210.

² Cro 150.

² Danv. Abr.

665.

6. An *Ejectment*, (*Ejectio Firmæ*) is an Action where one makes a Lease to another of Houses (or of one Room in a House,) Lands, Coal-mines, Boileries of Salt, &c. for Term of Years, and a third Person enters and ousts the Lessee, whereupon he recovers his Term and Damages. This is the common Action for Trial of Titles to Lands and Tenements. It comes in the Place of many real Actions, as Writs of Right, *Formedons*, &c. which were very tedious, difficult, and chargeable. And this Method by Ejectment is also made more easy than formerly. For now there is no Occasion for a Lease to be made, sealed, and delivered upon the Premises to the Lessee, who has a Mind to try the Title, and to leave the Lessee in Possession, to be ousted and ejected by the Tenant in Possession, &c. The usual Course now is, to draw a Declaration, and therein to feign a casual Ejector, or Defendant, in the Declaration (for no Arrest is to be made in this Action) and then deliver the Declaration to the Tenant in Possession, or his Wife, not to the Son, or Daughter, or to a Servant, with a Notice in Writing at the Bottom, or on the Back thereof, in the Name of the casual Ejector, directed to the true Tenant, for him to appear and defend his Title; or that he the feigned, or nominal Defendant, will suffer Judgment by Default, whereby he the true Tenant will be turned out of Possession. To this Declaration the true Tenant may appear by his Attorney, and consent to a Rule to be made Defendant in the Place of the casual Ejector, or feigned Defendant, and to confess a Lease, Entry, and Ouster, and at the Trial to stand upon the Title only.

If he, the Tenant in Possession, doth not appear in due Time after the Declaration left with him, and enter into the above-mentioned Rule, then upon an *Affidavit*, or Oath made, That the Declaration was left at his House with his Wife, or served upon him, with Notice to appear, as aforesaid; the Court upon Motion will order Judgment to be entered against the casual Ejector or feigned Defendant in the Declaration. Or if the true Tenant doth appear, and yet doth not consent to such Rule, the Court will order that Judgment shall be entered against the casual Ejector, (*viz.*) the feigned Defendant in the Declaration, and thereby the true Tenant will be ousted.

By 11 Geo. 2. ch. 19. §. 12. which recites, That great Inconveniencies frequently happen to Landlords by their Tenants secreting Declarations in Ejectment, or refusing to appear, or to suffer their Landlords to take the Defence; it is enacted, that every Tenant to whom such Declaration is delivered, shall forthwith give Notice thereof to his Landlord, or his Bailiff, or Receiver, upon Penalty of forfeiting the Value of three Years improved or Rack Rent, to the Person of whom he holds.

And the Court where the Ejectment is brought may suffer the Landlord to make himself Defendant, by joining with the Tenant to whom the Declaration was delivered, in Case he appears; but if he refuses or neglects to appear, Judgment shall be signed against the casual Ejector

^a In æquali jure melior est conditio possidentis, et rei quam actoris. 4 Rep. 90.
² Inst. 391. 4 Inst. 180.

for want of such Appearance; but if the Landlord of any Part of the Lands or Tenements for which the Ejectment was brought, shall desire to appear by himself, and consent to enter into the like Rule, that the Tenant in Possession, if he had appeared, ought to have done, the Court may permit such Landlord so to do; and order a Stay of Execution upon such Judgment against the casual Ejector, until further Order.

The Lessee of a Copyholder for a Year may maintain an *Ejectione Firmæ*, for his Term is warranted by general Custom of the Realm. 4 Rep. 25.

If there is no Tenant in Possession, the old Way of sealing a Lease upon the Premises must be observed; and he that first enters upon the Land without the Consent of the Lessee, may be made the Ejector. ^b But there is a shorter Method in such Case for Non-payment of Rent, prescribed by 11 Geo. 2. ch. 19. See p. 198. ante.

Upon Trial the Plaintiff must set forth his Title under the last Person seised in Fee of the Premises, and prove the Execution of the Deeds. See of Evidence, post.

In this Action the Possession only of the House or Land demised is recovered, and also Damages and Costs. [See 8 & 9 W. 3. ch. 11. For Costs in Ejectment where one of the Defendants is acquitted.] ^c But if the Term does lapse, while the Action is depending, yet the Action shall proceed for Damages and Costs. 2 Str. 1056.

Where there is a Recovery in Ejectment by Verdict, the Lessor of the Plaintiff, or the Plaintiff, may bring an Action for the mean Profits, and recover the same, from the Time of the Defendant's Entry laid in the Declaration.

Altho' there is a Verdict and a Judgment against the Plaintiff, yet the Plaintiff may bring another Action of Trespass and Ejectment for the Land, &c. A Judgment in this Action is never final; for it is but to recover the Possession of the Land; and is not like an Assize or Writ of Right, &c. wherein the Title to the Land is tried.

All Titles cannot be tried by Ejectment. For where the Entry is taken away by Disseisins, Descents, Fines, and Recoveries, Non-claims, or by the Statute of Limitations, no Ejectment lies. It lies not for Tithes generally, without expressing the Nature or Quality of them. [But see 32 H. 8. ch. 7.] It lies for a Rectory or Chapel, and the Tithes thereunto belonging. For from such a Thing one might be ejected, and one may be restored to the Possession of it. It lies not of a Rent, Common, ^d but it does for Common of Pasture, for it shall be taken to be Common appendant or appurtenant, for which Kind of Common Ejectment will lie, ^e a Right of Fishing in such a River, &c. 3 Cro. 301. 492. 11 Rep. 25. 2 Ld. Ray. 789. 1 Str. 54.

By 4 Ann. ch. 16. The Courts at Westminster may order a View of the Place before Trial in Ejectment, Trespass, &c. [See 4 Geo. 2. ch. 28. For Delivery of Ejectments upon Clauses of Re-entry for Non-payment of Rent.]

7. An Action by *Quare impedit* is a Possessory Action, to recover an Advowson; and lies where one hath an Advowson, and the Parson dieth, and another presents a Clerk, and disturbeth him who hath Right to present. It supposes both a Possession and a Right. ^f The Plaintiff or Demandant in his Writ must alledge a Presentation in himself, or his Ancestors, or in those under whom

^f Terms of the Law, v. Quare impedit.

² Roll. Abr.

376, 378.

² F.N.B. 33.

⁵ Rep. 97.

¹ Ld. Ray.

192.

he 2 Str. 1006.

- he claims, unless in Case of a Lapse to a Bishop, &c. It lies also for a Donative, Archdeaconry, Prebend, Mastership of an Hospital. [See 13 Ed. 1. ch. 5.] One that hath the Grant of the next Avoidance shall have a *Quare Impedit*.
- If one brings a *Quare Impedit* against the Patron and Incumbent within six Months, and recovers after the six Months, he shall remove the Incumbent, if named in the Writ.
- An Affise of *Darrein Presentment* lies, where I or my Ancestors have presented before. But here too one may have a *Quare Impedit*. For where *Darrein Presentment* lies, a *Quare Impedit* also lies, but not *contra*. [See 13 Ed. 1. ch. 5. and 7 Ann. ch. 18. and see of an *Ad. vovson*, p. 155. ante.]
8. An Action of *Waste* (*Vastum*) may be brought by the Heir, or him in Remainder, or Reversion, against Tenant for Life, Years, in Dower, or by Curtesy, or Guardian, who makes Waste or Spoil in the Houses, Woods, Gardens, Orchards, or Lands, which he holds, to the Prejudice of the Heir, or of him in the Remainder, or Reversion.
- Let us see who may bring this Action, and against whom it may be brought.
1. This Action must be brought by him that hath the immediate Estate of Inheritance, in Fee-simple, or Fee-tail. But sometimes another may join with him.
- Note, That the Reversion must continue in the same State, that it was at the Time of the Waste done, and not granted over. For though the Reversioner taketh the Estate back again, the Action is gone, because the Estate did not continue. But in some special Cases an Action of Waste shall lie, tho' the Lessor had nothing in the Reversion, at the Time of the Waste done. For if a Bishop makes a Lease, for Life, or Years, and dies, and the Lessee, the See being void, doth waste, the Successor shall have an Action of Waste. This is allow'd upon a particular Reason. A Purchaser shall have an Action of Waste, though the Statute, hereafter to be mentioned, speaks of those that are Inheritors.
- A Tenant for Life cannot have this Action. But a Parson, &c. may have an Action of Waste, and the Writ shall say *Ad Exactionem Ecclesie*, for it is the Dowry of the Church. If a Tenant doth Waste, and he in Reversion dieth, the Heir shall not have an Action of Waste, for Waste done in the Life of his Ancestor. For he cannot say, that the Waste was done to his Disinheritance. Neither shall a Bishop, Master of an Hospital, Parson, &c. have an Action for Waste done in the Time of his Predecessor.
- If a Lease is made to A. for Life, the Remainder to B. for Life, Remainder to C. in Fee; no Action of Waste lieth against the first Lessee, during the Estate in the mean Remainder. For then his Estate would be destroy'd. Otherwise, if B. had a mean Remainder for Years only; for that would have been no Impediment, the Recovery not destroying the Term for Years.
- If Lessee for Years committeth Waste, and the Years do expire, yet the Lessor shall have an Action of Waste for the treble Damages, tho' he cannot recover the Place wasted. But if the Lessor accepteth

accepteth of a Surrender of the Lease, after the Waste done, he shall not have his Action of Waste. (2u.) If a Tenant repairs, before Action brought, he in Reversion cannot have an Action of Waste. But he cannot plead that he did no Waste; therefore he must plead the special Matter.

By 20 Ed. 1. St. 2. *An Action of Waste is maintainable by the Heir, for Waste done in the Time of his Ancestors, as well as for Waste done in his own Time.*

Quere, If this is not an Ordinance only; for it is questioned, whether it is a Statute. And if it is a Statute, it is thought to have been repealed.

2. Now let us see, against whom the Action of Waste is maintainable.

There are five Writs of Waste; two at the Common Law, as for Waste done by Tenant in Dower, or by Guardian: three by Statute, as against Tenant for Life, Tenant for Years, and Tenant by the Curtesy. But it is said too, that Tenant by the Curtesy was punishable for Waste by the Common Law; for that the Law created his Estate, as well as that of Tenant in Dower, and therefore the Law gave like Remedy against him. The Common Law gave no Remedy against Tenant for Life or Years, for he comes in by a Lease of the Owner of the Land, &c. who might have provided by Covenant, that his Lessee should not do or suffer Waste.

By Stat. of Gloucester, or 6 Ed. 1. ch. 5. *An Action of Waste is maintainable against Tenant by the Curtesy, in Dower, for Life, or Years.*

By Construction of the Statute it is maintainable against Tenant for half a Year: But it lieth not against Tenant at Will, Tenant by Statute-Merchant, Staple, or Elegit; for they are not Tenants for Years. But an Action of Trespass lieth against them for voluntary Waste; or Covenant, if they are restrained by Covenant, shall not lie against Tenant [in Tail] after Possibility of Issue extinct; because the Inheritance was once in him.

It lieth against a Mortgagee in Fee conditional and Devisee.

By West. 2. or 13 Ed. 1. ch. 22. *An Action of Waste is maintainable by one Tenant in Common against another Tenant in Common of Wood, Turf, Land, Fishing, or other such Thing.*

This Act extends to Jointenants, but not to Coparceners; because they were compellable to make Partition by the Common Law.

By 11 H. 6. ch. 5. *An Action of Waste is maintainable by the Reversioner against Tenants for Life or Years, that alien their Estates to a Stranger, and afterwards (still receiving the Profits) commit Waste.*

He in the Remainder, as well as the Reversioner, may bring this Action; and every Assignee of the first Lessee, mediate or immediate, is within this Act.

If Tenant by Curtesy or Dower grants over his or her whole Estate, and the Grantee doth commit Waste, yet the Heir shall have an Action of Waste against them, and recover the Lands against the Grantee. In all other Cases regularly the Action shall be brought against him that did the Waste, whether the Tenant or his Assignee. If Tenant for Life or Years doth Waste, and after assigneth over his Estate, yet shall the Action of Waste be brought against him;

and against him shall the treble Damages be recovered, and the Place wasted.

^a 1 Inst. 54. a.
² 1 Inst. 145.
146, 303, 305

^a Tenant by the Curtesy, in Dower, for Life, Years, nay an *Infant*, or *Husband and Wife*, Lessees for Life or Years, must answer for the Waste done by themselves, or a Stranger, being left to take their Remedy against the Stranger, if he did Waste. A *Guardian* shall not be answerable for Waste done by a Stranger. But when there is no Remedy, as when Waste is committed by the King's Enemies, the Tenants, or Lessees, are not punishable; except there is a Covenant in the Lease, that they shall not permit or suffer Waste. (24.) If Tenant for Years commits Waste, no Action lies against his Executors or Administrators, for Waste done before their Time. For Actions grounded on Wrongs die with the Person.

^b 1 Inst. 53. b.
² 1 Inst. 302.

^c 2 Roll. Abr.
827.

^d 1 Inst. 54. a.
² 1 Inst. 303.

If Tenant in *Dower* takes Husband, who commits Waste, and dies, the Wife shall not be punished for this Waste. ^a But if the Husband hath a Lease for Years in Right of his Wife, and commits Waste, and then the Wife dies, an Action of Waste lies against him; because the Law gives the Term to him. A Wife that hath the Estate by Survivorship, shall be punished for Waste done by the Husband in his Life-time, if she agrees to the Estate.

^e 2 Inst. 302.

If one *Jointenant* doth Waste, both shall be attainted of the Waste. It is the Waste of both as to the Place wasted, but the treble Damages shall be recovered against him only that did the Waste.

If one recovers in an Action of Waste, against Tenant for *Life* or *Years*, he shall have the Corn growing upon the Land.

^f Noy's Max.
101.

^g 11 Rep. 82.
83.

^h 1 Inst. 220. a. i.
ⁱ 1 Inst. 146.

^j 2 Cro. 216.

^k 4 Rep. 63.
^l 5 Rep. 11, 76.

^m 11 Rep. 48.
50, 81.

If a Lease is made to one *without Impeachment of Waste* (from *Empeschement*, a Hindrance, or *Sine Petitione* [*impetitione*] *Vastii*, *e. without* Restraint of committing any Waste, or without Demand or Challenge of Recompense for doing Waste) then the Tenant may cut down Trees, and convert them to his own Use, tho' the Property was in the Lessor; or he may let the Houses be out of Repair, and not be liable to any Action. But if the Words are, *To hold without any Impeachment of any Writ or Action of Waste*, the Lessor may seize his Trees, if the Lessee cuts them down; or bring Trover for them; because the Discharge extends only to the Action of Waste. The Clause *without Impeachment of Waste* is very common in Leases; whereby the Tenant hath a Property in the Houses, Trees, &c. if he executes his Power during the Privy of Estate. But on the other Hand, it is as common to provide against Waste, by Condition, Covenant, or Exception, if Waste is not allowed.

As to the *Forfeiture* and *Judgment* in Waste, (*viz.*) the Thing wasted, and the treble Damages. See the Statute of Gloucester, explained 2 Inst. 303, &c. and 8 & 9 W. 3. ch. 11. s. 3. for Recovery of Costs; and Of Waste, p. 306, ante.

ⁿ 1 Inst. 145. b.
161. a.

^o See p. 192. as hath been observed ^p.

^q 11 Rep. 48.
50, 81.

9. A *Replevin* is a Remedy grounded or granted upon a Distress, that the Thing distrained may remain with the first Possessor, upon Security given by him to try the Right with the Distrainer, as hath been observed ^p. As thus—One doth distrain another's Cattle or Goods for Rent, Fine, Service, or Suit, or for Damage-feasant, the Owner (upon giving Security to the Sheriff, that he will pursue his Action against him that distrained, and return the Cattle or Goods again, if the Taking shall be adjudged lawful) may have a Writ of Replevin, or *Replegiari facias*; whereby the Sheriff

Sheriff is commanded to return the Cattle or Goods to the Owner or first Possessor, till the Right of the Distress is determined. For the End of this Distress is, that the Party distrained may be forced to satisfy the Debt or Duty to the Party distraining, or else to answer him at Law. Now the Party distrained is to be Plaintiff in the Replevin, and the Party distraining is to be the Defendant, or Avowant. For his Justification of the Distress is called an *Avowry*. If he took it in his own Right, he must shew it, and avow the Taking. If in the Right of another, he must then make Conusance (or Acknowledgment) of the Taking, as Bailiff or Servant to him in whose Right he took it. [See 21 H. 8. *cb.* 19. ^a and 32 H. 8. *cb.* 2.] ^a 1 Inst. 268. b.

Note, ^b Coparceners must join in an Avowry. But it is directly otherwise in the Case of Tenants in Common ^c. ^b 1 Ld. Ray: 64.

There must be two Sorts of Pledges, (*viz.*) *Plegii de Prosequendo*, and *Plegii de returno Habendo*. [See West. 2. or 13 Ed. 1. *cb.* 2. ^c 1 Ld. Ray: 422. *infra.*]

If the Cattle or Goods are not delivered upon the first Replevin, the Party distrained may have an ^a *Alias*, and a *Pluries* Replevin. ^a F. N. B. 88. The Sheriff may act in such Cases by Virtue of the *Writ* of ^b 2 Inst. 139. Replevin, or *Ex Officio* by *Precept* or Command by Word of Mouth ^c F. N. B. 69. to his Bailiff upon *Complaint*. Replevin by *Writ* is by *Common Law*, upon *Plaint* or *Complaint*, by *Statute*. For,

By Stat. Marl. or 52 H. 3. *ch.* 21. *If Beasts are taken and wrongfully with-helden, the Sheriff upon Complaint may deliver them, if they were taken out of Liberties. But if within Liberties, and the Bailiffs thereof will not deliver them, the Sheriff shall cause them to be delivered.*

This is the most usual Method to obtain a Replevin, (*viz.*) by *Plaint*.

The Sheriff may take a *Plaint* by the said Statute, and make a ^a 1 Inst. 145. b. Replevin presently, and afterwards enter it in the County-Court. ^b 2 Inst. 139. For it would be inconvenient that the Owner should tarry for his Cattle till the next County-Court.

By 1 & 2 Ph. & M. *ch.* 12. *The Sheriff of every Shire shall at his first County-Court, or within two Months after he receives his Patent, depute and proclaim in the Shire-Town within his Bailiwick, four Deputies, at least, to make Replevins, &c.*

If the Distrainer, after the Distress taken, doth carry it out of ^a 1 Inst. 140. the County, or to a Place unknown, or keep it in a Castle, &c. ^b F. N. B. 68, 69. so that the Sheriff cannot replevy it, or deliver it to the first Possessor, the Party may have a *Writ of Withernam* (from *Wyther* in Saxon *other*, and *Naam*, a Taking or Distress) directed to the Sheriff, to take so many of the Distrainer's own Cattle or Goods, by way of Reprisal, instead of the other that are so elained. And if the Cattle or Goods are put into a Strong Hold ^c, the Sheriff may take the ^a 1 Inst. 191. *Posse Comitatus* to break into it, that he may make the Replevin, &c. [See West. 1. or 3 Ed. 1. *cb.* 17.]

By West. 2. or 13 Ed. 1. *ch.* 2. *The Sheriff or Bailiffs shall take Pledges of the Plaintiff, to prosecute his Suit, and to return the Cattle, if a Return is awarded. And if Pledges are otherwise taken, he shall answer for the Price of the Beasts to be recovered by Writ. And if the Bailiff is not able to restore them, his Superior shall do it.*

It is a general Rule that the Plaintiff (*i. e.* he that is distrained) must have a general or special ^a Property of the Goods in him ^b at 1 Inst. 145. b; the Finch 316, 317.

the Time of the Taking. But if the Defendant (the Distrainer) claims the Property, the Sheriff cannot proceed, till that Matter is decided before him by Writ. For Property ought to be tried by Writ. And therefore in that Case, where the Trial is by *Plaint*, the Plaintiff may have a Writ *De Proprietate Probanda* directed to the Sheriff, to try the Property. And if it is found for the Plaintiff, then the Sheriff is to make a Replevin or Deliverance. But if for the Defendant, he can proceed no further. Yet the Plaintiff may afterwards replevy by *Writ*; and if the Sheriff returns the Claim of Property, it shall be put in Issue, and shall be tried in the Common Pleas.

One cannot claim Property in a Replevin by his Bailiff or Servant, where Replevin is by *Plaint* in the County Court; but one may claim Property in a Court of Record by a Bailiff or Servant.

If any Thing touching *Freehold* comes in Question, the Sheriff likewise can proceed no further. Neither shall a Replevin be granted, when it appears to the Sheriff, that the King is Party, or that the Taking was in his Right.

If a Landlord by his Deed grants a Rent with Clause of Distress, and that he shall keep the Goods distrained^b against Pledges, until the Rent is paid to him, yet the Sheriff may replevy the Goods distrained; for it is against the Nature of such a Distress, to be irreplevisable.

If after a Replevin brought, the Plaintiff (or he that is distrained) doth make Default, being nonsuit before Declaration, or is nonsuit after Declaration, or if Judgment is given against him, then the Defendant, (or he that distrained) may have a Writ *De Retorno Habendo* of the Goods, and by this he shall have the Distress delivered to him again.

If the *Plaint* is removed into the Common Pleas, &c. and the Plaintiff in Replevin is nonsuit before or after *Avowry* made, the Defendant may again distrain his Cattle, for the same Cause he distrained the first; yet the Plaintiff, or the distrained, may sue out a Writ of second Deliverance upon the same Record, which is to revive the first Suit.

If after this second Deliverance and Trial thereupon, or that the Plaintiff be again nonsuit upon a Declaration, then there must be awarded a *Returnum irreplegiabile* to the Defendant, and then he may make his *Avowry*, i. e. a Plea in Justification of his Distress, to ground a Writ to inquire of Damages; or he may hold the Beasts, &c. as a Distress till he is satisfied. [See *West. 2. c. 20*.]

If the Defendant maketh Default, the Plaintiff shall have Judgment, to recover all in Damages.

This Action of Replevin may be removed out of the County Court by *Pone* out of the Chancery, if it was sued by *Writ*; and by *Recordare*, if the Replevin was upon *Plaint*, returnable into the King's Bench, or the Common Pleas, where the Cause may be tried.

By 21 H. 8. ch. 19. Upon a Replevin sued, an *Avowry* may be made by the Lord, or Conusance and Justification by his Bailiff or Servant, of a Distress taken upon the Land bolden of the same Lord, without naming any Person certain to be Tenant thereof. The like Law is also upon every Writ sued of second Deliverance. [See 32 H. 8. c. 37.]

In any such *Avowry*, &c. in any Replegiare, or second Deliverance for Rents, Customs, Services, or Damage-feasant, if the *Avowry*, Cogni-

Cognizance, or Justification be found for the Defendant, or the Plaintiff be nonsuit, or otherwise barr'd, the Defendant shall recover such Damages and Costs, as the Plaintiff should have had, if he had recovered.

By 17 Car. 2. ch. 7. *When a Plaintiff shall be nonsuit before Issue in any Suit of Replevin, removed or depending in any of the Courts at Westminster, the Defendant making Suggestion in the Nature of an Avowry for Rent, (or if Judgment be given on Demurrer for the Avowant, by §. 3.) the Court upon his Prayer shall award a Writ to the Sheriff, to inquire of the Sum in Arrear, and the Value of the Distress, of the Execution of which Writ of Inquiry, the Plaintiff or his Attorney shall have fifteen Days Notice. Upon Return of which Inquisition the Defendant shall have Judgment to recover the Arrears, if the Distress amounts to that Value, or else the Value of the Distress with full Costs, and shall have Execution thereupon; and in Case the Plaintiff is nonsuit after Avowry made and Issue joined, or if the Verdict be given against him, the Jury shall, at the Prayer of the Defendant, inquire concerning the Arrears, and the Value of the Distress, and thereupon the Avowant shall have Judgment for such Arrears, or so much thereof as the Distress amounts to, with full Costs, and shall have Execution for the same.*

Where the Distress shall not be found to the Value of the Arrears, the Party may distrain for the Residue. [And by 19 Car. 2. ch. 5. The above Act is extended to Wales, and the Counties-Palatine.]

By 4 An. ch. 16. *The Plaintiff in a Replevin in any Court of Record, with Leave of the Court, may plead as many several Matters thereto, as he shall think necessary for his Defence.*

Provided, That if any such Matter shall upon Demurrer joined, be judged insufficient, Costs shall be given at the Discretion of the Court: Or if a Verdict shall be found upon any Issue for the Plaintiff or Demandant, Costs shall also be given; unless the Judge shall certify, that the Plaintiff in Replevin had a probable Cause to plead such Matter.

By 11 G. 2. ch. 19. §. 22. & 23. *All Defendants in Replevin may avow or make Conusance generally, that the Plaintiff in Replevin, or other Tenant of the Lands whereon the Distress was made, enjoyed the same under a Grant or Demise at such a certain Rent, during the Time wherein the Rent distrained for incurred, which Rent was then and still remains due; or that the Place where the Distress was taken was Parcel of such certain Tenements held of such Honor, Lordship, or Manor, for which Tenements, the Rent, Relief, Heriot, or other Service, distrained for, was at the Time of such Distress, and still remains due; without further setting forth the Grant, Tenure, Demise, or Title of such Lessor, or Owner of such Manor. And if the Plaintiff be nonsuit, discontinue, or have Judgment against him, the Defendant shall have double Costs.*

And all Sheriffs and other Officers having Authority to grant Replevins, shall, in every Replevin of a Distress for Rent, take in their own Names, from the Plaintiff and two responsible Persons, as Sureties, a Bond in double the Value of the Goods distrained (such Value to be ascertained by Oath of one or more credible Witnesses not interested in the Goods or Distress, which Oath such Officer may administer) conditioned for prosecuting the Suit with Effect, and without delay, and for duly returning the Goods and Chattels distrained, in Case a Return

shall be awarded before any Deliverance be made of the Distress. And such Officer shall at the Request and Costs of the Avowant, &c. assign such Bond to the Avowant, &c. by indorsing the same, and attesting it under his Hand and Seal in the Presence of two or more credible Witnesses; which may be done without Stamp, provided the Assignment be duly stamped before any Action brought thereon. And if the Bond so assigned be forfeited, the Avowant, &c. may sue and recover thereon in his own Name; and the Court may by Rule give Relief to the Parties upon such Bond, and such Rule shall have the Effect of a Defeasance to such Bond.

So that the Learning of Avowries is in a great Measure abridged by 21 H. 8. and the Intricacies of Process in Replevin, *Returno Habendo*, *Witbernarn*, &c. much remedied in Case of Distresses for Rents by 17 Car. 2. if the Practisers would pursue that Statute. And observe the Strictness in Pleading enlarged by 4 An. and 11 G. 2.

[See 1 Danv. Abr. Tit. *Avowry*, p. 644, 645, &c. And see of Sheriff, B. 1. ch. 7. and of Distresses for Rent, B. 2. ch. 2. Of the County-Court, B. 4. ch. 1. ante.]

Thus have I given a general and summary Account, how Actions are divided. Of which Actions, *Case*, *Debt*, *Ejectment* and *Replevin*, are the most usual. I proceed to shew,

2. Who are incapable to bring Actions; and against whom may Actions be brought.

* Lit. 196.
197, 198, 199,
200, 201.
1 Inst. 128.
a. & b. 129,
&c.
7 Rep. 17.
* See p. 24.
ante.
* See p. 325
& 336. ante.
* See p. 61.
ante.

* Men attainted of Treason or Felony, a Convict Recusant, [See 3 Ja. 1. ch. 5. 13 W. 3. ch. 6. 1 G. 1. St. 2. ch. 13. 5 G. 1. ch. 27.] Outlawed, or excommunicated Persons, Convicts of a *Præmunire*, an Alien Enemy, [the Law seems otherwise now as to personal Actions^b] a Religious (as Monk, Frier, &c.) cannot bring an Action, till Pardon, Reversal, Absolution, &c. Executors or Administrators 'outlaw'd may sue in the Right of the Testator or Intestate, though not in their own. A Feme Covert or married Woman must sue with her Husband^d, unless she is a sole Merchant in the City of London. [See as to Infants and Idiots, B. 1. ch. 1. ante.]

By 8 & 9 W. 3. ch. 11. Executors and Administrators have Power to continue Actions, if the Plaintiff dies after an interlocutory Judgment, and before a final Judgment. And if the Defendant dies after such interlocutory Judgment, and before final Judgment, the Plaintiff may continue the Action against the Executors or Administrators. And if one or more Plaintiffs or Defendants die, the Action shall survive to the surviving Plaintiff or against the surviving Defendant.

By 11 H. 7. ch. 12. Every poor Person (who can make Oath that he is not worth 5 l. over and above his and his Wife's wearing Apparel, his Debts paid) having Cause of Action, shall have original and other Writs and Subpoena's gratis. And the Chancellor, or Judge, or Judges of the Court, where the Suit depends, shall assign him Counsel and an Attorney; who are to dispatch his Business without Fees. [One may be admitted, to defend as well as sue, in forma Pauperis, See 9 & 10 W. 3. ch. 25. 2 G. 2. ch. 28. See also 23 H. 8. ch. 15. And of Maintenance, B. 3. ch. 3. ante.]

Quare,

Quere, If one ought to be admitted to sue *in Forma Pauperis* in an Action of the Case for Words?

Actions may be brought *against* all Persons, whether attainted of Treason or Felony, a convict Recusant, outlaw'd, or excommunicate, &c. A Feme Covert must be sued with her Husband. [See again of Infants, Idiots, Husband and Wife, and of Executors, *prout supra*, and of Writs, *infra*.]

By 8 & 9 W. 3. ch. 11. In Actions of Assault, Trespass, false Imprisonment, or Ejectment against several Persons, where one of the Defendants is acquitted by Verdict, he shall recover Costs, unless the Judge certify there was a reasonable Cause for making him a Defendant.

3. To know where Actions must be laid, it must be considered, that Actions are either *local* or *transitory*.

* 1. *Local*, as real and mixt Actions, Waste, Ejectment, Trespass *Quare Clausum fregit*, &c. are mixt Actions; and must be laid in the same County where the Land lieth.

By 31 El. ch. 5. In Actions upon penal Statutes the Offence shall be laid to be done in the County where it was done. Otherwise, if the Defendant traverses and disproves that Point, the Plaintiff shall be barred.

This Act shall not restrain Officers of Record, who, in respect of their Offices, have lawfully used to exhibit Informations, or sue upon penal Laws; nor Actions brought for Champerty, buying of Titles, Extortion, Offences against 1 El. ch. 11. Concerning the right Landing of Merchandise, and Custom of sweet Wines, concealing of Customs, &c. corrupt Usury, Forestalling, Regrating, or Ingrossing, when the Penalty shall amount to twenty Pounds or above. In these Cases the Offence may be laid in any County.

All Suits for using unlawful Games, or for using any Art or Mystery without being brought up in it, shall be prosecuted at the Assises or Sessions of the County, within which the Offence was committed, [See also 18 El. ch. 5.]

By 21 Ja. 1. ch. 4. Actions popular on penal Statutes, which may be prosecuted before Justices of Assize, Nisi Prius, Gaol-Delivery, Oyer and Terminer, or of the Peace, shall be prosecuted only in the Counties where the Offences were committed, except for Recusancy, Maintenance, Champerty, buying of Titles, concealing of Customs, &c. or transporting of Gold, Silver, Munition, Wool, Wool-fells, or Leather.

Upon Default of proving, that the Offence was committed in the same County where the Action is laid, the Defendant shall be found Not guilty.

The Informer shall make Oath, that the Offence was committed in the same County where the Action is laid, and within one Year before the Suit commenced.

^b By this Statute no Action of Debt, or Information, or other Suit, can be brought in any Court in Westminster-Hall, on any penal Statute, for any Offence, which is not therein excepted, if the Offender may be prosecuted in the proper County, where the Offence was committed, [unless such Offence shall be committed in the same County

^a 1 Inst. 282.

^a & b.

² Inst. 229,

230, 231.

⁶ Rep. 47.

¹ Cro. 645.

^b 3 Inst. 192,

¹⁹³.

¹ Cro. 645.

¹ Ld. Ray.

³⁷².

² Ld. Ray.

⁸⁷².

County in which such Court sits.] It not only restrains common Informers, but the Attorney General, and all other Persons, [except the Party grieved.] But there are several subsequent Statutes, which give an Action of Debt, &c. for the Recovery of a Penalty, in any of the King's Courts at *Westminster*, and so far they do repeal 21 *Ja.* 1. [And this Statute has been held not to extend to

^a Salk. 373.
² Str. 1081.

Actions upon subsequent Statutes^a.] Notwithstanding this Statute, Indictments may be removed by *Certiorari* into the King's Bench, and may be tried there, or in the Country by *Nisi Prius*.

⁴ Inst. 174,
&c.

[By 21 *Ja.* 1. ch. 12. *Actions on the Case, Trespass, Battery, or false Imprisonment brought against Justices of the Peace, Mayors, and other Officers of Corporations, Headboroughs, Constables, Tythingmen, Churchwardens, and Overseers, and their Deputies or Assistants, for any Thing done in their Office, shall be laid in the County where the Fact was committed.*]

By 3 *W. & M.* ch. 12. 1 *An. St.* 1. ch. 18. *All Matters concerning Highways, Bridges, &c. shall be determined in the County where they lie; and no Presentment, Indictment, or Order, shall be removed by Certiorari out of the County.*

[Besides which, there are several other penal Statutes which expressly direct the Actions brought on them to be laid in the proper County, as 5 *G.* 1. ch. 26. against keeping large Quantities of Gunpowder in improper Places, and 12 *Geo.* 2. ch. 28. against Gaming, &c.]

2. * *Transitory Actions*, or all personal Actions, where no Possession is awarded, (as Actions for Debt, Detinue, Assault and Battery, false Imprisonment, Deceit, Trover and Conversion, Account, &c.) may be brought in *any County*, and laid in any Place; and the Defendant cannot traverse it, or be allowed to say, that it was done in another Place; except in the Case of an Officer, as a Constable, &c. who has a special [local] Cause of Justification by Reason of his Office, by 21 *Ja.* 1. ch. 12. as above, or for taking Beasts or Goods *Damage-feasant*; or when an Action is brought against any one, for doing any Thing by Virtue of an Act of Parliament; or where Action is brought by a Lessor against a Lessee for Rent, &c. But if transitory Actions are laid in a different County, from that in which the Cause of Action did arise, ^b the Court upon *Affidavit* doth commonly alter the *Venue*, *i. e.* order it to be laid in the proper County, unless the Plaintiff will undertake to give some [material] Evidence, arising in that County, where he hath laid his Action; however, in Writs of Debt, Account, &c. you shall not declare, that the Contract was made in any other County, than is contained in the original Writ. [See 6 *Ri.* 2. ch. 2. though the Act is not put in Use.] But observe, that when the Place is material, as when it is made Parcel of the Issue, then the Jury cannot find the Point in Issue in any other Place. In Actions transitory the ^c *Day and Time* is not traversable, if the Act be done before the bringing of the Writ. As if a

^b 2 Salk. 668,
&c.

⁶ Rep. 46,
47.

^c Lit. 485.
¹ Inst. 283. a.
² Inst. 318.
³ Inst. 230.

* *Debitum et contractus sunt nullius loci.* 2 Inst. 231.

Trespass

Trespas was done on the 4th of May, and the Plaintiff alledgeth it to be done on the 3th of May, or the 1st of May, when no Trespas was done, yet if the Trespas was done before the Action brought, it is sufficient. So it is in Indictments.

An Attorney has a Privilege, to lay his Action in *Middlesex*,^{2 Inst. 229.} because of his Attendance at the Courts of *Westminster*. [See of *Vent. 47.* Privilege in the Catalogue of Writs, *post.*]

Where the Contract and the Performance is beyond Sea, this^{6 Rep. 46.} wants Trial in our Law; except in the Case of a Bond. [But this^{Hob. 11, 12.} hath been since held not to be Law; for that Matters transitory and^{1 Salk. 290.} personal, tho' transacted abroad, may be tried here.] [See of the^{2 Ld. Ray.} Court of Chivalry, (or Court Martial) and of the Court of Admiralty, B. 4. ch. 1. and of the Courts in Cities, &c. ch. 2. *ante.*]^{1532.}

4. Actions must be brought in *due Time*, or they will be barr'd by Statutes of Limitation. Limitation is a certain Time prescribed by Statute, within which an Action must be brought.

¹ Time of Limitation is two-fold, (*viz.*) in Writs by several^{2 Inst. 115.} Statutes, and to make Title to an Inheritance by Common Law. [See for Title to an Inheritance by Prescription, B. 2. ch. 3. *ante.*]

As to Writs or Actions.

By West. 1. or 3 Ed. 1. ch. 39. The Limitation of a Writ of Right was from the Time of Ri. 1. (*i. e.* from the first Day of his Reign. For from the Time being indefinite, doth include the whole Time of his Reign.) But this Time is altered. For,^{2 Inst. 114. b.}

By 32 H. 8. ch. 2. The former Limitation of Time in a Writ of Right is reduced to sixty Years next before the Teste of the Writ.^{115. a.} And so other Actions are limited to fifty, forty, or thirty Years; as^{2 Inst. 94. ac.} by that Act [and 21 Ja. 1. ch. 16.] at large appeareth.^{238.}

This Act doth not extend to Services which by common Possibility may not happen or become due within sixty Years; as to cover the Hall of the Lord, &c. nor to a Rent created by Deed, nor to a Rent reserved upon any particular Estate, nor any Writ of Right of Advowson, *Quare Impedit*, Affise of Darrein Presentment, or *Jure Patronatus*, [See 1 Mar. Seff. 2. ch. 5.] but they are left as they were before the Statute; within which Time the Demandant or Plaintiff in a real Action must prove himself or some of his Ancestors to be seised. For the Law doth favour a long Possession as an Argument of Right, tho' no Deed can be shewn, rather than an ancient Deed without Possession.^{4 Rep. 10.}

Note, That tho' one hath been out of Possession for sixty Years, yet if his Entry is not taken away, he may enter and bring his Action of his own Possession. For the first Clause in the Act of 32 H. 8. doth not bar any Right; but says, that no Person shall sue or maintain any Writ of Right, or make any Prescription, Title, or Claim for any Lands, &c. of the Possession of his Ancestor or Predecessor, but only of the Seisin of his Ancestors within sixty Years; which does not take away any Action of his own Possession, &c.^{11.}

By 31 El. ch. 5. Actions, Suits, Bills, Indictments, or Informations upon penal Statutes, where the King only hath the Forfeiture, shall be commenced within two Years. Where the King hath only a

Part, and the Informer the rest, they shall be commenced within one Year, or after that one Year by the King only, within the two Years after that Year ended. [See 18 El. ch. 5. §. 1.]

But this is to be understood, where a shorter Time is not limited by any other Statute.

[See 21 Ja. 1. ch. 2.] By which concealed Lands shall not be recovered by the Crown, unless it is proved, that the Crown hath been answered for the Profits, or that the same have been duly charged of Record, within sixty Years before.]

By 21 Ja. 1. ch. 16. (The Statute of most Use) All Writs of Formedon in Descender, Remainder, or Reverter, shall be sued within twenty Years after Title accruing. Otherwise such Title shall for ever be barr'd. And all Persons having any Right or Title of Entry into any Lands, Tenements, or Hereditaments, must enter within twenty Years after Title accrued. The Titles of any Infant, Feme Covert, Non Compos Mentis, one imprison'd, or beyond Sea, are saved; so as they commence their Suit within ten Years after such Impediments removed. [See the 4 Ann. ch. 16. infra.]

Note, * That Copyhold Lands are within these Statutes of Limitation of Entry within twenty Years.

Now for the Time of Limitation in Personal Actions according to the same Statute.

Also all Actions upon the Case (other than for Slander) Actions of Account, (other than what concern Merchandize between Merchant

and Merchant) [This Exception seems to be now understood not to relate to an Account stated, but only to an Account current] Actions of Trespass Quare Clausum Fregit, Debt upon Lending or Contract without Specialty, or Arrearages of Rent, of Detinue, Trover, Replevin, shall be commenced within six Years after the Cause of Action, and not after.

Note, That the Debt must be upon Lending or Contract, and without Specialty; or else for Arrearages of Rent without Specialty.

A Debt confessed within six Years doth not avoid the Statute. It must be an express Promise to give a new Cause of Action. [2 Qu.

If it is not now generally understood, that an Acknowledgment of the Debt is sufficient to avoid the Statute.] Delivery of the last Goods by Tradesmen continues the Action, for what was before due.

All Actions of Trespass, of Assault, Menace, Battery, Wounding, Imprisonment, shall be commenced within four Years after such Cause of Suit, and not after.

All Actions of the Case for Words shall be commenced within two Years after the Words spoken, and not after; and in this Action the Plaintiff shall recover no more Costs than Damages, if the Jury assess the Damages under 40s.

The Right of Infants, Feme Coverts, Non Compos Mentis, Persons imprison'd, or beyond Sea, is saved; so that they commence their Suits within the Time above limited, after their Impediments are remov'd.

Provided, That if in any such Actions Judgment is given for the Plaintiff, and the same is reversed by Error; or if a Verdict pass for him, and upon Motion in Arrest of Judgment it is given against him;

him; or if the Defendant is outlaw'd in the Suit, and does after reverse the Outlawry; in these Cases the Plaintiff, his Heirs, Executors, or Administrators may commence a new Action within a Year after such Reversal, and not after.

Note, That it is said to be the Course of the Common Pleas, to declare in any Action (especially upon an *Assumpsit* or the like) upon a *Quare Clausum fregit*, as they do upon a *Latitat* in the King's Bench. [But *Qu.* If a *Quare Clausum fregit*, tho' returned, is a sufficient Commencement of a Suit to avoid the Statute of Limitations.] If one sues out an *Original*, or takes out a *Latitat* in a personal Action within the Time limited by Statute, and hath a *Non est Inventus* returned by the Sheriff, and enters his Writ upon the Roll, and files it, though he doth not declare against the Party within the Time limited by the Statute, the Action shall be said to be brought in due Time. But a Writ sued out, and not returned, will not avoid the Statute of Limitations. Trusts are not within the Statute of Limitations.

The King is not within these general Acts of Limitation, nor Ecclesiastical Persons for their Lands belonging to their Churches; for then by Collusion they might evade the Statutes, made to prohibit their Alienations.

An Action of Debt grounded on the 2 *Ed. 6.* For not setting out of Tithes, or any Action growing by Virtue of a Statute (being a *Specialty*) is not within 21 *Ja. 1. ch. 16.* The like of Arbitrament under the Hand and Seal of the Arbitrator, being a *Specialty*.

See 10 & 11 *W. 3. ch. 14.* Concerning Limitation of Writs of Error under *Fines, Recoveries, Judgments, &c.* and 4 *Ann. ch. 16.* Concerning Claims and Entries to avoid a *Fine*, or what shall be a sufficient Entry, or Claim within the Statute of Limitations of 21 *Ja. 1. ch. 16.* and concerning Suits in the Admiralty for *Seamens Wages* to be prosecuted within six Years. See also 12 & 13 *W. 3. ch. 3.* Whereby the Plaintiff staid by *Privilege of Parliament* shall not be barr'd by any Statute of Limitation.

By 4 *Ann. ch. 16.* If any Person against whom there shall be Cause of Action for *Seamens Wages*, or of *Trespass, Detinue, Trover, Replevin, Account, Case, Debt grounded on Contract or Lending without Specialty*, or for *Rent, or Assault, Menace, Battery, Wounding, and Imprisonment* shall, at the Time of such Cause of Suit accrued, be beyond Sea, then the Person intitled to such Suit may bring an Action after the Return of such Person, so as he brings the same within such Times after the Return, as are respectively limited by 21 *Ja. 1. ch. 16.*

The former Statute of 21 *Ja. 1.* saved the Plaintiff's Right where he was beyond Sea, but not where the Defendant was beyond Sea.

It is to be wished, that in Criminal Cases at the Suit of the King, there was a Limitation of Time for Prosecution; especially in Case of Life and Death. [See 7 & 8 *W. 3. ch. 3.* By which the Indictment in High Treason or Misprision of Treason committed in *England, or Wales*, in some Cases, is to be found within three Years after the Offence committed. And 1 *Geo. 1. ch. 5.* Concerning Rioters, whereby Prosecution is to be within twelve Months.] In Offences under Treason and Felony there are many Statutes that limit the Time of Prosecution to one or two Years, six Months, &c.

A short

A short Limitation of Time is always necessary, where an Offence is committed by bare Words. [See 6 Ann. ch. 7. whereby Information upon Words spoken against the Protestant Succession contrary to that Act, must be given upon Oath within *three Days*, and Prosecution be within *three Months* after Information, and Conviction must be by the Oath of *two Witnesses*.]

He that will take Advantage of the Statute of Limitations must plead* it; or he cannot have the Benefit of it, although it appears upon the Declaration that the Cause of Action accrued so many Years ago.

Of Writs.

^b Terms of the Law, v. Brief.

¹ Inst. 73. b.

² 89. a.

² Inst. 39.

⁴⁰, ⁴¹.

⁷ Rep. 20.

II. ^b A Writ (*Breve, à Brevitatē*) in general is the King's Precept in Writing under Seal, commanding something to be done, or giving *Commission* to have it done.

Writs are larger than Actions. Some are grounded upon *Rights of Action*. Some are in the Nature of *Commissions*, as Writs of Error, *Oyer* and *Terminer*, Writs to elect Knights and Burgeſſes of the Parliament, for Surety of the good Behaviour or Peace, &c.

Some Writs are *Mandatory* and *Extrajudicial*, as *Ne exeat Regno sine Licentiā*, Writs for calling one to be a Peer, to chuse a Bishop, to call one to be a Serjeant, Chief Justice, &c. Some Writs are *Patent*, and some *Cloſe*. *Patent* (or open) ready to be shew'd, that the Sheriff, &c. might take Notice thereof. *Cloſe*, as Writs directed into Ancient Demefne, &c.

Some Writs are directed to the Sheriffs or Coroners; and in special Cases to the Party, as Writs of Prohibition, *Ne exeat Regno*; or to others, as to Judges Temporal or Ecclesiastical, &c.

But now of Writs grounded upon *Action*.

After the Action is fix'd on for a Wrong done, or a Right detain'd, ſuch a Writ must be taken out, as is ſuitable to the Action. For the Writ is different from the Action, though they are often confounded; for an Action is the Right of Suit. And the Writ is grounded thereupon, and is the Means to bring the Plaintiff to his Right. Such a Writ is the King's Precept in Writing under Seal iſſuing out of his Courts, whereby any Thing is commanded to be done touching a Suit or Action commenced. But yet more particularly; a Writ is a Proceſs iſſuing out of the *Chancery*, or other Court, commanding the Sheriff of the County, &c. to ſummon or attach a Perſon, to answer the Suit of another. The Writ must be directed to the Sheriff, * though it be for a Thing done in a Franchise. And he must ſend it to the Bailiff of the Franchise, ^d who ſhall ſerve it as a Servant to the Sheriff, and the Sheriff ſhall return it.

* See p. 70, &c. ante.

^d See p. 209. ante.

Of Writs that are grounded on Civil Actions, ſome are *Original* and ſome *Judicial*. *Original* (of great * Authority for the Proof of the Law in particular Cases) which iſſue out of the Court of *Chancery* in the King's Name, and are ſent to make a Defendant appear. ¹ Some are in the *Præcipe quod reddat*, as Debt, Detinue, &c. Some *Quod Permittat*, as for one to uſe his Common, &c. Some *Quod Faciat*, as in an Action of Account, Covenant. A *Præcipe* is a Command to the Sheriff, to require the Defendant to do ſomething that the Plaintiff ſueth for, or to appear to the Suit. A *Si fecerit te ſecurum*, or *Pone*, is an original Writ, and the Ground

^e 1 Inst. 93. b.

⁸ Rep 48, 49.

¹ Str. 146.

&c.

^f Finch 257.

² Inst. 40.

Ground of the *Capias* which issues out of the Common Pleas or King's Bench thereon, when the Proceedings are not by Bill. Here the Plaintiff in the Writ is supposed to give Security by Pledges; but this is refused. Writs original also may be in Appeals that concern Life. [See 1 H. 5. cb. 5. ^b Of *Additions* in original Writs of Actions personal, Appeals, &c.] *Judicial*, which issue out of the Court where the Original is return'd, after the Suit is begun, or where the Cause depends, and do bear the Name of the Chief Justice of the Court, whence they issue.

Writs also according to the Nature of the Action are either *Real*, ^{c 1 Inst. 73.b.} *Personal*, or *Mixt*. *Real*, which touch the *Possession*, and are ^{2 Inst. 40.} call'd Writs of *Entry*; or the *Property*, which are Writs of *Right*, &c. But these *Real* Writs, and the several Processes thereon, as the *Grand Cape*, *Petit Cape*, *Saver Default*, *Resceit*, *View*, *Aid Prayer*, *Voucher*, &c. are out of Use. For in most Cases at this Day (as I have said before) where the Entry is lawful, Men chuse to recover their Possessions by *Ejectment*. In common Recoveries only, the Form of such *Real* Actions is preserved. And sometimes, tho' seldom, there is a Writ of *Dower*, or *Formedon*. But in the Grand Sessions in *Wales* they proceed by such Writs. The Remedy also by Writs of *Affise*, as *Novel Disseisin*, &c. and the several Forms and Proceedings relating to them are antiquated by the common Use of *Ejectments* instead thereof. So that an *Affize* is rarely brought, unless for the Recovery of the Possession of *Offices*. Other *Affizes*, as for *Commons*, *Ways*, *Nuances*, &c. are turned (as hath been said) into Actions of *Trespas*s, and Actions on the Case. *Personal*; which are Writs taken out for Debt or Damages, &c. where the Plaintiff is to be restored to something in the Personalty. *Mixt*; which are Writs that issue out for the Recovery of the Thing demanded and Damages.

Note, ^a That the King's Writs are *Ex Debito Justitiæ*, and cannot be denied to the Subject; tho' some are *Ex Gratia*, as Writs of Protection, *De Excommunicato Capiendo*, &c. And it ought to be remembred, that it is regularly true, that no Man shall be punished for suing of Writs in the King's Courts, be it of Right or Wrong. ^{4 1 Inst. 161.a. 2 Inst. 40. 369, 623.}

Writs *Original* and *Judicial*, most necessary to be known, are these that are set down in *Alphabetical Order*. But *Fitzberbert's Natura Brevium* must be read again and again, and upon all Occasions consulted.

A.

^a *Accedas ad Curiam*, lies to remove Plaints in any other Court- ^{b F.N.B. 19.} Baron besides the County-Court, and is directed to the Sheriff to make a Record of the said Suit in Presence of the Suitors of the said Court, and to certify it into the King's Court. ^{70. Terms of the Law, v. Accedas ad Curiam.}

^c *Account*, lieth against Guardian in Socage, a Bailiff, or Receiver, or against one as Bailiff and Receiver. [See 4 Ann. cb. 16.] ^{d F.N.B. 116.}

^e *Ad Admittendum Clericum*, is directed to the Bishop, to admit a Clerk, after he has recovered his Presentation. ^{f F.N.B. 38.}

Ad Inquirendum, is a Judicial Writ, commanding an Inquiry to be made by a Jury, into any Thing touching a Cause, depending in Court, for the Satisfaction of the Court, and Execution of Justice,

- ^a Finch 484. [See *Inquiry infra*.] ^a There need not to be twelve upon the Jury. [But *Qu.* If the Practice is not to have twelve upon such Writs.]
- ^b F. N. B. 221. ^b *Ad Quod Damnum*, is a Writ of Inquiry, of what Damage it will be to the King or any other Persons, to grant a Liberty, Fair, or Market, or to turn a Highway, &c. [See 8 & 9 W. 3. *ch.* 16.] or to grant Lands, or Licence to alien in Mortmain, &c.
- ^c F. N. B. 152. Finch 161. See p. 199. ante. ^c *Annuity*, is a Writ which lieth for the Grantee, where one granteth to another a yearly Rent for Life, or for Years, or in Fee, out of his Lands, or out of his Coffers, or to receive from his *Person* (and his Heirs if named) yearly at a certain Day, when it is behind at the Day of Payment.
- ^d F. N. B. 31. 32. 2 Inst. 356. &c. ^d *Affise of Darrein Presentment* (i. e. *Ultimæ Prasentationis*) lies where one or his Ancestors have presented a Clerk to the last Avoidance of a Church, and a Stranger, upon the Death, Resignation, &c. of the Clerk, presents a Clerk to the same Church, in Disturbance of him that hath Right. [See *Quare Impedit infra*, and for the Meaning of an *Affise*, *Lit.* 234.]
- ^e F. N. B. 48, 49, 195. 1 Inst. 159. a. 2 Inst. 407. ^e *Affise of Juris Utrum*, lieth for a Parson against a Layman, or for a Layman against a Parson, or for one Parson against another for Lands or Tenements, whether they be Lay-Fee or Free-Alms, or Free-Alms of this Church or another. [See *West.* 2. *ch.* 24. 14 *Ed.* 3. *St.* 1. *ch.* 17.]
- ^f F. N. B. 195, &c. 1 Inst. 159. a. Finch 290. ^f *Affise of Mortdancestor* (*Affisa Mortis Antecessoris*) lieth where one's immediate Ancestor dies seised of Lands, and a Stranger abates, &c.
- ^g F. N. B. 177. 8 Rep. 45, &c. ^g *Affise of Novel Disseisin*, is a Real Writ for a Freeholder against his Disseisor, whether of Land, Rent, &c.
- ^h Terms of the Law, v. Attachment. ^h *Attachment*, is to take one by his Body, &c. to bring him to answer, &c. Also it issues for Contempt of the Court, or upon *Affidavit* for not obeying a Rule or Order, &c. and the Person so attached may be examined upon Oath on Interrogatories. And if he is acquitted [or has cleared his Contempt] he shall be discharged upon Motion to the Court. But if he appears to be Guilty, he shall be fined for his Contempt. In *inferior* Courts there may go an Attachment against one's Goods, to make him appear in a personal Action. There is also a *Foreign Attachment*, which is an Attachment of the Goods of Foreigners within a Liberty, or City, at the Suit of any within the Liberty, to whom a Foreigner oweth Money, &c.
- Further, There is a Writ of Attachment of *Privilege* at the Suit of a Clerk or Attorney of the Court, which is in the Nature of a *Capias*, to bring a Defendant into Court. It will hold the Defendant to bail, [in the same Cases where a *Capias* will.]
- ⁱ F. N. B. 105, &c. Finch 484, 485. ⁱ *Attaint*, lieth against a Jury of twelve Men after Judgment, who have given a false Verdict in any Court of Record, that the Judgment may be reversed. [See *West.* 1. *ch.* 37. 34 *Ed.* 3. *ch.* 7. 9 *Ri.* 2. *ch.* 3. 32 *H.* 8. *ch.* 3.] The Plaintiff in the Attaint can give no more Evidence, than was given at first. But the Defendant in Affirmance of the first Verdict may.
- ^k F. N. B. 107. Finch 488, 489. 1 Inst. 290. b. 2 Inst. 396. 3 Rep. 13, 14. ^k *Audita Querela*, is for a Person who is like to be in Execution, or is actually in Execution, upon a Statute, Recognizance, or Judgment, to set aside the Execution, by suggesting some just Cause since the Judgment, to discharge himself of the Execution; as Arbitrament, Release, &c. This Writ shall issue out of *Chancery* directed

rected to the Justices of the *King's Bench* or *Common Pleas*, willing them to grant Summons to the Creditor, to appear before them to answer the Complaint at a certain Day. * It lies not against the King. ^{3 Inst. 235.}

B.

^b *Beneficio Primo Ecclesiastico Habendo*, is a Writ directed from the King, to bestow the Benefice that shall first fall in the King's Gift, above or under such a Value, upon a particular Person. ^{Reg. 307. b.}

C.

Capias ad Respondendum, is the next Writ to the Original in an Action of Debt, &c. and is a Process to imprison the Defendant. [See 19 H. 7. ch. 9. 23 H. 8. ch. 14.]

* *Capias ad Satisfaciendum*, is a Judicial Writ for Execution after Judgment, to take the Body of a Man, and to imprison him, till Satisfaction is made. It lay not at Common Law. But it is given in many Cases by Statutes. [See 1 Ja. 1. ch. 13. 21 Ja. 1. ch. 24.] ^{1 Inst. 289. a. 2 Inst. 394. 395. 3 Rep. 11. 12. Finch 476. 1 Roll. Abr. 897. &c. Finch 476.}

^a *Capias Utlagatum*, is an Execution for arresting a Person outlaw'd, when he refuses to appear upon the *Exigent*. [See *Exigent*.]

There is also a special *Capias Utlagatum* against his Body, Lands, and Goods.

* *Capias pro Fine*, is when a Fine is imposed for an Offence, and is payable to the King. [See 5 & 6 W. & M. ch. 12.] ^{Finch 476.}

Capias in Withernam. [See *Withernam*, *infra*.]

^c *Certiorari*, is a Writ directed to an inferior Court of Record, to remove, and certify the Record of a Cause [into the Court of Chancery, King's Bench, or Common Pleas, or to remove Indictments, or Orders, or Convictions by Justices of Peace into the Court of King's Bench.*] No Record shall be removed into the Common Pleas, or Indictment taken in the Country to the King's Bench immediately by a *Certiorari* [2y.]; but first it must be certified into Chancery by a Surmise, and from thence sent by *Mittimus* into the Common Pleas or King's Bench, as the Case is. [This hath been otherwise determined, ^b and that a Record of an inferior Court may be removed into the King's Bench or Common Pleas immediately by *Certiorari*, as well as by *Certiorari* and *Mittimus*.] [See 1 & 2 Ph. & M. ch. 13. 21 Ja. 1. ch. 8 & 23. 12 Car. 2. ch. 23. 22 Car. 2. ch. 12. 3 W. & M. ch. 10 & 12. 4 & 5 W. & M. ch. 23. 5 & 6 W. & M. ch. 11. 7 & 8 W. 3. ch. 6. 8 & 9 W. 3. ch. 33. 1 Ann. St. 1. ch. 18. 5 Ann. ch. 14. 5 Geo. 1. ch. 15. 5 Geo. 2. ch. 19.] ^{F. N. B. 242. Finch 443. Terms of the Law, v. Certiorari. 1 Salk. 144. &c. See Hawk. P. C. B. 2. p. 285, &c. 1 Ld. Ray. 216, 469, 580. 2 Ld. Ray. 836.}

^d *Cautione Admittenda*, is a Writ that lieth to a Bishop (when one taken by Force of the Writ *de Excommunicato Capiendo*, offereth sufficient Pledges or Caution to obey and submit to the Ecclesiastical Laws for the future) to admit the Caution and to deliver him. It may be directed to the Ordinary himself, to command him to be delivered, which the Ordinary may do by Word. [See *Excommunicato Capiendo* and *Deliberando*, *infra*.] ^{F. N. B. 63. 2 Inst. 189. 623.}

* Clerico

- ^a 2 Inst. 4. ^a *Clerico Capto per Statutum Mercatorum, &c.* is for the Delivery of a Clerk out of Prison, who is imprison'd upon a Statute-Merchant, &c. [See 13 Ed. 1. St. 3.]
- ^b F. N. B. 175. ^b *Clerici non Eligantur in Officium, &c.* For a Clerk not to be chosen an Officer for his Lands; as Bailiff, Beadle, or in any such like Office. And this Writ reciteth, that by the Common Law they ought not to be chosen.
- ^c F. N. B. 170. ^c *Conge d'Elire* (Leave to elect) is the King's Licence to a Dean and Chapter in the Time of Vacation, to proceed to an Election of a Bishop. [See 25 H. 8. ch. 20.]
- ^d F. N. B. 114. Finch 446. See p. 434. ante. ^d *Conspiracy*, is where two Persons at least maliciously conspire, to indict any Person falsely of Felony, Trespass, &c. [*Quære* of Trespass?] and the Person is acquitted. Here the Person, indicted, after Acquittal shall have a Writ of Conspiracy.
- ^e F. N. B. 50. ^e *Consultation*, is to return a Cause, removed by Prohibition, to the Ecclesiastical Court, when the Judges find, that that Court hath Jurisdiction, or that the Suggestion is false, or not proved. It is in the Nature of a *Procedendo*. [See 24 Ed. 1. 50 Ed. 3. ch. 4. and of a *Procedendo* and *Prohibition*, *infra*.]
- ^f F. N. B. 163. ^f *Coronatore Eligendo*, is directed to the Sheriff out of *Chancery*, to call together the Freeholders of the County, to chuse a new Coroner, and to certify the same into *Chancery*. There is also a Writ *De Coronatore Exonerando* to discharge him.
- ^g F. N. B. 251. ^g *Corpus cum Causâ*, issues out of the Chancery, where a Man lies in Execution upon a *Judgment* for Debt, to remove the Body and the Record into the King's Bench, &c. there to lie until the Judgment is satisfied. [*Qu.* If this Writ is any thing more than a *Habeas Corpus cum Causâ*, to remove a Cause from an inferior Court: For this Description of the Writ seems to be a Mistake, occasioned by blending the Writ itself and the Consequences of it, when returned, according to 2 H. 5. ch. 2. which Act, reciting that Debtors in Execution often procured Writs of *Certiorari* and *Corpus cum Causâ* out of the Chancery to bring up their Bodies, with the Cause of their Imprisonment, who were then let to Bail, enacts, that if it be returned upon any such Writ, that the Prisoner is condemned by Judgment, he shall be remanded, and not let to Bail.] [See 2 H. 5. ch. 2. 21 Ja. 1. ch. 23.]
- ^h Terms of the Law, v. Corpus cum Causâ. [A Writ of the same Name also lies to ^h remove any Action from inferior Courts of Record into any of the Courts of Law at *Westminster*. See *Habeas Corpus*, *infra*.]
- ⁱ F. N. B. 145. ⁱ *Covenant*, lies upon a Covenant by Deed. [See *Actions of Covenant*, *supra*.]

D.

- Darrein Presentment*. [See *Affise* of, &c.]
- ^k F. N. B. 119. ^k *Debt*. [See *Action of Debt*, *supra*.]
- ^l F. N. B. 95. ^l *Deceit*. [See *Action of the Case*, *supra*.]
- ^m F. N. B. 171. ^m *Decies Tantum*, lieth against a Juror, who takes Money of either Party, to give his Verdict. And it lies against all the Jurors, though they severally take Money, as some more some less. It is call'd *Decies Tantum*, because the Recovery is for ten Times so much, as was taken. [See 38 Ed. 3. St. 1. ch. 12.]

ⁿ *Dedimus*

Dedimus Potestatem, is a Writ to commission private Persons, to do some Act in the Place of a Judge, as to take a Person's Answer to a Bill in Chancery, to examine Witnesses, &c. to take a Fine, to take a Recovery, &c. [See 15 Ed. 2.]

Detinue. [See *Action of Detinue*, *supra*.]

Distingas, is directed to the Sheriff, &c. commanding him to distrain one for a Debt to the King; or for his Appearance at a Day [or at the Suit of a private Person, where the Defendant is privileged, or is a Corporation aggregate, in order to compel an Appearance]. *Distingas Juratores*, is a Writ directed to the Sheriff, commanding him to distrain upon the Jury, and to return *Issues*, (Profits of their Lands and Tenements) to appear; which cannot be saved upon Non-Appearance, but on reasonable Cause proved by Oath. [See 4 & 5 W. & M. ch. 24.]

Dower. [See *Right of Dower*, *infra*.]

Duces Tecum, issues out of Chancery, commanding one to appear at a Day in that Court, and to bring with him some Writing, &c. that is wanted, to be there inspected.

There is also a *Duces tecum licet languidus*, directed to the Sheriff, upon a Return that he cannot bring his Prisoner without Danger of Death.

E.

Ejectione Firmæ. [See *Action by Ejectment*, *supra*.]

Elegit, is a Writ judicial, given by Statute, directed to the Sheriff, where one hath gotten Judgment for Debt or Damages, or upon a Recognizance, in any Court, commanding him to deliver to the Person recovering all the Goods (Beasts of the Plough excepted) of the Debtor, and half the Lands, &c. if the Goods are not sufficient; upon which the Creditor shall hold the Moiety of the Land belonging to him, until his whole Debt or Damages are satisfied. This must be done by an Inquest or Jury of twelve Men, summoned by the Sheriff, upon such Land as the Defendant had at the Time of the Judgment. But this Writ ought to be sued within a Year and a Day after the Judgment. [See *West. 2. ch. 18. 32 H. 8. ch. 5.*]

Error is to redress a false Judgment, given in any Court of Record, where the Court hath Power to hold Plea of any Sum in Debt or Trespas above 40 s.

Essendi Quietum de Telonio, is to Officers, not to grieve those that ought to be quit of the Payment of Toll in Fairs and Markets according to their Privilege, either by Charter or Prescription.

Excommunicato Capiendo, is directed to the Sheriff upon Certificate of the Bishop, &c. under his Seal into the Chancery, to apprehend a Person denounced excommunicated forty Days, for Contumacy or Contempt of the Ecclesiastical Laws; and to commit him to Prison without Bail, until he submits. This Writ must be returnable in the King's Bench. The Certificate is good tho' it comes from a Bishop elect before Consecration. For the Confirmation gives him Jurisdiction. [See 5 El. ch. 23.]

Excommunicato Deliberando, is directed to the Sheriff, to deliver an excommunicate Person upon his Submission to the Church, upon Certificate of the Bishop into the Chancery, that the Church is satisfied, and that he hath absolved him.

7 K

If

- ^a 2 Inst. 4. ^a *Clerico Capto per Statutum Mercatorum, &c.* is for the Delivery of a Clerk out of Prison, who is imprison'd upon a Statute-Merchant, &c. [See 13 Ed. 1. St. 3.]
- ^b F. N. B. 175. ^b *Clerici non Eligantur in Officium, &c.* For a Clerk not to be chosen an Officer for his Lands; as Bailiff, Beadle, or in any such like Office. And this Writ reciteth, that by the Common Law they ought not to be chosen.
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- ^d F. N. B. 114. Finch 446. See p. 434. ante. ^d *Conspiracy*, is where two Persons at least maliciously conspire, to indict any Person falsely of Felony, Trespass, &c. [*Quære* of Trespass?] and the Person is acquitted. Here the Person, indicted, after Acquittal shall have a Writ of Conspiracy.
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- ^f F. N. B. 163. ^f *Coronatore Eligendo*, is directed to the Sheriff out of *Chancery*, to call together the Freeholders of the County, to chuse a new Coroner, and to certify the same into *Chancery*. There is also a Writ *De Coronatore Exonerando* to discharge him.
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- ^h Terms of the Law, v. *Corpus cum Causâ*. [A Writ of the same Name also lies to ^h remove any Action from inferior Courts of Record into any of the Courts of Law at *Westminster*. See *Habeas Corpus*, *infra*.]
- ⁱ F. N. B. 145. ⁱ *Covenant*, lies upon a Covenant by Deed. [See *Actions of Covenant*, *supra*.]

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Darrein Presentment. [See *Affise* of, &c.]

- ^k F. N. B. 110. ^k *Debt*. [See *Action of Debt*, *supra*.]
- ^l F. N. B. 95. ^l *Deceit*. [See *Action of the Case*, *supra*.]
- ^m F. N. B. 171. ^m *Decies Tantum*, lieth against a Juror, who takes Money of either Party, to give his Verdict. And it lies against all the Jurors, though they severally take Money, as some more some less. It is call'd *Decies Tantum*, because the Recovery is for ten Times so much, as was taken. [See 38 Ed. 3. St. 1. ch. 12.]

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Ejectione Firme. [See *Action by Ejectment*, *supra*.]

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Excommunicato Deliberando, is directed to the Sheriff, to deliver an excommunicate Person upon his Submission to the Church, upon Certificate of the Bishop into the Chancery, that the Church is satisfied, and that he hath absolved him.

If the Bishop will not accept of his Caution, or Pledges to submit upon the King's Writ *De Cautione Admittenda*, or will not command the Sheriff to deliver him, or if the Excommunication is for a Matter, that is not of Ecclesiastical Cognizance, this Writ shall be directed to the Sheriff, to deliver him. And if an Excommunicate Party offers to perform a Sentence, and the Bishop refuses to accept it, and to absolve him, the Party shall have a Writ to the Bishop, requiring him to absolve him. [See *Cautione Admittenda, supra.*]

^a Reg. Orig.

^{67.}

^{F. N. B. 64.}

^b F. N. B. 20.

^a *Excommunicato Recipiendo*, is to remand a Person excommunicated to Prison, who hath been illegally delivered from thence, before he has submitted to the Church.

^b *Executione Judicii*, is directed to a Judge of an inferior Court of Record, or not of Record, to do Execution upon the Judgment, or to return some reasonable Cause wherefore he delays the Execution. [See of *Execution, infra.*]

Exigent, lieth where the Defendant in an Action personal cannot be found. It is directed to the Sheriff, to proclaim and call the Defendant five County-Days one after another, *exacting* and requiring him to appear upon Pain of Outlawry, or to be out of the Protection of the King and his Laws. The Judgment of Outlawry is to be pronounced by the Coroner, on the fifth County-day. [See 31 *El. ch. 3.*]

^c F. N. B. 131.

⁴ Rep. 67.

^c *Extent* is directed to the Sheriff, to seize and value Lands and Goods, to the utmost *Extent*, if one that is bound to the King by Specialty, or to others by Statute, Recognizance, &c. hath forfeited it; so that by the yearly Rent the Creditor may be paid his Debt. Upon this the Creditor may sue a Writ to the Sheriff out of the Chancery, to deliver him the Lands and Goods to the Value of the Debt; which is called a *Liberate*. [For Extents by *Elegit*, Statute-Merchant or Staple, &c. See *West. 2. ch. 18. Stat. de Asson. Burnel de Mercatoribus*, or 11 *Ed. 1. 23 H. 8. ch. 6.* and 32 *H. 8. ch. 5.*]

F.

^d F. N. B.

^{86. K.}

^e F. N. B. 17,

^{18.}

^f F. N. B.

^{146. B.}

¹ Inst. 290. b.

^d *Falſe Imprisonment*, is brought for imprisoning one without Cause, or for unlawfully detaining him without legal Process.

^e *Falſe Judgment*, is to correct a Judgment, given in a Court not of Record.

^f *Fieri Facias*, is directed to the Sheriff, where one hath recovered in an Action Debt or Damages in the King's Court, to command him to levy the Debt or Damages of the Goods and Chattels of the Person against whom the Recovery was had. It may be brought at any Time within a Year and a Day after Judgment. [See *West. 2. ch. 18. Scire facias* and *Execution, infra.*]

^g F. N. B.

^{248.}

^g *Forcible Entry*, lies where one is seised of a Freehold, and is thereof disseised, or put out of his Lands or Tenements, with Force; or if he is disseised peaceably, and afterwards the Disseisor doth keep and detain the same with Force. [See 8 *H. 6. ch. 9.*]

^h F. N. B.

^{211, &c. 217.}

^{219, &c.}

¹ Inst. 326. b.

^{393. b.}

^h *Formedon* (*De Forma Donationis*, because the Writ doth comprehend the Form of the Gift) is of three Sorts, (*viz.*) *Formedon* in the *Descender*, *Remainder*, and *Reverter*. *Formedon* in *Descender* is for the Issue in Tail, which claim by Descent *per Formam Doni*. It is the highest Writ that a Tenant in Tail can have. [See *West. 2. ch. 1.*]

A

A *Formedon in Remainder* is for him in Remainder, his Heirs and Assigns, after the Determination of the Estate-tail. *Formedon in Reverter* lieth for him in the Reversion, or his Heirs or Assigns, after the Estate in Tail is spent.

H.

* *Habeas Corpus*, lies where one is indicted of a Trespass before Justices of the Peace, or in a Court of any Franchise, and is imprisoned for the same, and hath offered sufficient Bail, and it is refused where bailable; [or it lies ^b where a Person is imprisoned in any Gaol or other Place, to bring him up either to the Court of Chancery, or other the King's superior Courts, or before a Judge, in order to his being bailed, discharged, or remanded, as the Case may be, and in many other Cases to bring up the Body of any Prisoner into any of those Courts, in order to do or receive what to Justice appertains, or to answer the Purposes of Justice, as to give his Testimony as a Witness (which is called a *Habeas Corpus ad testificandum*) or the like] or where a Debtor is arrested in an inferior Court and in Prison, this Writ, which in such Case is usually called a *Habeas Corpus cum causa*, may remove his Body and the Cause from the inferior Court, to be tried at Common Law in a Superior Court. [See 43 *El. ch. 5.* 21 *Ja. 1. ch. 23.* 31 *Car. 2. ch. 2.*]

^a F. N. B. 250. H.
² Inst. 52, 53; 55, 615.
Terms of the Law, v. Habeas Corpus.
^b See p. 171 ante.

* *Habeas Corpora*, is to bring in a Jury, or so many of them as refuse to come upon the *Venire facias*, for the Trial of a Cause at Issue.

^a Terms of the Law, Ibid.

* *Habere Facias Seisinam*, is directed to the Sheriff, to give Seisin in Land of Freehold recovered in the King's Courts.

^a F. N. B. 157.
Terms of the Law, v. Hab. Fac. Seis. Finch 410.

* *Habere Facias Possessionem*, is directed to the Sheriff to give Possession of a Term for Years, recovered in the King's Courts, as in Ejectment.

* *Homine Replegiando*, is to bail one out of Prison, except in Cases of Treason, Murder, Outlawry, Excommunication, &c. [See *West. 1. ch. 15.* and the *Petition of Right*, 3 *Car. 1. ch. 1.*]

^a F. N. B. 66, 67.
² Inst. 185; &c.
See of Bail, ch. 5. post.

I.

* *Idiotia Inquirendo vel Examinando*, is directed to the Sheriff, requiring him to call before him the Party represented to be an Idiot, and to examine him, and also to inquire by a Jury, whether he is of sufficient Understanding to manage his own Lands, and to certify the same into Chancery. But he may be afterwards examined before the Lord Chancellor; and if it doth not appear that he is an Idiot, the Inquisition of the Sheriff may be set aside.

^a F. N. B. 232, 233.

[Instead of this Writ a Commission is now issued under the Great Seal, directed to certain Commissioners, who direct their Precept to the Sheriff to summon a Jury, &c.]

^a See Harrison's Practice in Chancery, vol. 2.

* *Indicavit*, lieth for the Patron of the Defendant, where one Parson sueth another Parson in the Spiritual Court for Tithes, which amount to a fourth Part of the Advowson of the Tithes. It is a Writ of Prohibition, directed to the Ecclesiastical Judge not to proceed. For in this Case the Cause belongs to the temporal Courts, because the Patron of the Clerk Defendant shall lose the Benefit of his

^a F. N. B. 44, 45.
Finch 451, 452.
¹ Inst. 243. &
² Inst. 364, 365.

his Advowson, losing the Profits of the Church, if the Clerk of the Plaintiff shall recover.

The *Indicavit* then is always between four Persons, (viz.) two Patrons, and two Clerks. One claimeth to hold of the Advowson of one Patron, the other of the other Patron. This Writ is set at a fourth Part by *Articuli Cleri* or 9 Ed. 2. ch. 2. whereas it might have issued for any Value before the Statute. And so it is now in the Case of the King.

[*Inquiry* is a Writ issuing out of the King's Courts of Record, directed to the Sheriff, for summoning a Jury, to inquire what Damages the Plaintiff hath sustained, who hath obtained an interlocutory Judgment in any of the said Courts.]

^a West's
Symb. 2 pt.
Tit. Proceed-
ings in Chan-
cery, §. 25.

^a *Injunction*, generally issues out of *Chancery*, or the *Exchequer*, to stay Proceedings in the temporal Courts, and sometimes in the spiritual Courts, upon Suggestion, that if the Rigour of the Law takes Place, it is against Equity and Conscience. Sometimes it is granted in *Chancery* or the *Exchequer*, to quiet a Possession.

^b F. N. B.
117. C. 119.
152. B.
2 Inst. 312.
Terms of the
Law, v. Ju-
stices.

Juris Utrum, [See of *Assise of Juris Utrum*, *supra*.]
^b *Justices*, is directed to the Sheriff, to do Justice in a Cause above 40 s. in the County-Court, of which he hath not Cognizance by his ordinary Power; the Court above having such Confidence in the Sheriff, that no Return is required of this Writ. It is in the Nature of a Commission to the Sheriff.

L.

^c Terms of
the Law, v.
Latitat.
2 Ld. Ray.
882.
1 Str. 550.

^c *Latitat*, is to call one into the King's Bench, to answer in a personal Action. It hath its Name from a Supposition, that one cannot be found in the County of *Middlesex*, but that he hides himself in some other County, as appears by the Return of the Sheriff of *Middlesex*. Therefore this Writ is directed to the Sheriff of that County, to apprehend him there.

^d F. N. B.
265.
Finch 471.

^d *Levari facias*, is directed to the Sheriff for levying or collecting of a Sum of Money upon the Rents, Corn, and other present Profit of the Land, and the Goods and Chattels of him that hath forfeited a Recognizance. This Writ is given by the Common Law before the Statute of *West. 2. ch. 18*, which gave the *Elegit*. The *Fieri facias* is to levy Execution of the Goods and Chattels only. [See *Of Execution*, *infra*.]

^e Terms of
the Law, v.
Liberate.

^e *Liberate*, is directed to the Gaoler for the Delivery of a Prisoner, that hath put in Bail for his Appearance. It also issues out of Chancery to the Sheriff, for the Delivery of Lands and Goods taken upon Forfeiture of a Recognizance. [See *Extent*.] And it lies likewise for the Payment of a Yearly Pension or Sum of Money, granted under the Great Seal, being directed out of Chancery, to the Lord Treasurer, Chamberlains, Barons of the Exchequer, or Clerk of the Hamper, &c.

^f F. N. B. 229.
2 Inst. 281.

^f *Libertatibus Allocandis*, is a Writ that lies to a Court, commanding them to allow a Liberty, upon Claim and Plea of the Grant of it.

2 M.

* *Mandamus*, issues out of the Court of King's Bench to the Head of a College [See 1 Geo. 1. St. 2. ch. 13.] or other Corporation, requiring them to admit or restore some Person into their Society, into an Office, &c. also to a Bishop or Archdeacon, to swear a Churchwarden, an Executor, or Administrator; to a Rector, Vicar, or Churchwarden, to restore a Sexton, &c. [And also in many other Cases to compel Judges of inferior Courts, and ministerial Officers, and other Persons, to exercise their proper legal Jurisdictions, or to admit or restore Parties to the Enjoyment of their legal Rights.] [See 9 An. ch. 20. To render the Proceedings upon Writs of *Mandamus* more effectual.]

^b *Melius Inquirendum*, is a Writ that lieth for a second Inquiry, where the first finding is defective or partial. F.N.B. 255.
Terms of the
Law, v. Me-
lius Inquirend.

* *Mittimus*, is for removing and transferring of Records from one Court to another; and sometimes by *Certiorari* into Chancery, and from thence by a *Mittimus* into another Court. But the Lord Chancellor may deliver such Record with his own Hands, if he pleases. 8 Rep. 168,
169.
2 Inst. 691.
692.
Finch 445.
F.N.B. 22.G.
2 Inst. 52,
596, 592.

A *Mittimus* is also used for a Precept to a Gaoler, to receive and keep safe an Offender sent to Prison.

* *Monstraverunt*, lies for Tenants in antient Demesne, who hold by free Charter, not by Copy, &c. when they are distrained to do unto their Lords other Services and Customs than they, or their Ancestors, used to do. It is directed to the Lord, or to the Sheriff, to charge the Lord, that he do not distrain them for such unusual Services, &c. It lies also when the Tenants are distrained for the Payment of Toll, &c. contrary to their Liberty. F.N.B. 14.
4 Inst. 169.

* *Ne Admittas*, is to be directed to the Bishop, for the Plaintiff, or Defendant, where a *Quare Impedit* or *Affise of Darrein Presentment* is depending, when either Party fears, that the Bishop will admit the other's Clerk. It ought to be brought within six Calendar Months after the Avoidance, otherwise the Bishop may present by Lapse. F.N.B. 37.
Finch. 458.
6 Rep. 61, 62.

^b *Ne Exeat Regnum* (or *Regno*) is to inhibit one from going into foreign Parts without the King's Licence. It may be directed to the Sheriff, to make the Party find Surety, that he will not depart, or else to commit him to Prison; or it may be directed to the Party himself, and if he goes he may be fined. F.N.B. 83.
Inst. 178.
2 Inst. 178.

[This Writ seems to be now no otherwise in Use than for the Benefit of private Persons, to prevent one, on whom they have a Demand ¹ *merely equitable*, flying from Justice; and for that Purpose it issues out of Chancery upon the Application of a Plaintiff, (who has filed his Bill there for any such Demand) and Affidavit of the Demand, and of the Defendant's Design to leave the Kingdom, on which the Defendant must either find Surety in the Sum ordered by the Court to be indorsed on the Writ, according to the Nature and Amount of the Demand, or be committed to Prison.] Wma. 312;
King-2, Wma. 263;

Nisi Prius. [See of the Court of *Affises*, ch. 1. ante.]

* F. N. B. 68, 74. * *Non Omittas Propter Aliquam Libertatem*, is directed to the Sheriff (where the Bailiff of a Liberty refuses or neglects to serve a Writ) to enter into the Franchise, and execute the King's Process himself, or by his Officer. Before this Writ is granted, the Sheriff must return, that he hath sent to the Bailiff, and that he hath not served the Writ. But for dispatch the usual Practice is to send a *Non Omittas* with a *Capias* or *Latitat*, [or without.]

* F. N. B. 165, 2 Inst. 127, 447, 448. * *Non Ponendis in Affis & Juratis*, is granted for the freeing some Persons, from being put upon Juries. It is founded upon *West. 2. ch. 38. Artic. super Chartas, ch. 9.* But see 4 & 5 W. & M. ch. 24. whereby Oath is directed to be made, that the Suggestion is true, before this Writ issues, (and see *Marl. or 52 H. 3. ch. 14.* as also 2 Inst. 130. Where one that hath a Charter of Exemption, may sue the Sheriff for returning him.

Novel Disseisin. [See *Affise of Novel Disseisin, supra.*]

O. *Oyer and Terminer.* [See of the Court of *Affises, ch. 1. ante.*]

P.

* F. N. B. 61, 62. 1 Inst. 165. b. 166. a. & b. 167. a. 169. a. 170. a. 171. a. & b. * *Partitio Facienda* is to set out and assign to every one a distinct Part by Metes and Bounds, where two or more Persons hold Lands or Tenements, as Jointenants, Tenants in Common, or Coparceners, and one or more of them refuse to join in Partition. [See 31 H. 8. ch. 1. 32 H. 8. ch. 32. 8 & 9 W. 3. ch. 31.]

* F. N. B. 69. Finch 444. 2 Inst. 339. * *Pone*, is a Writ whereby a Cause depending in the County-Court, or other inferior Court, is removed into the *Common Pleas*, and sometimes into the *King's Bench*. As when a *Replevin* is depending by Writ out of Chancery, the Plaintiff or Defendant may remove the Plea by *Pone*. The Plaintiff without Cause, and the Defendant with Cause.

A Writ willing the Sheriff (on the Plaintiff's putting in Sureties to prosecute, being a Thing merely supposed) to summon the Defendant to appear, and to answer the Plaintiff's Suit, is also called a *Pone*, from the Words in the Writ, (*viz.*) *Si A. fecerit te securum, &c. Pone B. &c.* [See *supra.*]

* F. N. B. 21 N. 2 Inst. 447, 448. * *Ponendum Sigillum Ad Exceptionem*, is to require a Judge to put his Seal to Exceptions, made in Writing by the Plaintiff or Defendant against the Evidence, Challenge to a Juror, Verdict, or other proceedings before the said Judge. [See *West. 2. or 13 Ed. 1. ch. 34.*]

Premunire. [See B. 3. ch. 3. ante.]

* 2 Inst. 551, Finch 321. Hob. 177. * *Privilege*, lies for an Officer of the Courts at *Westminster*, that is sued in any other Court than where he attends, to remove the Cause to his own Court. An Attorney, &c. being Executor or Administrator, shall not sue or be sued as a privileged Person. [See 18 Ed. 3. St. 5.]

* 5 Rep. 63, 2 Inst. 269. F. N. B. 153, &c. * *Procedendo*, is to send down a Cause (called from an inferior Court to a superior Court, as the Chancery, King's Bench, &c. by Writ of *Privilege, Certiorari, Habeas Corpus, &c.*) directing the Judge of the inferior Court to proceed upon it; it not appearing to the

the higher Court, that the Suggestion is sufficiently proved. [See 21 *Ja. 1. cb. 23.*] This is a *Procedendo in Loquelâ*.

But there is a *Procedendo ad Judicium*, where the Judges of any Court delay the Party, Plaintiff or Defendant, and will not give Judgment for him, when they ought to do it.

Prohibition, issues out of the Chancery, King's Bench, or Common Pleas, to forbid a Judge, &c. in the Spiritual Court, Admiralty, Court of Chivalry, &c. to proceed in a Cause, that belongs to the Common Law Courts, or that belongs not to their Jurisdiction though the Courts at Law can give no Remedy; or it may forbid a Judge of any Temporal Court, to proceed in a Cause depending before him, upon Suggestion that the Cognizance of the Cause does not belong to him. The King's Courts that may award Prohibitions, being informed by Plaintiff or Defendant, or by any Stranger, that any Court Temporal or Ecclesiastical do hold Plea, where they have no Jurisdiction, may lawfully prohibit that Court, as well after Judgment and Execution, as before. [No Prohibition shall go to the Spiritual Courts after Sentence, unless for Defect of Jurisdiction, where it is a Matter not of Spiritual Consuance; for if the Prohibition be for Defect of Trial, it is too late to apply for it after Sentence, unless it be in the Case of a Refusal of Proof of Payment by one Witness, or the like, where the Sentence is the Grievance.] And if the Judge of the inferior Court, or the Party, proceeds notwithstanding a Prohibition, an Attachment may be had against them, or an Action of the Case will lie against them. But upon a Prohibition in the Spiritual Court, the Party may appear and take a Declaration upon the Suggestion, and go to Trial. And if thereupon it be found against the Plaintiff in the Prohibition, a Writ of Consultation will be awarded with Costs. [See 8 & 9 *W. 3. cb. 11.*]

In a Suggestion for a Prohibition to the Ecclesiastical Court in a Cause of Tithes and other Spiritual Profits, the Suggestion must be proved to the Court by two sufficient Witnesses within six Months after such Prohibition granted; provided the Suggestion does not contain a Negative. [See 2 & 3 *Ed. 6. cb. 13.*]

An *Inhibition* is commonly issued forth out of a higher Court-Christian to an Inferior Court-Christian, to stop Proceedings; and is in the Nature of a Prohibition. [See *Stat. De Circumspecte Agendis*, 13 *Ed. 1. St. 4. Artic. Cler.* 9 *Ed. 2. cb. 1.* 45 *Ed. 3. cb. 3.* 50 *Ed. 3. cb. 4.* and 2 *Inst.* 601 to 618.]

Proprietary Probanda, is to inquire before the Sheriff of the Property of Goods distrained, when the Defendant claimeth Property upon a Replevin sued.

Protection cum Clausula Volumus, is an Immunity given by the King to a Person in his Service, to be free against Suits of Law for one Year; and so from Year to Year. Thus the King may grant a Protection to his Debtor, that he be not sued till the King is paid his Debt. [See 25 *Ed. 5. Sr. 5. cb. 19.*] There are many Sorts of Protections; but they are rarely used, being in many Cases ousted by Act of Parliament in personal Actions. [See if this Writ is now at all in Use.] [But see 12 & 13 *W. 3. cb. 3.* of Privilege of Parliament, &c.]

* Terms of
the Law, v.
Proviso.
2 Ld. Ray.
1083.
2 Str. 1055.

* *Proviso*, is where the Plaintiff forbears to bring his Cause to Trial, and the Defendant takes a *Venire Facias* directed to the Jury with this Clause (*viz. Proviso Quod, &c.*) provided that if the Plaintiff taketh out any Writ to that Purpose, the Sheriff should summon but one Jury upon them both. This is called going to Trial by *Proviso*.

* F. N. B. 32,
33.
1 Inst. 344.
a. & b.
2 Inst. 356,
&c.

* *Quare Impedit*, lies when one is disturbed by another in his Right of Advowson, to present a Clerk to a Church when it is void. It differeth from a *Darrein Presentment*, because that lies where one and his Ancestors formerly presented; [See Affise of *Darrein Presentment*, *supra*.] whereas a *Quare Impedit* lies also for a Purchaser. [See *West. 2. ch. 3.* Also 7 *An. ch. 18.* And see of an *Advowson*, B. 2. ch. 2. *ante*. And of an *Action of Quare Impedit*, *supra*.]

* F. N. B. 48.
Terms of the
Law, v. Quare
Incumbravit.

* *Quare Incumbravit*, lieth after a Recovery in a *Quare Impedit* or Affise of *Darrein Presentment*, against a Bishop, who within six Months after the Death of the Incumbent admitteth a Clerk to the Benefice, notwithstanding the Writ of *Ne admittas* served on him; this Writ may be brought after the six Months. If the Bishop doth incumber the Church before a *Ne admittas*, then the Party shall have a *Quare Impedit*; for the Ordinary can have no Notice till the *Ne admittas*. A *Quare Incumbravit* lieth always hanging the Plea.

* F. N. B. 47.

* *Quare non admittit*, is where one hath recovered in a Plea of *Advowson*, and the Bishop will not admit his Clerk upon Pretence of *Lapse, &c.*

* Terms of
the Law, v.
Quo Minus.

* *Quo Minus*, lies for the King's Farmer or Debtor in the Court of *Exchequer*, because by the Detaining of his Debt he is the less able to pay the King. This Writ goes into *Wales*, as well as the *Subpoena* out of the Office of Pleas.

* 2 Inst. 279,
&c. 495. &c.
F. N. B. 229,
230.
Finch 322.
2 Inst. 282,
495, 497.

* *Quo Warranto*, lieth against any Person or Corporation that usurps any Franchise or Liberty against the King. [See 18 *Ed. 1. St. 2. ch. 20.*]

* Note, That in a *Quo Warranto*, final Judgment is given against the King, or for the King. But there is a *Salvo Jure* for the King to save any other Title than that adjudged on the *Quo Warranto*.

* F. N. B. 71,
72.

* *Recaption*, is to recover Damages, for him whose Goods being distrained for Rent, Services, &c. (but not for Damage-feasant upon a new Trespass) are distrained again for the same thing, hanging the Plea in the County-Court, or before the Justices.

* F. N. B. 76,
2 Inst. 339.

* *Recordare facias doquelam* (called a *Refalo* by contracting it into the initial Letters) is to command the Sheriff to make a Record of the Proceedings in the County-Court, &c. by Writ or without Writ, and to send it up to the King's Bench or Common Pleas. It is in the Nature of a *Certiorari*. The Plaintiff may remove the Plea in the County without Cause; but the Defendant cannot remove it without Cause shewn in the Writ, as upon a Plea of Freehold,

hold, &c. But if the Plaint is in another Court, neither the Plaintiff or Defendant can remove it without Cause. [See *Accedas ad Curiam, Certiorari*, and *Pone*, *supra*.]

Recordo et Processu mittendis, for a Record and the whole Proceedings in a Cause out of an inferior Court into a higher Court at Westminster, &c.

Re-extent, is a second Extent upon Lands or Tenements, upon Complaint that the former Extent was partially made, &c. [See *Extent*, *supra*.]

* *Replevin*. [See *Action by Replevin*, *supra*.]

There is also a Writ call'd *Secunda Deliberatione*, which is a second Writ of Replevin, granted where Cattle or Goods are distrained and afterwards replevied; yet by Reason of some Default in the Party that took out the Replevin, the Cattle are adjudged to him that distrained them; so that this Writ lieth for the replevying the same again, upon giving Security to re-deliver them, if the Distress is justified.

^a F. N. B. 68.
¹ Inst. 145. b.

Rescous, lieth where one doth distrain for Rent, Services, Damage-seafant, and as he is driving the Cattle towards the Pound, another rescues them, or taketh them from him before they are impounded. [See of *Replevin* and *Rescous*, B. 2. ch. 2. ante.]

^a F. N. B. 101, 102.
Finch 459.

* *Restitutio Temporalium*, is directed to the Sheriff, to restore the Temporalities, or the Barony, to a Bishop elected and confirm'd.

^a F. N. B. 169.
¹ Roll. Abr. 880, 881, 882.
^a F. N. B. 74.

* *Returno Habendo*, is where Cattle are distrained and replevied, and the Person that took the Distress justifies the Taking, and proves it to be lawful, upon which the Cattle are to be return'd to him. This Writ also lies, when the Plaint is removed by *Recordare* into the King's Bench or Common Pleas, and he whose Cattle are distrain'd makes Default, and doth not prosecute his Suit. [See *West. 2. ch. 2.*]

* *Right* (or a *Writ of Right*) is a Writ of the highest Nature in Real Actions, to recover not only the Possession, as in other Writs, but the Property. It hath the most assured and final Judgment. The Writs of Right are, *Right Patent*, *Right Close*, *Right of Advowson*, *Right of Dower*, &c.

^a 1 Inst. 158. b.

Right Patent, lies only for him that hath a Fee-simple in the Lands or Tenements sued for (not in a Rent-Charge, Common, &c.) against Tenant of the Freehold at least.

^a F. N. B. 1.
², &c.
Finch 312.

Right Close, where one holds Lands or Tenements by Charter in ancient Demesne, in Fee-simple, Fee-tail, or for Term of Life, or in Dower, and is disseised. It is directed to the Bailiff of the King's Manor, or to the Lord of antient Demesne, if the Manor is in the Hands of a Subject, commanding him to do Right in his Court.

^a F. N. B. 11.
⁴ Inst. 269.

Right of Advowson, lies only for him that hath an Estate, or Right of Estate, in the Advowson to him and his Heirs in Fee-simple, and is disturbed to present upon an Avoidance; having not brought any Action of *Quare Impedit* or *Darrein Presentment* within six Months. [See of an *Advowson*, B. 2. ch. 2. ante.]

^a F. N. B. 30.

Right of Dower, lies where a Woman hath received only Part of her Dower, and demands the Residue against the same Tenant in the same Town, shewing the Right to recover such Residue. It shall be directed to the Heir of the Husband, or to his Guardian.

^a F. N. B. 7.
⁸, 147.
¹ Inst. 32. b.
³³, a. 38. b.
³⁹, a.

Dower *Unde nihil habet*, is where the Wife hath receiv'd no Part of it; as where a Man having Lands or Tenements hath made no Assurance of any Part thereof to his Wife, so that she is driven to sue for her Dower against the Heir or his Guardian. [See 20 H. 3. ch. 1. And of an *Estate in Dower*, B. 2. ch. 1. ante.]

There are other Writs of Right in their Nature, as *De Rationabili parte*, and *Ne injuste vexes*, but now of little or no Use.

S.

Scandalum Magnatum, is a Writ to recover Damages for scandalizing of a Peer. [See of the *Nobility*, &c. B. 1. ch. 4. ante.]

a 1 Inst. 290.
b. 291.
Finch 477.

Scire Facias, is to call one to shew Cause why Execution of a Judgment should not be made out, or if he can say any Thing in Bar of Execution. It is not to be granted till a Year and a Day after the Judgment, [unless where the Parties to the Judgment are changed by the Death, Marriage, &c. of either of them. See of *Scire Facias* Tit. *Execution*, infra.] It is in the Nature of an Action, because the Defendant may plead to it. [See *West*. 2. ch. 45.] Within a Year Execution may be by *Capias ad Satisfaciendum*, *Fieri Facias*, and *Elegit*. It lies not against the King.

b 2 Ld. Ray,
1048, 1253.
c 3 Inst. 235,
236.

Significavit, is the same with the *Excommunicato Capiendo*; tho' the Ordinary's Certificate into Chancery is sometimes so call'd. *Significavit* is an emphatical Word in the Writ. [See *Excommunicato Capiendo*.]

d F.N.B. 36,
37.

Spoliation (a Way of suing, but not mentioned as a Writ in the Register) lieth for one Incumbent against another Incumbent in the Spiritual Court, where the Right of the Patronage does not come in Debate; as where a Parson is made a Bishop, and has a Dispensation to hold his Benefice, and the Patron presents another Incumbent. Here the Bishop shall have a *Spoliation* against the new Incumbent, &c.

Subpœna, is the leading Procefs in a Court of Equity, to call Persons to appear in that Court. [See of the *Court of Chancery*, ch. 1. *supra*.]

There is also a *Subpœna* made Use of in the Court of Exchequer in the Office of Pleas. [See of the *Court of Exchequer*, ch. 1. *supra*.] [There is also a *Subpœna*, issuing out of the Courts of Law and Equity, to compel Witnesses to appear to testify the Truth in those Courts.]

e F.N.B. 236.
Finch 453.

Supersedeas, may go in several Cases. But in general it is a Writ to stay further Proceedings in a Suit, &c.

f F.N.B. 80.
D. 81, 82.
3 Wms. 103.

Supplicavit issues out of Chancery directed to the Sheriff, &c. for taking Surety of the Peace, when one is in Danger of being hurt in his Body or Goods.

Sur Disseisin in le Poft, is used for passing Common Recoveries.

T.

De Telonio Effendi Quietum. [See *Effendi Quietum*, &c.]

Teflatum, lieth where a Defendant in a Personal Action cannot be arrested upon a *Capias* in the County wherein the Action was laid; and therefore upon testifying or returning *Non est inventus* by

by the Sheriff, this Writ shall be sent into another County, where such Person is thought to be. [See *Latitat*, *supra*.]

^a *Tolt*, is for the Plaintiff to remove a Cause depending in a F.N.B. 4.A. Court-Baron into the County-Court. Finch 444.

^b *Trespas*, lies for every Manner of Trespas done, either directly F.N.B. 86, to the Sheriff to end the Matter in the County-Court, or returnable 92. in the King's Bench or Common Pleas. The Words *Vi et Armis* shall be in the returnable Writs, but not in the former. But in Writs of Trespas upon the *Cafe* those Words must not be inserted, tho' returnable in the King's Bench or Common Pleas.

V.

Venditioni Exponas, is a Judicial Writ directed to the Sheriff, requiring him to sell the Goods, which he had formerly levied, to satisfy the Judgment.

Venire Facias, lies to the Sheriff, to cause a Jury to appear, when a Cause is brought to Issue. [See 35 H. 8. *cb*. 6. 27 El. *cb*. 6. 4 Ann. *cb*. 16.] It is also the common Process upon any Presentment, not being Felony, where no Process is specially appointed by Statute.

Ventre inspiciendo,^c is a Writ to search a Woman, that says she is with Child, and thereby withholdeth Lands from the next Heir. (591.) The Trial thereof is by a Jury of Women.

^d *Vi Laica Removenda*, is directed to the Sheriff, to remove all Lay Force, where two Persons contend for a Church, and one of them enters into it with a Number of Laymen, and holdeth out the other *Vi et Armis*. But the Sheriff ought not to remove the Incumbent out of the Church, whether he is there by Right or Wrong. 3 Inst. 161.

W.

^e *Waste*. [See of *Waste*, B. 2. *cb*. 4. *ante*, and of *Actions of Waste*, *supra*.] F.N.B. 55.

A Writ of *Estrepement* is a Prohibition of Waste in Real Actions. F.N.B. 60.

^b *Withernam*, is directed to the Sheriff, for the taking of as many Beasts or Goods of the Party, when Cattle distrained are drove by him out of the County, or into an unknown Place, &c. so that the Sheriff cannot make Deliverance of them upon a Replevin, &c. [See *West*. 2. *cb*. 2. and of an *Action by Replevin*, *supra*.] F.N.B. 68.

The first Ground of a Suit in the Common Pleas is an Original, by *Præcipe* or *Pone* to summon, [See of a *Præcipe* of Writs in *Principio*, and *Pone* in the Catalogue of Writs, *supra*.] and is a Warrant to every *Capias* to arrest.

An *Arrest* is the Apprehending or Restraining one's Person by Process, in Execution of the Command of some Court, or Officer of Justice. There may be four Defendants Names put in one Writ. But you can have but one Plaintiff in a Writ, unless it be in a Joint Action. The *Capias* is to be directed to the Sheriff, to take the Body of the Defendant, who by his Under-Sheriff grants a Warrant thereon to his Bailiffs, to arrest him: [But see 12 G. 1. *cb*. 29. and 5 G. 2. *cb*. 27. *infra*.] [See 1 H. 5. *cb*. 5. Con- 2 Inst. 665, cerning &c.]

cerning the *Addition* of the Defendant's Mystery, &c. in original Writs of Actions Personal, &c. and of *Outlawry*, *post*. Also 5 *El. ch. 23*. Where in an *Excommunicato Capiendo*, if the excommunicate Person hath not a sufficient *Addition*, he shall not incur the Penalties of the Statute. See also 27 *El. ch. 7*. Concerning the *Addition* of Jurors, &c.]

By 8 *El. ch. 2*. If one doth maliciously, or for Vexation or Trouble, cause or procure another to be arrested in the inferior Courts at the Suit of a third Person, where there is no such Person, or without his Consent; the Offender shall suffer six Months Imprisonment, and forfeit treble the Damages and Costs sustained, to the Party grieved; and moreover forfeit ten Pounds to the Plaintiff, if known. [See 43 *El. ch. 6*. 6 *Geo. 1. ch. 21*. §. 53. Against Sheriffs or others making out Warrants for the arresting Persons upon Process, without having any Writ, or other Process in their Custody to justify the same.]

^a 1 *Saund.* 228. ^b *Lutw.* 1571. ^c 1572. ^d See p. 75. ^e *ante*. ^f 1 *Ventr.* 306. ^g 9 *Rep.* 66. ^h An Action will not lie, for arresting one without Cause, unless it is for an exorbitant Sum, on purpose that the Defendant should lie in Prison for Want of Bail. [2y.]

It is not sufficient for the Bailiff, ^b who hath the Sheriff's Warrant upon the Writ, to say, *I arrest you at the Suit of A.* but he must lay hold of him, or touch him; otherwise it is no Arrest. ^c If a Bailiff lays hold of one by the Hand (whom he hath a Warrant to arrest) as he holds it out of a Window, this is such a Taking of him, that the Bailiff may justify the Breaking open of the House to carry him away. ^d An Arrest in the Night is lawful.

[See 22 & 23 *Car. 2. ch. 20*. Which prohibits the carrying Prisoners to Victualling-Houses without their Consent, or taking of them any illegal Fees for waiting, &c. And also 32 *G. 2. ch. 28*. For the Relief of Debtors with respect to the Imprisonment of their Persons.]

^e *Finch* 355. ^f 6 *Rep.* 52, 53. ^g 9 *Rep.* 68. ^h Note, That ⁱ Peers of the Realm are not to be arrested, unless upon Contempts for rescuing, &c. Against these the Process is by Distress infinite (i. e.) continual Distress. Clergymen doing Divine Service [See 50 *Ed. 3. ch. 5*. 1 *Ri. 2. ch. 15*.] shall not be arrested. Corporations and Companies too must be made to appear by

ⁱ *Finch* 353. ^j 4 *Inst.* 24. ^k 25. Distress infinite of Issues upon their Lands; ^l which are chargeable with these Issues into whose Hands soever they come. ^m Members of Parliament are privileged from Arrests, &c. [But see the Statutes, *infra*.] and Members of the Convocation. [See the 8 *H. 6. ch. 1*.]

ⁿ 1 *Ventr.* 1. ^o 299. ^p *Hob.* 177. Also ^q Clerks, Attornies at large, &c. belonging to the Courts of Justice [so long as they continue to practice,] are not to be arrested: But must be sued by Bill of Privilege; otherwise they may plead their Privilege, and come off without Bail. ^r Persons attending upon any Courts of Record, upon Business there, are to be freed and protected from Arrests by mean Process, but not upon Execution; though the Sheriff may then be committed for a Contempt.

One that is *subpœna'd* for a Witness, may have a Writ of Privilege, to protect him from Arrests, in going and returning.

^s 3 *Inst.* 140. ^t 141. ^u 1 *Lev.* 159. ^v No Arrests ought to be within the King's Palace at Westminster, &c. where his Royal Person resides; nor of any the King's Servants in Ordinary in any other Place, without Notice first given to the Lord Chamberlain, that he remove them, or make them pay their

their Debts. No Arrests ought to be in *Westminster-Hall*, and other Courts of Record. [*Quere*, If the Party has no Business there.] No Arrests are to be in *Wales*, the *Counties-Palatine*, or the *Cinque-Ports*, by Writs issuing from *Westminster-Hall*. [But special *Latitats* and *Capias*'s out of the Courts at *Westminster*, directed to the Chancellor of the Duchy, the Chamberlain of *Chester*, or the Warden of the *Cinque-Ports*, (or as the Case is) are constantly issued, commanding them by Writ under the Seal of the County-Palatine, &c. to charge the Sheriff to take the Body of the Defendant, who is thereupon arrested in the County-Palatine or *Cinque-Ports*: And *Quo Minus*'s and *Subpoenas* go into *Wales* from the *Exchequer*: Besides which, the Right to arrest in *Wales* and the *Counties-Palatine* upon Process issued out of the Courts at *Westminster*, is recognized by the following Statute; for,

By 11 & 12 W. 3. ch. 9. No Sheriff or other Officer in *Wales*, or the *Counties-Palatine*, shall hold any Person to special Bail, upon any Process issued out of any of the Courts at *Westminster*, unless an Affidavit be made and filed in the Court of the Cause of Action, and that the same amounts to twenty Pounds. Bail shall not be taken for more than is expressed in the Affidavit.]

[Note, This Statute is not repealed * by the following Acts.]

By 12 G. 1. ch. 29. and 5 G. 2. ch. 27. No Person shall be arrested, or held to special Bail in a superior Court, where the Cause of Action does not amount to 10 l. or upwards; nor in an inferior Court where the Cause of Action does not amount to 40 s. or upwards; nor unless Affidavit be first made of the Cause of Action, and the Sum specified in the Affidavit, indorsed on the Writ; but shall be served personally with a Copy of the Process.

[Note, This Affidavit to hold to Bail, must be * clear and absolute, and not closed with a Reference, not even in the Case of an Action brought by * Executors or Administrators.]

By 29 Car. 2. ch. 7. Arrests and Service of Process on the * Lord's Day, (except on Escape Warrants, by 5 A. ch. 9.) are void, and the Persons serving the same shall suffer Damages, as if they had done the same without Warrant; except in Cases of Treason, Felony, and Breach of the Peace.

N. B. Since this Act, Service of a Citation upon a Sunday hath been held good; but *Quere*. Whether the Delivery of a Declaration on a Sunday will be good.

By 12 & 13 W. 3. ch. 3. Actions may be commenced and prosecuted in the Courts of Record at *Westminster*, *Chancery*, *Exchequer*, *Duchy*, *Admiralty*, and in Cases matrimonial and testamentary, in the *Archies*, *Prerogative Courts* of *Canterbury* and *York*, *Delegates* and *Courts of Appeal* (By 11 G. 2. ch. 24. In any Court of Record, or Court of Equity or *Admiralty*, or any Court having Cognisance of Causes matrimonial, or testamentary) against any Peer, or any Person intitled to Privilege of Parliament, immediately after Dissolution or Prorogation, till a new Parliament shall meet, or the same is again assembled; and immediately after Adjournment of both Houses for above fourteen Days, till re-assembled.

7 N

Provided

* Dies Dominicus non est dies Juridicus. 2 Inst. 264.

Provided that the Person of any Member of the House of Commons, or any intitled to Privilege of Parliament, shall not be subject to be arrested during the Time of Privilege. But Persons having Cause of Action against Lords of Parliament, during such Time as aforesaid, may have such Process out of the King's Bench, Common Pleas, or Exchequer (or by 11 G. 2. ch. 24. out of the Great Sessions in Wales, Courts of Session in the Counties-Palatine, Courts of King's Bench, Common Pleas and Exchequer in Ireland) as they might out of Time of Privilege; and may have Process against any of the House of Commons, or other Person intitled to Privilege of Parliament, during such Time as aforesaid, out of the same Courts by Summons, and Distress infinite, or by original Bill and Summons, Attachment, and Distress infinite thereupon, till they appear, or file Common Bail. [See 1 Ja. 1. ch. 13. post, Of Execution.]

The King's original and immediate Debtor is not to have Privilege of Parliament, either in Law or Equity. Nevertheless such Debtor being a Lord of Parliament, shall not be arrested, or being a Member of the House of Commons, shall not be arrested, during the Continuance of the Privilege of Parliament.

[See in this Statute concerning the Method of proceeding in Courts of Equity, against any intitled to Privilege of Parliament.]

By 2 Ann. ch. 18. Any Actions may be prosecuted in the Courts at Westminster against any Officer of the Revenue, or other Officer of publick Trust, for any Misdemeanor, Forfeiture, or Breach of Trust, relating to such Office or Trust, though such Officer, &c. be a Peer or Member of Parliament, or otherwise intitled to Privilege of Parliament.

Provided, That the Person of such Officer, being a Peer or Lord of Parliament, shall not be arrested; nor if a Member of the House of Commons, during the Time of Privilege; but Summons, Distress infinite, &c. shall be issued out till the Party appears.

By 7 Ann. ch. 12. All Process whereby the Person of any Ambassador or other Publick Minister of any foreign Prince or State authorized and received as such by the King, or of his Domestick, or Domestick Servant, may be arrested, or his Goods distrained, seized or attached, shall be adjudged void. And the Persons suing forth such Process, their Attornies and Solicitors, and the Officers executing the same, being convicted thereof by Confession, or the Oath of one Witness, before the Lord Chancellor, and the Chief Justices, or any two of them, shall suffer such Penalties, and corporal Punishment as they, or any two of them shall think fit. But no Merchant or Trader within the Description of any of the Statutes against Bankrupts, who shall put himself into the Service of any such Ambassador, &c. shall have or take any Manner of Benefit by this Act; and no Person shall be proceeded against as having arrested the Servant of an Ambassador, &c. by Virtue of this Act, unless the Name of such Servant is registered in the Office of one of the Secretaries of State, and transmitted to the Sheriffs of London and Middlesex, who must hang it up in some publick Place in their Office.

By 8 & 9 W. 3. ch. 27. All pretended privileged Places are taken away. [See 9 Geo. 1. ch. 28. 11 Geo. 1. ch. 22.]

See the Mutiny Acts, whereby Soldiers voluntarily inlisting, are privileged from being arrested for Debts under ten Pounds. And 5 Geo.

Geo. 2. ch. 30. Concerning *Bankrupts* in going to, staying with, or coming from, the Commissioners, &c. who ought not to be arrested.

In the *King's Bench* the first Process is a *Bill of Middlesex* only. But if the Defendant lives in any other County than *Middlesex*, there lies a *Latitat* directed to the Sheriff of that other County, [though in all personal Actions in the *King's Bench*, except when commenced by Original or Attachment of Privilege, a *Bill of Middlesex* is supposed to have first issued] and in the *King's Bench* one may also proceed by *Original*.

In the *Exchequer* the Process is by *Subpœna* or *Quo Minus*; which go into *Wales*, the *Counties-Palatine*, &c.

In Courts where Writs lie not, the Suit is begun by *Plaint*, (*i. e.*) by entering the Action, and Cause of Complaint; as in the County-Courts, Courts-Baron, &c. It always concerns Common Pleas.

The King only can begin by *Inquiry*. *Inquiry* for the King is ^{a Finch 251, 323, &c.} when Matter is found by a Jury called an *Inquest of Office*; ^{2 Inst. 688, 689, &c.} whether it is by Officers themselves, (as *Sheriffs*, &c.) *Virtute Officii*, or ^{5 Rep. 54, 55, &c.} *Virtute Brevis*, or by *Commission* to them directed. [See 2 *Ed. 6. ch. 8. Of Offices.*] ^{1 Inst. 77. b.}

III. ^b At the Common Law none could be outlawed but for Fe- ^{Of Outlawry.} lony and in Actions *Vi & Armis*. But since by divers Statutes Out- ^{a Finch 346, 355, &c.} lawry lies in many Civil Actions, as in *Cafe*, *Detinue*, *Account*, ^{1 Inst. 128. b.} *Debt*, *Covenant*, *Annuity*, &c.

If the Defendant is not taken on the Return by the Sheriff of the *Capias*, *Alias*, and *Pluries Capias*, (for if one Precept is not served, another of the like Nature shall go forth till it be served, if possible) one may have an *Exigent* and *Proclamation* in Order to an *Outlawry*; [See 31 *El. ch. 3.*] and then the *Exigent* being returned by the Sheriff of the County, certifying the Non-appearance, the Person is outlawed, and a general *Capias Utlagatum* may go to arrest the Body of the Defendant, or a special *Capias Utlagatum* against his Body, Lands, and Goods.

^c By *Outlawry*, a Man is disabled to sue, or to have the Benefit of the Law; for the Word *outlawed*, implies, that he is put out of the Law. But he may bring *Error* [to reverse the Outlawry] or *Attaint*, ^{a Lit. 197, 1 Inst. 122. b. 128. a. & b. 288. b. 6 Rep. 53.} [if outlawed only in a personal Action] [See the 23 *H. 8. ch. 3.*] Yet Outlawry does not disable, nor does *Error* lie upon it, till it appears of Record, either by Return of the *Exigent*, or Removal of the Outlawry by *Certiorari*. And of this Disability all Men may take Advantage, by pleading the Outlawry against him; which Plea shall stop his Proceedings, till he hath reversed the Outlawry. Outlawry in a *County-Palatine*, &c. shall not disable the Plaintiff to sue in any Court at *Westminster*.

An *Executor* or *Administrator* shall not be disabled by Outlawry: For he sues in the Right of the Testator or Intestate. And by the like Reason a *Mayor* and *Commonalty* shall maintain their Action, though the *Mayor* is outlawed. [See *Of Excommunication*, *ch. 1. ante.*] A *Woman* cannot properly be said to be outlawed, but *seised*, as one left out, and not regarded; because *Women* are not sworn in *Leets* and *Turns* to bear Allegiance to the King. Therefore an *Im-*

^a *Minor, qui infra ætatem duodecim annorum fuerit, utlagari non potest.*
¹ *Inst. 128. a.*

fant under twelve Years of Age cannot be outlawed. A Peer of the Realm cannot be outlawed in civil Causes, by Reason of his Dignity, for it cannot be intended, that a Peer is without Lands.

Judgment of Outlawry is given by the Coroners in the County, in all Places, except *London*; where the Lord Mayor by Custom is Coroner, and Judgment of Outlawry is given by the Recorder.

If one appears *before* he is returned outlawed, he may supersede the Exigent, and appear without Bail, be the Debt never so great. So he may if he is returned outlawed upon a *Quare clausum fregit*, as the usual Course is.

• 1 Inst. 128. b.
259. b.
• 1 Inst. 670.

An Outlawry may be *reversed*, whether the Party is taken or not. 1. By *Motion* to inform the Court of some Fault in the Proceedings. 2. By *Plea* which is out of Use. 3. By the King's *Pardon*. 4. By *Writ of Error*. The first Way by *Motion* is the most usual; for almost any Objection will serve. [See the Statute of *Additions* ^b, 1 H. 5. ch. 5. and also 31 El. ch. 3.] He who thus reverses an Outlawry, must have an Attorney of Record present, to undertake an Appearance to a new Original; he must also put in special Bail, if the Debt or Damage amount to 10 l. or above.

An Outlawry after Judgment cannot be reversed, till the Plaintiff hath acknowledged Satisfaction on Record, or the Defendant hath brought the Money into Court. [See Of *Execution*, in *fine*, *post*.]

By 4 & 5 W. & M. ch. 18. In the King's Bench, one may appear by Attorney, and reverse an Outlawry; except in *Treason* and *Felony*; and without Bail, except where special Bail shall be ordered by the Court ^c. And if any Person is taken upon a *Capias Utlagatum*, other than for *Treason* or *Felony*, the Sheriff (where special Bail is not required by the Court, may take an Attorney's Engagement to appear for him, and may thereupon discharge the Defendant. And where special Bail is required, he shall take the Defendant's Bond in double the Sum with one or more Sureties, to appear by Attorney, &c. and then may discharge him.

• 2 Str. 1178.

[See of the County-Court, ch. 1. *ante*. Of *Process*, and Of *Forfeiture*, ch. 5. *post*.]

• Of Appearance and Bail.

IV. If the Defendant is arrested, the Sheriff by his Officers takes a Bond, (according to the Nature of the Action) either for his *Appearance*, or for *special Bail*. If the Action requires only an *Appearance*, then an Attorney for the Defendant may back the Sheriff's Warrant, by indorsing that he will appear for the Defendant at the Return of the Writ, and file *common Bail*. [See 23 H. 6. ch. 10. and 13 Car. 2. ch. 2. *infra*.]

[But since 12 G. 1. ch. 29. which see *ante*, the Sheriff does not execute the Writ, where it does not require special Bail, but only a Copy of such Writ is served on the Defendant by the Plaintiff's Attorney; and as to bailable Writs, the Sheriff takes a Bond in double the Sum sworn to, and indorsed on the Writ, for the Defendant's Appearance at the Return thereof.]

If the Defendant does not appear (*i. e.*) does not find special Bail, at the Return of the Writ, or within such Time after, as is allowed by the Rules of the Court, the Plaintiff's Attorney must call on the Sheriff for the Return of the Writ, or for an Answer indorsed thereon, whether the Defendant is arrested or no; or may serve him with a Rule to return the Writ, which if he do not, he may be amerced,

amerced, or he may be summoned before a Judge, to shew Cause, &c. Where a *Cepi Corpus* is returned, and yet no Bail, there may be a Rule to bring in the Defendant's Body, &c. [And if the Sheriff neglect to bring in the Body within the Time prescribed by the Rule, the Court will grant an Attachment against him, or amerce him.] But generally the Sheriff having taken good Bail, will on a Rule return a *Cepi*, and assign the Bail-Bond to the Plaintiff, and often on Request without a Rule; and then you may arrest the Defendant and the Bail on the Bond in your own Name. [See 4 *An. ch. 16. infra.*] This is called Bail to the Arrest. [You cannot arrest the Defendant, or his Bail, on the Bail-Bond, but can only serve them with a Copy of a Writ to compel their Appearance, for they are not obliged to find special Bail a second Time. And the Plaintiff is not obliged to accept an Assignment of the Bail-Bond, but may proceed against the Sheriff.] 1 *Ld. Ray.* 722.

An Officer of the Court is always in Court, and must answer an Action, else he will be condemned. Thus it is of a Prisoner in the same Court. [See 4 & 5 *W. & M. ch. 21. infra.*]

There are but three Ways by which a Defendant can appear, (*viz.*) in proper Person, by Attorney, by Guardian. The first two are the usual Ways of Appearance; the other is a Privilege, given to Infants, or those that are under Age. [See what Time, after the Return of a Process, the Defendant hath, to cause his Appearance or common Bail to be entered and filed, 5 *G. 2. ch. 27.*]

The Manner of Appearing is by Bail.

Bail (*Ballium*, from *Bail*, a Guardian, Keeper, or Gaoler) is a 4 *Inst.* 178. Freeing or setting at Liberty one arrested or imprisoned upon an Action, under Surety taken for his Appearance at a certain Day and Place. The Prisoner is supposed to be delivered into the Custody of those, that bind themselves for his Appearance, who are to answer the Party, if they do not produce him.

Bail is either *Common* or *Special*. *Common*, because any Sureties are taken of Course, as *John Doe* and *Richard Roe*, and is nothing but a mere Form of Appearance. *Special*, because in Causes of greater Weight, the Sureties must be Men of *special* Substance and Estate, answerable to the Action. This is to be given at the Return of the Writ before a Judge, or before Commissioners in the Country. [See 4 & 5 *W. & M. ch. 4. post.*] When accepted, it is to be filed. It doth engage to satisfy the Condemnation and Costs, or render the Defendant to Prison. The Bail upon a Writ of Error cannot render the Party in their Discharge, because they are bound to pay the Money, if Judgment is affirm'd. 4 *Inst.* 179.
5 *Rep.* 70, 71. [See 3 *Ya. 1. ch. 8.*] In the *King's Bench*, when the Proceedings are by Bill, the Bail are not bound in a certain Sum to the Plaintiff; but only undertake that the Defendant shall pay the Condemnation-Money, or render his Body to Prison. The Recognizance, being General, shall be reduced to a Certainty by the Judgment. [But the Bail shall not be liable to a larger Sum than is sworn to, and indorsed on the Writ.] But in the *Common Pleas* the Bail are bound to the Plaintiff in a certain Sum. This is Bail to the Action. If the Defendant is indebted to the Plaintiff to the Value of ten Pounds, or upwards, he may be forced to put in Special Bail. But in Actions on the Case for Words, Common Batteries, Trespas and Ejectment, Covenant, unless to pay Money, for Breach of a Condition, upon penal Statutes,

tutes, a By-Law, and upon Bonds with collateral Conditions, Special Bail is not usually required, [unless by Special Order of the Court or one of the Judges.] Neither will Special Bail be required against *Heirs, Executors, or Administrators*, in any Action brought against them for the Debt of the Testator or Intestate; unless they have wasted the Goods of the Deceased, and the Action is grounded on a *Devastavit*. Neither will they be forced to give Bail upon a Writ of Error. But in the Courts of *London*, and in other ^a inferior Courts, *Heirs, Executors, and Administrators* must give Special Bail. ^b Where the Husband is arrested for the Act of his Wife, he is bound to appear for himself and his Wife, and to put in Special Bail, if the Action requires it. If the *Wife* only is arrested upon a Writ against the Husband and Wife, she shall be discharged by *Superfedeas*, upon entring Common Bail.

[See 11 & 12 *W. 3. ch. 9.* 12 *G. 1. ch. 29.* and 5 *G. 2. ch. 27. ante.*]

^a 2 *Lev. 204.*
¹ *Danv. Abr.*
681.
^b 1 *Roll. Abr.*
583.

Special Bail ^c is required in the *King's Bench*, in all Cases of Removal by *Habeas Corpus*, Writ of Privilege, *Certiorari*, &c. where Bail was required in the Court below (except in the Case of *Heirs* and *Executors* or *Administrators*, as above.) Privileged Persons of the Court shall not regularly be forced to find Special Bail. But if they bring Actions against another Person (who is not privileged) they ought to have Special Bail to their Actions, though under 10 *l.* [24. But certainly this cannot be so since the Statutes above-mentioned.]

The Cognizors of Bail must justify themselves in open Court, either by Oath made in Court, or before one of the Judges of the Court, or by *Affidavit* before such Commissioners, as took the said Bail, that they are House-keepers and worth double the Plaintiff's Debt, over and above their Debts.

^d 4 *Inst. 180.* ^e Pledges for the Plaintiff are now set down only as Matter of Form. [See 4 *An. ch. 16.*]

10 *Rep. 99.*
&c.

By 23 *H. 6. ch. 9.* *Sheriffs, &c.* shall let out of Prison all Persons arrested by them in any Personal Action, or on Indictment of Treason, upon reasonable Surety of sufficient Persons, &c. to keep their Days in such Place, as the Writ, Bill, or Warrant shall require; except Persons in their Ward by Condemnation, [See 2 *H. 5. ch. 2.*] Execution, *Capias Utlagatum*, or *Excommunicatum*, Surety of the Peace, or committed by Command of any Justice, or Vagabonds refusing to serve according to the Statute of Labourers.

The Sheriff, &c. shall take no Bond of any such Person arrested, but for Appearance at the Day and Place, and to themselves only. Bonds otherwise taken, by Colour of their Office, to be void; and the Sheriff, &c. to forfeit treble Damages to the Party grieved, and 40 *l.* to be divided betwixt the King and Prosecutor.

10 *Rep. 100.* *Sheriffs, &c.* could not let such Persons arrested to Bail before this Act.

The Act extends only to Persons in their Custody, and not to an Obligation made to the Sheriff, &c. or to the Plaintiff for Payment of the Money due on an Execution by *Fieri Facias*.

An Obligation with a Condition to save the Sheriff harmless (who let one to Bail, who was not bailable) is void by the Common Law.

By 13 *Car. 2. St. 2. ch. 2.* None arrested by Process out of the *King's Bench* or *Common Pleas*, in which Process the true Cause of Action

tion is not expressed, and for which the Defendant is bailable by 23 H. 6. ch. 2. shall be forced to enter into Bond with Sureties for Appearance in any Sum exceeding 40 l. which Bond after Appearance by Attorney shall be discharged.

This Act shall not extend to Writs of Cap. Utlagatum, Attachments upon Rescous, Privilege or Contempt.

This Act was the Occasion of inserting the Words *Ac etiam Billa* in Writs issuing out of the King's Bench to hold to Special Bail. †

† Judic. Author Mat. Rolls 197.

[By 12 Geo. 1. ch. 29. 5 Geo. 2. ch. 27. Where the Defendant is not to be held to Bail, he shall not be arrested, but served with a Copy of the Process. And see 32 G. 2. ch. 28. For the Demeanor of Officers and Gaolers towards Persons under Arrest.]

By 4 & 5 W. & M. ch. 4. Two Judges of the King's Bench, Common Pleas, and Exchequer (whereof the Chief Justice and Chief Baron in the respective Courts to be one) may by Commissions under the Seals of the said Courts, empower Persons (other than Common Attornies and Solicitors) in every County, to take Recognizances of Bail in Causes depending in their several Courts.

The Justices and Barons respectively may make such Rules for justifying such Bails, as to them shall seem meet, by Affidavits duly taken before the Commissioners; so as the Cognizors be not compelled to appear in Person in the said Courts to justify themselves, unless they live in London or Westminster, or within ten Miles thereof.

Any Judge of Assize may take such Recognizance of Bails, &c.

[See 4 & 5 W. & M. ch. 18. As to Bail upon a *Capias Utlagatum*, Title, Outlawry, *supra*.]

By 1 An. St. 2. ch. 6. Where Persons escape out of Prison and are retaken, the Bail for such Person shall be discharged on a Writ directed to the Sheriff, commanding him to keep the Prisoner in Discharge of the Bail.

By 4 An. ch. 16. The Sheriff may assign the Bail-Bond to the Plaintiff, which he may sue in his own Name. [See 21 Ju. 1. ch. 26. 4 & 5 W. & M. ch. 4. As to the Punishment for personating Bail, &c.]

One that is Bail cannot be a Witness for the Defendant upon the Trial; but the Court upon a Motion will discharge such Bail, upon giving other sufficient Bail.

* *Mainprise* (*Manu Captio*, a Taking into the Hand) signifies taking a Man into friendly Custody, who might otherwise be committed to Prison, upon Security given for his appearance at a Time and Place assigned. He is supposed to go at large, and to be at his own Liberty, under no Possibility of being confined by his Mainpernors or Sureties, as in the Case of Bail. Mainprise is more large than Bail. For every Bail is Mainprise, but every Mainprise is not Bail. [See of Bail in criminal Cases, ch. 5. *post*.]

* Terms of the Law, v. Bail. 4 Inst. 179, 180. H. P. C. 98.

When the Plaintiff and Defendant appear then follows the Declaration.

V. ^b The Declaration, (*Narratio*, the same in Effect which the Civilians call a *Libel*) is a Setting forth in Writing the Demand or Complaint of the Demandant or Plaintiff against the Tenant or Defendant, who is supposed to have done the Wrong. It is grounded upon the *Writ* in the Common Pleas, but upon the *Bill* in the King's Bench. ^c In the Common Pleas it is usual to declare in any Action upon a *Quare Clausum Fregit*, as they do upon a *Latitat* in the King's Bench. These Courts do differ sometimes in the Forms of

Of the Declaration. ^b 1 Inst. 17. a. 303. a. & b. Finch 357.

^c 2 Ventr. 259, &c.

of their Declarations. What I call in general a Declaration, is more properly called a *Count* in *real* Actions, and a *Declaration* in *personal* Actions, tho' these are sometimes confounded.

The Declaration must set forth the Plaintiff's and Defendant's Names, the Nature of the Action, the Cause or Matter of Complaint, and the Manner of it, the Time and Place, and the Damage sustain'd. For it is an Exposition of the Writ with the Addition of Time and Place, &c. It ought to be true, clear and certain, for the Court is not to take Things in it by Implication. But it is not necessary to set forth Matters of Fact, as in Bills in *Chancery*, &c. For those are to be heard and tried by a Jury. If a Declaration, &c. is defective, it may be aided sometimes by *Statutes*. They are call'd the *Statutes of Jeofails* from *Jay faille*, I have fail'd. [See 8 H. 6. ch. 12 and 15. 32 H. 8. ch. 30. 18 El. ch. 14. 27 El. ch. 5. 21 Ja. 1. ch. 13. 16 & 17 Car. 2. ch. 8. 4 An. ch. 16. 9 An. ch. 20. 5 G. 1. ch. 13. 4 G. 2. ch. 26. 5 G. 2. ch. 27. 6 G. 2. ch. 6, 14. And see 1 *Darv. Abr. Tit. Amendment.*]

An *Audita Querela* and a *Scire Facias* are in the Nature of Declarations, and do set forth at large the Cause of the Plaintiff's Action.

By 36 Ed. 3. St. 1. ch. 15. *All Pleas, which are pleaded in any of the King's Courts, shall be pleaded and judged in the English Tongue, but entered and enrolled in Latin.* [See *infra.*]

Where there is a ^{a 5 Rep. 121.} Latin Word, which is falsely Englished, the ^{10 Rep. 133.} English Word shall be adjudged void, and the Latin Word shall stand. And where there is no Latin, yet if it is significant, and hath the Countenance of Latin, by adding an *Anglice* to it, it is good. As *Velvetum*, *Anglice Velvet*, *Operimentum*, *Anglice a Rug*, &c. But where senseless Words, which signify nothing, are used in a Declaration, they are to be rejected; yet they shall not hurt the Declaration, if it is good without them. There are Words significant and known to the Lawyers, though they have no Countenance of Latin; as *Mesugium*, *Toftum*, *Gardinum*, &c. There are then four Sorts of Words, that pass under the Name of Latin. 1. *Good Latin*, allow'd by Lawyers and Grammarians. 2. *False* or incongruous Latin, which shall abate original Writs; but shall not make void any judicial Writ, Declaration, Plea, nor any Grant or Deed: Especially if a made Word has any Countenance of Latin, and an *Anglice* added to it. 3. *Senseless* Words and of no Signification, and which have not any Countenance of Latin. 4. Words of *Art*, significant and known only to the Sages of the Law, though not to Grammarians, which may be called *Lawyers Latin*. Senseless Words only are absolutely rejected: [But now these Distinctions are of little Use. For,

By 4 G. 2. ch. 26. 5 G. 2. ch. 27. 6 G. 2. ch. 6, and 14. *All Writs, Pleadings, Rolls, Entries, and Proceedings, shall be in the English Language.*

The Plaintiff after the Return of the Writ hath two Terms, to declare; the Term, in which the Writ was returnable, being reckoned for one. If he does not deliver to the Defendant's Attorney a Copy of the Declaration before the *Effoin* Day of the second Term, the Defendant is not obliged to plead 'till the third Term. [Qu. if the Defendant's Attorney is obliged to accept the Declaration at all after the End of the second Term, although no *Nonpross* be signed.] The *Effoin* Day, is [for *Effoins*] a kind of *Imparlance*, *Licentia Interloquendi*, or a Craving of a longer Time, and lies in

^a See p. 468. ante.

in * Real, Mixt, and Personal Actions. If no Declaration comes ^{a 2 Inst. 125.} in before the Rising of the Court the last Day of the second Term (after a Rule given for that Purpose is out) [without any Rule to declare in the King's Bench, unless the Proceedings are by Original] the Plaintiff may be *non suit*, and the Defendant may sign a *Non Prof. (Non Prosequitur)* and have his Costs for not declaring in two Terms. [See 13 Car. 2. ch. 2.] A *Non suit* is different from a *Retraxit*. A *Non suit* is when the Plaintiff upon Demand should appear in Court, and he makes Default by not prosecuting his Suit with Effect, or else by refusing to stand a Verdict upon Trial. But a ^{b F.N.B. 48.} *Retraxit* is a voluntary Renouncing of the Suit or Plea by the Plaintiff or Defendant present in Court. Upon a *Non suit* before ^{8 Rep. 58. 59.} Appearance, and so regularly after Appearance, one may commence ^{1 Inst. 138. b.} his Action again, but not upon a *Retraxit*. But in a *Quare Impedit* ^{139. a. & b.} it is peremptory; because the Defendant shall have a Writ to the Bishop. And *Non suit* after Appearance is also peremptory in an ^{1 Roll. Abr.} Appeal, and on Attaint. The King cannot be *non suit*; but his Attorney-General may enter an *Uterius non vult Prosequi*, which hath the Effect of a *Non suit*. But an Informer, *qui tam*, &c. may be *non suit*. ^{584.} ^{3 Cro. 551.}

By 4 & 5 W. & M. ch. 21. *Where the Defendant is taken, or charged in Custody, upon any Writ out of any of the Courts at Westminster, and imprison'd or detain'd for Want of Sureties for Appearance, the Plaintiff, before the End of the next Term after the Writ is returnable, may declare against the Prisoner, and may cause a Copy to be delivered to the Prisoner or to the Gaoler or Keeper; to which Declaration the Prisoner shall appear and plead; or otherwise the Plaintiff shall have Judgment; as if the Defendant had appear'd, and refused to plead.*

[See 8 & 9 W. 3. ch. 27. Concerning the Delivery of a Copy of a Declaration against a Prisoner in the Fleet. 4 Ann. ch. 16. Concerning the filing of Warrants by the Attorney of the Plaintiff and Defendant.]

Note, That there must be a *Continuance* from Day to Day till ^{c Finch 431.} the End of the Suit. Day in legal Understanding is the Day of ^{Regula Placit. 62, 63.} Appearance of the Parties or Continuance of the Suit. [In the King's Bench they never enter Continuances ^{1 Inst. 134. b.} till the Plea comes in, ^{2 Ld. Ray.} and the Continuances may be enter'd on the Roll only from Term ^{872.} to Term.] If the Plaintiff doth nothing, it is call'd a *Discontinuance* (*viz.*) of the *Process*, and he must begin his Suit again. [See 1 Ed. 6. ch. 7. 8 El. ch. 2. 4 & 5 W. & M. ch. 18. 1 Ann. St. 1. ch. 8.] ^{1 Str. 492.}

VI. *Pleadings (Placita)* largely taken, are all the Sayings of the Parties to the Suit or Action after the Declaration, until Issue in Law or Fact is join'd. But here I take them for the Defendant's Answer to the Declaration of the Plaintiff. If a Copy of the Declaration is delivered to the Defendant's Attorney before the Essoin Day, he may be compell'd to plead that Term, or else Judgment may be enter'd against him. By Course of the Court the Defendant is to plead the same Term in which he appears, if it is an *issuable* Term,

^b *Qui semel actionem renunciavit, amplius repetere non potest.* 8 Rep. 59.

and the Writ be returnable at the Beginning thereof. But usually the Defendant hath Time to plead till the next Term. [See the late Rules, made in the *Common Pleas*, *Easter* 3 G. 2. and in the *King's Bench*, *Trin.* 5 & 6 Geo. 2. that on Process returnable the first or second Return of any Term, if the Plaintiff declares in *London* or *Middlesex*, and the Defendant lives within twenty Miles of *London*, the Defendant shall plead within four Days; otherwise within eight Days. [But in both these Cases the Declaration must be delivered four Days before the End of the Term, or the Defendant will be intitled to an *Imparance* till the next Term.]

After the Declaration, and before the Defendant can be forced to plead, there is often a Prayer of *Oyer* (or Demand to hear) and of Copy of a Deed upon which one is sued. And then an *Imparance* (from *Parler*, to speak) which is Leave given by the Court for the Defendant to plead till the next Term. And this *Imparance* is either *General* or *Special*. *General*, which is set down in general Terms without any special Clause. *Special*, with such like Clause inserted, (*viz.*) saving all Advantages against the Jurisdiction of the Court, to the Writ, and Declaration, &c. [See of *Demurrer*, *infra*.]

^a Finch 362, 363, 364.

^a The Plea or Defence is either *Dilatory*, or a *Plea* to the *Action*.

1. *Dilatory*, either in *Disability* or *Abatement*. In *Disability*, to the *Jurisdiction* of the Court, or to the Person of the Plaintiff; as that he cannot commence any Suit by Reason that he is an ^b *Alien* Enemy, outlaw'd, under a *Præmunire*, under Attainder, excommunicated. In *Abatement* for some Fault in the Writ, Declaration, &c. Disability in the Person only stops the Cause for a While till the Defects are remov'd. [See 8 & 9 W. 3. ch. 11. as to Abatement, where the Plaintiff or Defendant dies, &c.]

^b Lit. 196, &c.
¹ Inst. 128. a. &c.

By 1 Ed. 6. ch. 7. *Creations of Honour, depending Suit, shall not abate Writ or Action.*

^c 1 Inst. 303. a.

The Defendant must observe this ^a Order in his Pleading, (*viz.*)
1. To the *Jurisdiction* of the Court. 2. To the Person, Plaintiff or Defendant. 3. To the Declaration. 4. To the Writ. 5. To the *Action*.

By 4 Ann. ch. 16. *No Dilatory Plea is to be received without Affidavit of the Truth thereof, or some probable Matter shewn.*

^a Finch 378.

2. ^a A *Plea* to the *Action* is that which goes to the Merits of the Cause or *Action*; and is either *General* to the Declaration, as in Case, *Trespass*, and *Trover*, *Not guilty*; in Debt upon a Contract without Specialty, *Nil Debet per Patriam*; in an *Action* of the Case upon *Assumpsit*, *Non Assumpsit*; in Covenant, *Performance of Covenants*; in Debt on Bond, *Non est Factum*, &c. or *Special*, which setteth forth the Matter pleaded at large with apt Conclusion to the Declaration or *Action*. The *Special Pleas* are many, as *Per Dures*, *Per Minas*, Pleas in Justification, as *Son Assault Demesne* in Assault and Battery, (*i. e.*) That the Plaintiff struck the first Blow, &c. that therefore the Battery was occasioned by his own Assault. ^a In *Trespass*, if the Fact was committed, and one hath Cause of Justification and Excuse, he must confess the Fact and plead the *Special Matter*. But if he pleads *Not guilty*, he cannot give the *Special Matter* in Evidence. In *Detinue*, the Defendant

^a 1 Inst. 282. b.
283. a.
5 Rep. 119.

on *Non Detinet* pleaded cannot give in Evidence, that the Goods were pawn'd to him. In Waste, on *Nul Waste* pleaded, one may give in Evidence Lightening, Enemies, or any Thing that proves it to be no Waste. But he cannot give in Evidence justifiable Waste; as that he cut down Trees to repair the House, or any other special Matter. In all these Cases and the like, one must confess and plead *Specially*.

* If the Defendant in any Action pleadeth a Plea, which is a sufficient Answer, and destroyeth the Action of the Plaintiff, it is a *peremptory* Exception, and is call'd a *Plea in Bar*; because it *barreth* the Plaintiff of his Action. As a Release, the Statute of Limitations, ^a Estoppels, (*i. e.*) when a Man's own Act or Acceptance ^b stoppeth him to alledge or plead the Truth; Accord or Agreement ^b with Satisfaction, Arbitrament, or an Award, Performance of the Condition of a Bond, &c. If one under Age pretends that he is of full Age, and enters into Bond, tho' he may avoid it by pleading Nonage, yet you may indict him for a Cheat. [*Qu.*] There are also *temporary* Pleas in Bar, or that bar only for some Time.

There is also a Plea call'd a *Foreign Plea*, as to an Action in the *Marshalsea-Court*, that the Cause of Action did arise out of the Jurisdiction of that Court; and the like as to other inferior Courts, that the Lands in Question are Antient Demesne, and to be impleaded for in the Court of the Manor, of which they are holden.

* *Confession* is also a Plea to the Action, where the Defendant confesses the Plaintiff's Action to be good. ^c Finch 387.

This is the strict Signification of a Plea. But in a large Sense, when the Defendant has pleaded, the *Plaintiff* pleads too, and answers the Defendant's Plea; which is call'd a *Replication*. The ^d *Replication* must not vary from the Declaration; but must pursue, and maintain the Cause of the Plaintiff's Action. Otherwise it will be a *Departure* in Pleading, a Going to another Matter, and a Saying and Unsayings; which the Law will not allow. A *Rejoinder* (*Triplatio*) is the Defendant's Answer to the Replication of the Plaintiff. A *Surrejoinder* (*Quadruplicatio*) is the Plaintiff's Answer to the Defendant's Rejoinder. Sometimes, though very rarely, the Parties go so far in Pleading, that it comes to a *Rebutter*. A *Rebutter* (from *Bouter*, *repellere*, to put back) is the Answer of the Defendant to the Plaintiff's Surrejoinder. *Surrebutter* is the Replication or Answer of the Plaintiff to the Defendant's Rebutter.

Some Particulars often arise in the Course of Pleading, (*viz.*) *Traverses*, *Averments*, *Protestando's*, *Uncore Prist*, *Quæ est Eadem*, &c. *Colour*, *Departure*, &c. which some think to be full of curious Learning. [But see 4 *Ann. ch. 16.* 5 *Geo. 1. ch. 13.* 10 *Rep. 90.* &c.]

To *Traverse* (*Traverser*, *Transfigere*, to strike through) something particularly charged in the Declaration or Pleadings, is no more than particularly to deny it to be true in these Words (*viz.*) *Absque hoc*, *Without that*, &c. It may be of the *Matter*, or *Manner*, of the *Day*, *Year*, or *Place*. A *Traverse* is good, when it traverses that Part which strikes through, or makes an End of the Cause, when the Point is determined by the Jury. [See 4 *Ann. ch. 16.*] Every Plea ought to be triable, otherwise the Cause will never be at an End.

^a 1 Inst. 303. a. All Pleas in the Affirmative ought to be *averr'd* with *Hoc Paratus est Verificare*; but a Negative cannot be *averr'd*, because it cannot be proved. [See 4 Ann. ch. 16.] This Affirmative is what is call'd an *Averment*, and is *General* as before mentioned, with *Hoc Paratus, &c.* *Particular*, as where the Life of Tenant for Life or in Tail, or the Age of a Person, &c. are *averr'd*. [For *Protestando's*, *Confessing* and *Avoiding*, *Uncore Priſt*, *Quæ est Eadem*, &c. See *Regula Placitandi*, *Bobun's Institutio Legalis*, &c. And the Books of *Entries*; of which there are great Variety.]

^b 1 Inst. 303. ^{a. & b.} Every Plea must be Direct, and not by Way of Argument or Rehearſal: A double Plea will be diſallow'd.

[But by 4 Ann. ch. 16. Any Defendant or Tenant, in any Action or Suit, or Plaintiff in Replevin, in any Court of Record, with Leave of the Court, may plead as many ſeveral Matters as are neceſſary.]

* The Pleading of every one ſhall be taken ſtrongly againſt himſelf. For every one is preſumed, to make the beſt of his own Cauſe.

^c 5 Rep. 119. ¹ Inst. 283. a. ¹ Roll. Abr. 328, &c. When one is *authorized* to do any Thing by the Common Law, by Grant, Commiſſion, Act of Parliament, or by Cuſtom, he ought to purſue the Subſtance and Effect of the ſame accordingly. And regularly when one doth any Thing by Force of a Warrant or Authority, he muſt plead it. But generally in late Statutes there is a Clauſe to empower one, that is ſued for executing an Authority given by them, to plead Not guilty, and to give the Special Matter in Evidence. [See *infra* of *Issues*.]

Whenever one cannot have the Advantage of the Special Matter by Way of Pleading, ^d he ſhall take Advantage of it in Evidence.

^e 1 Inst. 303. b. ² Ld. Ray. 869. Special Pleadings which amount to the *general Issue*, are not to be allow'd, but are demurrable to.

[See, where a Defendant will not plead, *Of Judgment by Default, infra*. And 4 Geo. 1. ch. 11. For Transportation of unlawful Exporters of Wool that reſuſe, while in Priſon for Want of Bail, to plead to the Declaration, &c.]

Of Issues. VII. When the Parties by Plea, Replication, Rejoinder, &c. are come to ſomething affirmed by one, and denied by the other, they are at *Issue*.

^f 1 Inst. 126. a. ¹¹ Rep. 10. Finch, B. 4. ch. 35. ^g 1 Inst. 294. b. Finch 398. *Issue*, (from *Iſſuer*, *Emanare*, to flow, *Exitus*) is a ſingle, certain, and material Point, iſſuing out of the Allegations or Pleas of the Plaintiff and Defendant, conſiſting regularly of an Affirmative and Negative, to be tried by twelve Men. Upon a Writ of Right it is call'd the *Miſe* (from *Mitto*) becauſe the whole Cauſe is put upon that Point. *Miſe* is alſo taken for Expences, as *Miſe et Cuſtagia*.

Issue has ſeveral Significations in Law. Sometimes it is taken for the Children begotten between a Man and his Wife, ſometimes for Amerciaments and Fines, and ſometimes for Profits of Lands and Tenements. But here it is taken for the Point of the Cauſe de-

* *Ambiguum placitum interpretari debet contra proferentem.* 1 Inst. 303. b.
! *Oportet quod res certa deducatur in exitum aut judicium.* 5 Rep. 35, 38, 61.

pending in Suit, whereupon the Parties join, and put their Cause to Trial; which is properly a *Traverse*.

Issues in this last Sense are of two Kinds, (*viz.*) Upon Matter of Law, or upon Matter of Fact.

1. An Issue joined upon Matter of Law, is to be determined by the Judges; and this is called a *Demurrer*. A *Demurrer* (from *Demorari*, to abide) is an abiding in Point of Law, and a referring to the Judgment of the Court, whether the Declaration or Plea of the adverse Party is sufficient in Law to be maintained. When the Demurrer is joined, the Case is made a *Confilium*, and is to be argued by Council on both Sides; and then the Judges give Judgment; taking it for granted, that he that demurreth in Law, confesseth all Matters of Fact, that are well and sufficiently pleaded; but not otherwise. If the Judges are equally divided, or conceive great Doubt of the Case, the Cause may be adjourned into the Exchequer-Chamber, to be argued by all the Judges. [See 14 Ed. 3. St. 1. ch. 5.]

A Demurrer is either *general* or *special*. *General*, which shews no Cause. *Special*, which sheweth the Cause of Demurrer, and does particularly specify it. [See 27 El. ch. 5. 4 Ann. ch. 16.]

If the Point is difficult to be decided, it is publicly argued by the Judges of the Court. [See of Judgment, *infra*.]

2. An Issue of Fact (*i. e.*) Whether the Fact is true or false, is either touching a Matter of Record, upon pleading *Nul tiel Record*, or no such Record; or touching a Matter in *Pais* or *Fact* out of Court, as whether such a Deed was sealed and delivered by the Defendant; whether he promised Payment, &c. If a Plea is sufficient in Law, and the Matter of Fact thought to be false, Issue is taken thereupon, and tried by a Jury.

The King may waive a Demurrer, and take Issue at his Pleasure.

Issues of Fact too are *general* or *special*. *General*, when it is left to the Jury, whether the Defendant hath done any such Thing as the Plaintiff layeth to his Charge; as when he pleads *Not Guilty* to a Trespass, &c. *Special*, when some special Matter, or some material Point alledged by the Defendant in his Defence, is to be tried by the Jury; as in Assault and Battery, where the Defendant pleads that the Plaintiff struck first, &c.

There may be an Issue to Part, and a Demurrer to Part. [See Of a Demurrer to Evidence, *infra*.]

In many Instances, by Virtue of several Acts of Parliament, one may plead the *general Issue*, and give the *special Matter* in Evidence for Excuse or Justification; it is to be wished, that it was so in more Cases. For these Acts are made for avoiding Prolivity and Captiousness of Pleading, which is chargeable and dangerous. Upon the general Issue, the Defendant in such Cases may give any Thing in Evidence, which proves the Plaintiff hath no Cause of Action. [See 23 H. 8. ch. 5. 1 Ja. 1. ch. 15. 7 Ja. 1. ch. 5. 1 Ja. 1. ch. 12, &c. See also of Evidence, *post*.]

If the Tender of the Issue comes on the Part of the Plaintiff, the Form is, *Et hoc petit quod Inquiratur per Patriam*. If on the

Part of the Defendant, it is, *Et de hoc Ponit se super Patriam*. [See again 4 Ann. ch. 16. for Costs on Demurrer.]
 [By 14 G. 2. ch. 17. If the Plaintiff neglects to bring on his Issue to be tried according to the Course of the Court, the Court upon Motion may give Judgment for the Defendant, as in the Case of a Nonsuit.]

Of Trial

1 Inst. 124. b.
 225. a.
 Finch, ch. 36.

VIII. Trial is an Examination of the Truth of the Point in Issue, or of the Question betwixt the Parties, whereupon Judgment may be given. The Trial of the Truth of the Fact is according to the Nature of the Issue. As,

9 Rep. 30.
 31.
 1 Roll. Abr.
 572.
 2 Roll. Abr.
 572, 573, 578.

1. Trial by Inspection, upon a Writ of Error to reverse a Fine levied by an Infant, or in *Quarta Quarta* to avoid a Recognizance or Statute acknowledged during Minority. Here the Infant may be viewed and examined by the Court. But there ought to be other concurrent Proof, for the Court may be deceived, if they rely only upon View of the Party. Also *Mayhem* shall be under the Inspection of the Court, to increase the Damages, if the Court thinks fit.

9 Rep. 30.
 1 Inst. 6. b.
 4 Inst. 479.
 Finch, ch. 38.
 2 Roll. Abr.
 575, 675.

2. Trial by Witnesses, as where Issue is in Dower, whether the Husband is living or no. Here two Witnesses at least are requisite, because this Trial is by Witnesses, not by a Jury. [So two Witnesses are required to prove the Suggestion on a Prohibition to a Suit for Tithes, by 2 & 3 Ed. 6. ch. 13. §. 14.]

1 Inst. 74. a.
 261. a.
 9 Rep. 24.
 31.
 2 Roll. Abr.
 579, 580,
 581, 583,
 584, 585,
 586, &c.

3. Trial by Oath of the Marshal of the King's Host, in Times of War out of the Realm, whether the Party is in the King's Service or no. Of the Chief Officer of the Place out of the Realm in Time of Peace, as if it be alleged in Avoidance of Outlawry, that the Defendant was in Prison at *Bourdeaux* in France, it shall be tried by the Certificate of the Mayor of *Bourdeaux*. But it is said, that this must be understood, when the said Town was Part of the King's Dominions. For Matters within the Realm, by the Certificate of the Lord Mayor and Aldermen of London, by the Mouth of one of the Recorder, or a Custom of London, unless the Lord Mayor and Aldermen are interested in the Action; of the Sheriffs of London, whether one hath the Privilege of a Citizen or is a Foreigner; of the Judges concerning Records in their Custody, when Issue is joined upon *Nat. det. Record*, or whether there is such a Record or no; by Certificate [Examination] of the Sheriff, whether he made such a Return or no; of the Ordinary in Causes Ecclesiastical, as of Loyalty or Lawfulness of Marriage, General Bastardy, Excommunication, Penalty by Institution into a Church, Ability of the Parson, &c. If a Defendant claims his Privilege as a Scholar, &c. of the University, the Claim is by the Certificate of the Chancellor or Vice-Chancellor. But not if the Parties are at Issue, whether the Defendant is of such a College, &c.

1 Inst. 294. b.
 295. a.
 2 Inst. 45.
 4 Rep. 95.
 9 Rep. 37, 87,
 88, 89, 90.
 Finch, Book 4,
 ch. 39.
 Exod xxii.
 v. 10, 11.

4. Trial by Wager of Law, or the Defendant's Oath, as in Debt upon a simple Contract, Detinue, &c.

Eventus judiciorum sunt incerti. 9 Rep. 40.

To wage Law (Vadiare Legem) is to take an Oath at the Bar, that he oweth not the Debt demanded of him upon a simple Contract, or any Part thereof: But he ought to bring with him eleven of his Neighbours, or so many Persons as the Court shall order, that will avow upon their Oaths, that they believe he sayeth the Truth. But this may be dispensed with at the Discretion of the Court.

Note, Though the Books mention eleven Compurgators, yet it is the Course in the Common Pleas to have but six. 1. Ld. Ray. 500.

But Actions *on the Case* are now brought for Debts upon simple Contract; and Trover and Conversion for Detinue, &c. where the Defendant cannot wage his Law; upon which Account Wager of Law is much out of Use. It may be still in Actions of Debt upon a By-Law or an *Amerciament* in a Court-Baron, unless the Lord does prescribe to determine Pleas by a Jury. No Wager of Law shall be against the King. And in every *Quo Minus* brought by the King's Debtor in the Exchequer, against one indebted on a simple Contract, the Defendant shall not wage his Law, for the Benefit of the King.

* Trial by Battle is disused. Trial by Ordeal is taken away by 9 Rep. 32. 33.
Statute not printed.

5. Trial of Matters of *Law* is by the Judges upon Demurrers, special Verdicts and Exceptions to Evidence. Also upon the Customs and Usages of every Court. 9 Rep. 30. 1 Inst. 125. a. 155. b. Finch 227. 3 Inst. 19. 137. 230.

If a Judge is doubtful or mistaken in Matter of Law, a *Stander-by* (as *Amicus Curie*) may be allowed to inform the Court. 1 Inst. 217. b. 9 Rep. 31. 2 Roll. Abr. 574. 575. 576. 9 Rep. 24. 30. Finch 399. 400. Litt. 368. 1 Inst. 228. a. See of Trial by Peers, ch. 5. post.

6. Trial of Matters of *Record* is to be by the *Record* itself. The Proceedings of Courts not of Record, shall be tried by a Jury. 1 Inst. 217. b. 9 Rep. 31. 2 Roll. Abr. 574. 575. 576. 9 Rep. 24. 30. Finch 399. 400. Litt. 368. 1 Inst. 228. a. See of Trial by Peers, ch. 5. post.

7. Trial by twelve Men, or by *Jury*, is the common Method, and of daily Practice. Matters of Fact are to be tried and decided by them; though if they take upon themselves the Knowledge of the Law, and give a general Verdict, it is good. But to find the special Matter is the safest Way.

In this Way of Trial by Jury, let us consider the *Process* to bring in the Jury, *Challenges* of the Jury, the Evidence to be given to the Jury, the *Verdict*.

1. The *Process* to bring in the Jury in the Common Pleas, is by *Venire facias* and *Habeas Corpora Juratorum*; a *Disfringas Juratores* goes out of the King's Bench to the same Intent as the *Habeas Corpora Juratorum*. Upon this Writ of *Venire* the Sheriff shall return a Jury in a Panel, or little Piece of Parchment, annexed to the Writ; on which Account the Jury is said to be *impanelled*; and then shall go the Writ of *Habeas Corpora*, to bring in the Jury. [See the Catalogue of Writs, *supra*, for *Venire facias*, *Habeas Corpora* and *Disfringas Juratores*, and 13 Car. 21 St. 2. ch. 2. 7 & 8 W. 3. ch. 32.]

^b *Ex facto jus oritur.* 2 Inst. 226. b. 2 Inst. 49. 3 Inst. 29. *Ad questionem juris non respondent juratores, sed judices.* 1 Inst. 125. a. 155. b. 226. a. 9 Rep. 24.

^a *Ad questionem facti non respondent judices, sed juratores.* 1 Inst. 125. a. 155. b. 226. a. 9 Rep. 24.

By 4 An. ch. 16. By Virtue of special Writs of Distringas or Habeas Corpora, six Jurors may view the Houses, Lands, or Places in Question. [See 3 G. 2. ch. 25.]

Now the Plaintiff's Attorney ought to give the Defendant's Attorney sufficient Notice of Trial in Writing.

[By 14 G. 2. c. 17. He must give ten Days Notice at least, if Defendant resides above forty Miles from London; and

Countermand of Notice must be at least six Days before the intended Trial, or else the Plaintiff shall pay Costs, as if there had been no Countermand.]

But for the Sittings in London or Middlesex, if the Defendant lives within forty Miles from London, eight Days Notice of Trial, exclusive, is sufficient; if above forty Miles there must be fourteen Days; and if the Defendant lives within forty Miles, two Days Countermand is sufficient.]

When the Jury appear upon the Process, if the Defendant does not appear, the Plaintiff may pray, that the Inquest may be taken by Default, and his Petition will be granted, whether the Defendant afterwards appears or not. [In such Cases the Usage is to go into the Evidence for the Plaintiff, and take a Verdict for him.] But if the Plaintiff makes Default, he shall be nonsuited, and the Defendant shall have Costs. [See 7 & W. 3. ch. 32. and for the Writ of Proviso the Catalogue of Writs, *supra*, v. Proviso.]

^b Finch 400.

¹ Inst. 154. b.

^{155. a. & b.}

² Inst. 27.

³ Inst. 221.

^c F. N. B.

^{166.}

² Inst. 447.

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2. The ^b Jury (*Jurata* from *Jurare*, to swear) signifieth twelve Men (*Liberos et Legales*, Freemen, indifferent, and not outlawed or infamous) who are sworn Judges upon Evidence in Matters of Fact. The Words *Affize*, *Inquest*, and *Homage*, are sometimes taken for a Jury.

^c Aliens, Men attainted of any Crime, ought not to serve on Juries. Clergymen, Infants under fourteen Years of Age, and Persons seventy Years old, &c. are exempted. [See *West. 2. ch. 38.* for Persons seventy Years old. *6 W. 3. ch. 4.* for Apothecaries. *7 & 8 W. 3. ch. 32.* for the County of York, and for the Inhabitants of Westminster, &c. And see *Non ponendis in Affis et Juratis* in the Catalogue of Writs, *ante*.]

There is a Jury sometimes *Per medietatem Linguae* (*i. e.*) half of the Jury are to be Aliens, where one of the Parties is an Alien. [See *27 Ed. 3. St. 2. ch. 8.* *28 Ed. 3. ch. 13.* *8 H. 6. ch. 29.* *1 & 2 Ph. & M. ch. 4.*] But this is not allowed in High Treason.

^d 3 Inst. 27.

^{H. P. C. 260.}

^e 21 H. 6. pl. 4.

^{Trials per pais}

^{196.}

^{Hawk. P. C.}

^{B. 2. p. 420.}

If both Parties are Aliens, the Jury shall be all English. Sometimes a *special Jury* is granted (*viz.*) that the Sheriff should attend the Prothonotary with his Book of Freeholders, that the Prothonotary, in the Presence of the Attornies on both Sides, may take out forty-eight, from which each Party strike out twelve, and then the Sheriff may impanel the rest.

[See *7 & 8 W. 3. ch. 32.* For the Constable's Duty to return to the Quarter-Sessions a List of all those that are qualified to serve on Juries, &c. See *3 Geo. 2. ch. 25.* and *4 Geo. 2. ch. 7.* for chusing Juries by Ballot, &c. and the Method of appointing Views, and special Juries, and *24 Geo. 2. ch. 18.* touching special Juries, and for returning Juries *de Corpore Comitatus* on Issues upon penal Statutes, and for altering the Law for returning a Knight upon the Panel where a Peer of the Realm is a Party.]

Tales-

* *Tales-Men* (*Tales de Circumstantibus*) are By-Standers to supply the Want of Jury-Men of the principal Panel, who were impannell'd on the Jury, and did not appear; or at their Appearance were challenged by either Party as not indifferent. In which Case the Judge of *Nisi Prius*, upon Motion of the Plaintiff or Defendant, grants a Supply to be made by the Sheriff, &c. of one or more present in the Court, to make a full Jury, which he could not do by the Common Law. [See 35 H. 8. ch. 6. 4 & 5 Ph. & M. ch. 7. 5 El. ch. 25. 14 El. ch. 9. 4 & 5 W. & M. ch. 24. and especially the 7 & 8 W. 3. ch. 32.] There is also a *Decem Tales*, as when a full Jury doth not appear at a Trial at the Bar, there goes out a *Writ to the Sheriff, Apponere Decem Tales*.

10 Rep 102,
103, 104, 105.
Finch 414.
2 Roll. Abr.
671, 672.
2 Ld. Ray.
1170.

3. There may be Challenges of a Jury. A Challenge (*Calumnia*, a feign'd Word in this Case) in legal Sense, as applied to a Jury, is an Exception against them that are return'd to be Jurors. This Challenge is two-fold (*viz.*) to the *Array* and to the *Polls*.

1 Inst. 155 b.
156 a & b.
Terms of the
Law, v.
Challenge.
Finch 400,
401, 412, 413.
2 Roll. Abr.
636, 637,
638, 639,
640, 641 &c.

1. A Challenge to the *Array* (so called because the Jurors Names are arrayed and rank'd one under another) is to the Array of the principal Panel, or to the Array of the *Tales*. A Challenge to the Array of the principal Panel is at once to except against all the Persons so arrayed or impannell'd. And here may be a principal Cause of Challenge to the Array, and a Challenge to the *Favour*. 1. A principal Cause, in Respect of *Partiality* or *Default* of the Sheriff, or other that made the Return of the Jury, and not in Respect of the Persons return'd. *Partiality* of the Sheriff may be by Reason of Kindred or Affinity to the Plaintiff or Defendant, or if one of the Jury is return'd at the Nomination of the Plaintiff or Defendant, &c. His *Default* may be by not returning a Knight, when a Peer of the Realm is either Plaintiff or Defendant, [but the Challenge for this Cause is taken away by 24 Geo. 2. ch. 18.] or if the Array is return'd by the Bailiff of a Franchise, and the Sheriff returns it as of himself. 2. To the *Favour*; which is not so self-evident an Exception, but is left to the Judgment of *Triers*, two of them that are impannell'd being appointed by the Court for that Purpose; as if the Plaintiff or Defendant is Tenant to the Sheriff, or if the Sheriff's Son hath married the Daughter of the Party, &c. This Exception to the *Favour* may be left to such a Trial, and the whole Array may be quash'd for it. The King may take a principal Challenge, or to the *Favour*; and it shall be tried according to the usual Course. But where the King is Party, or in Case of Life, one shall not challenge the Array for *Favour*, though the King may do it. A Subject may take a principal Challenge. If one Man is sworn, the Array cannot be challenged, either for a principal Cause of Challenge, or for *Favour*. Yet if the Challenge to the Array is found against the Party that takes it, he shall have his Challenge to the Array of the *Tales*, and his particular Challenge to the *Polls*.

10 Rep 102,
103, 104, 105.
Finch 414.
2 Roll. Abr.
671, 672.
2 Ld. Ray.
1170.

2. A Challenge to the *Polls* is an Exception against one or more particular Jurors return'd. And this may be *Peremptory*, *Principal*, for *Favour*, for *Default* of *Hundredors*.

1 Inst 156 b.
157 a & b.
158 a.
172 b.
Kitchen 181,
&c.

1. *Peremptory*, without shewing any Cause, which is only in Treason or Felony, in Favour of Life.

2. *Principal*, so call'd, because if it is found true, it is sufficient, without leaving it to Triers. Principal Challenge to the Polls may be reduced to four Heads, (*viz.*) *Propter Honoris Respectum*, *Propter Defectum*, *Propter Affectum*, *Propter Delictum*.

Propter Honoris Respectum, in Respect of Honour, as because he is a Peer of the Realm.

Propter Defectum, in Respect of some Defect, or Default; as of Birth, because *Alien* born; or of Age, because a * *Minor*; or of Estate. For,

By 4 & 5 W. & M. ch. 24. and 7 & 8 W. 3. ch. 32. Jurors Estates ought to be 10l. per Ann. at least, for Life in Freehold or Copyhold Lands, or Tenements, or Rents, and in Wales Six Pounds per Ann. excepting Strangers return'd Per Medietatem Linguae. Tales-Men must be Freeholders or Copyholders of the County, of Five Pounds a Year; and within Wales of Three Pounds a Year. Saving to all Cities, Boroughs, and Towns Corporate, their ancient Usage of returning Jurors in such Manner, as hath been accustomed.

[By 3 Geo. 2. ch. 25. A Lease for 500 Years, or for 99 Years, determinable on a Life or Lives, of the yearly Value of twenty Pounds, over and above the reserved Rent, is a Qualification. And by 4 G. 2. ch. 7. A short Lease of 50l. improved Rent, over and above the Ground Rent in Middlesex. And the Sheriffs of London may impanel any Householder who hath Lands, Tenements, or Personal Estate to the Value of one Hundred Pounds.]

[See 2 H. 5. St. 2. ch. 3. 8 H. 6. ch. 29. 4 H. 8. ch. 3. 23 H. 8. ch. 13. 35 H. 8. ch. 6. 27 El. ch. 6. See also 7 & 8 W. 3. ch. 32. 3 & 4 Ann. ch. 18. 10 Ann. ch. 14. For the County of York.]

1 Cro. 413. These Statutes speak only of Jurors Estates betwixt * Party and Party, which extend not to the King, where he is Party. But here the Juror ought to have some Freehold as at Common Law.

[But by 3 Geo. 2. ch. 25. §. 20. Sheriffs or others shall not impanel any Person to serve on any Jury in any County, City, or Place, for the Trial of any capital Offence, who at the Time of such Return would not be qualified to serve as a Juror in a civil Cause, in such County, City, or Place: And the same Matter and Cause alledged by way of Challenge, and so found, shall be taken as a principal Challenge; and the Person so challenged may be examined upon Oath, as to the Truth of such Matter.]

1 Inst. 156.b. 157.a. & b. 158.a. Hob. 294. 1 Saund. 344. 1 Str. 643. *Propter Affectum*, working a principal Challenge, or to the Favour. *Principal*, when there is express Favour, or express Malice. If a Body Politick or Incorporate brings an Action that concerneth the Body, if the Juror is of Kindred to any of that Body, it is a principal Challenge. So if one of the Parties is of Consanguinity or Affinity to a Juror; if a Juror hath given a Verdict before for the same Cause, Matter, or Title, tho' betwixt other Persons;

* *Minor jurare non potest.* 1 Inst. 172.b.

if one labours a Juror, and gives him any Thing for his Verdict; if after he is return'd, a Juror doth eat and drink at the Charge of either Party; if a Juror hath been an Arbitrator, chosen by the Plaintiff or Defendant in the same Cause. To the Favour, [See *Postea*.]

Propter Delictum, for Crime, as if the Juror is convicted or attainted of Treason, Felony, Perjury as a Witness, adjudged to the Pillory, Tumbrel, &c. or to be branded or stigmatized, or to have any other corporal Punishment, whereby he becometh * infamously, or if he is outlaw'd or excommunicated.

These are all *principal* Challenges, because they are betwixt the Parties to the Record. In this and all other Cases he that challenges length must shew the Record, if he will have it take place as a principal Challenge; otherwise he must conclude to the Favour; unless it is a Record of the same Court.

3. For *Favour*; when either Party cannot take any principal Challenge, but sheweth Cause of Favour; which must be left to the Discretion of the Triers, upon hearing of the Evidence, as upon a Challenge of the Array for Favour. But some of them come nearer to a principal Challenge than others. The Causes of Favour are infinite, but thereof something may be gathered from what hath been said. In general it is a Rule, that a Juror must stand indifferent, as he stands unsworn.

4. For Default of † *Hundredors*. But, By 4 An. ch. 16. For preventing Delays which happen by Reason of Challenges to the Array of Panels of Jurors and to the Palls, for Default of Hundredors, every Venire Facias for Trial of Issue in any Action or Suit in any Court of Record at Westminster, shall be awarded of the Body of the proper County, where such Issue is triable. This is not to extend to Appeals of Felony or Murder, or to any Indictment or Presentment of Treason or Felony, or to any Writ, Bill, Action or Information upon any penal Statute. [See 27 El. ch. 6.] But by 24 Geo. 2. ch. 18. it shall extend to Actions and Informations upon penal Statutes.

The Time to challenge a Juror is before he is sworn, otherwise, if the Cause of Challenge arises after he is sworn.

The Juror himself may be examined upon a * *Vere Dire* (to speak the Truth) upon his Oath, to inform the Triers of the Truth of the Challenge, if the Cause of Challenge tends not to his Discredit. But the Triers are not bound by his Oath.

No Challenge can be made to a Jury impanell'd upon a Writ of Enquiry. [See of Judgment, *infra*.]

[See of Trial and Challenge, ch. 5. *post*.]

4. Each Juror must take the Oath appointed by Law, and must be sworn well and truly to try the Issue of *Nisi Prius* according to the Evidence.

* *Repellitur à sacramento infamis.* 1 Inst. 158. a.

† *Vicini facti vicini praesumitur fieri.* 1 Inst. 158. b.

^a Terms of
the Law, v.
Evidence.
¹ Inst. 283. a.

Evidence, (*Evidentia*) is generally used for some Proof either by Writings or Witnesses.

This Word *Evidence* doth not only contain Matters of Record, as Letters Patent, Fines, Recoveries, Inrollments of Bargain and Sale, &c. and Writings under Seal, as Charters and Deeds (though the Seal is broken off) and other Writings without Seal, as Court-Rolls, Accounts, Letters, &c. which are call'd *Instruments*; but in a larger Sense it containeth also the Testimony of Witnesses, and other Proofs to be produced and given to the Jury, for finding the Issue joint betwixt the Parties. It is call'd *Evidence*, because thereby the Point in Issue is to be made *evident* to the Jury. If it tends towards such Evidence, it is also call'd Evidence in legal Understanding, though not in common Speech.

Where the Evidence proves the Effect and Substance of the Issue, it is good.

1. As to Writings.

^b Trials per
Pais 177, 178.
^{232, 233.}
¹ Str. 446.

General Acts of Parliament may be given in Evidence, and need not to be pleaded. And of these the printed Statute Book is good Evidence. A *private Act* of Parliament in many Cases ought to be pleaded; and the printed Statute is not allowed as Evidence, tho' in the same Volume with the general Statutes printed by the King's Printer; but a Copy, whether printed or written, examined by the Record or Parliament-Roll, and proved to be a true Copy, is sufficient Evidence.

^c 9 Rep. 31.
¹ Inst. 117. b.
^{260. a.}
² Roll. Abr.
^{574, 575, 576.}
¹⁰ Rep. 92.
^{93.}
¹ Inst. 128.
^{a. & b.}
³ Inst. 173.
^c Trials per
Pais 166.

Records and *Inrollments* prove themselves, and cannot be proved by Witnesses. The Copy of a Record or Inrollment may be given in Evidence, being sworn to be a true Copy. No Rasure or Interlining shall be intended in a Record. But the surest Way is to exemplify a Record under the Great Seal, or under the Seal of the Court, to prove a Record upon *Nul tiel Record* pleaded; and then the Exemplification of a Record may be offered in Evidence; if the whole Record, not a Part of it, is exemplified. But if one takes out a Copy of Part of a Record, he must at least take out so much as concerns the Matter in Question, and make Oath that there is no more of it that concerns the Issue, [but *Qu.* If this is sufficient.]

By 3 & 4 Ed. 6. ch. 4. 13 El. ch. 6. *An Exemplification of the Inrollment of Letters Patent under the Great Seal shall be sufficient, to be pleaded, and shew'd forth in Court.*

¹ Inst. 225. b.

The Letters Patent themselves were to be shew'd at Common Law. [See the Difference betwixt an *Exemplification* and a *Constat*, and of an *Inspecimus*, *Innotescimus*, and *Vidimus*, 5 Rep. (53, 54.)]

By 5 H. 4. ch. 14. 23 El. ch. 3. 27 El. ch. 9. *Inrollments of Fines and Recoveries are of as great Validity as the Originals.*

^c Trials per
Pais 167, 209.

A Fine or Common Recovery may be given in Evidence, tho' it is not under the Great Seal, or Seal of the Court, and without vouching the Roll of the Recovery. The Part intended is the usual Evidence that there is such a Fine. But again it is said on the contrary, that the Fine must be shew'd with the Proclamations under Seal, and that the Cyrograph or Indenture will not be sufficient; [that is, where the Fine with Proclamations is to be a Bar to a Stranger, there must be an examined Copy from the Roll of the Fine and Proclamations.]

Probationes debent esse evidentes, perspicuae et faciles intelligi. 1 Inst. 283. a.

An

An Inrollment of a Deed proves itself, the Court being certified of it by a Copy of the Inrollment, examined and attested upon Oath. Inrollments ought to be credited, the Deeds being first acknowledged to be the Deeds of the Parties before a Master in Chancery, if inrolled in the Chancery; or before a Judge of the Court where it is inrolled. The Transcripts too are made by Officers of Trust. But the Inrollment of a Deed, which needs no Inrollment, or ^a where the Estate doth not pass by it, is only Evidence to some Purposes, and when it can be proved to a Jury by Circumstances, that there was such a Deed, which is lost or burnt.

By 10 Ann. ch. 18. *If an Indenture of Bargain and Sale* ^b is ^c pleaded, a Copy of the Inrollment thereof, examined and signed by the proper Officer, and proved upon Oath to be a true Copy, is as good Evidence as the original Indenture of Bargain and Sale. [See 5 El. ch. 26. 5 Ann. ch. 18. 6 Ann. ch. 35. 7 Ann. ch. 20. and 12 Ann. Sess. 2. ch. 14. where Examinations of Popish Patrons, &c. 1 Geo. 1. ch. 10. where Entries of Augmentations, &c. or Copies thereof, are Evidence.]

A Copy of a Conviction upon an Indictment is not sufficient Evidence singly by itself in an ^e Action of Trespass, for the same Assault and Battery, but with other Evidence it may. [24.] An express Confession upon an Indictment is full Evidence; not an implied Confession, where the Defendant submits to a Fine, rather than contend with the King.

A Record of an inferior Court has been rejected in Evidence, and the Party has been put to prove, what has been done in the inferior Court. So much of Evidence by Records, as they come under the Head of Evidence by Writings.

Concerning Deeds and Writings not of Record.

Every ^d antient Deed proves itself, where Possession is gone accordingly; and tho' it has no Seal on it, or tho' the Execution of it cannot be proved. But later Deeds must be proved by Witnesses. If the Seal is broken off, yet the Deed may be given in Evidence. If all the Witnesses are dead, the Hand-writing of one of them must be proved. A Deed cannot be proved by a ^e Copy, for the original Deed might be interlined, razed, or not sufficient in Law, or not sealed or delivered. Yet in Cases of Extremity, as where the Deed was burnt, &c. the Judges may at their Discretion allow a Copy to be proved by Witnesses. A Copy of a Deed will be allowed, when the Defendant has the Deed, and will not produce it, upon Notice. If an original Deed is in Being, or may be had, the ^f Counterpart cannot be produced in Evidence; otherwise if the Original cannot be procured. Nay, a Copy of a Counterpart of a Lease, the Lease being lost, has been admitted. The ^g Recital of a Deed is no good Evidence, without shewing the Deed itself; unless it can be proved, that there was such a Deed in Being, and that it is lost. There cannot be an Exemplification of a ^h Copy of a Deed, though the Copy is inrolled. Writings not of Record, as Leiger Books of Corporations, where Leases and Grants are entered, and

^a Trials per Pais 194, 206.

^b See p. 260. ante.

^c Terms of the Law, v. Battery. Trials per Pais 25, 166.

^d 1 Inst. 6 b. 2 Inst. 118. Trials per Pais 166, 220, 232, 233.

^e 1 Inst. 225. a. & b. 10 Rep. 92. Trials per Pais 232. 1 Mod. 4.

^f 1 Lev. 25. Trials per Pais 232. 1 Salk. 287. 1 Inst. 352. b. Vaugh. 74. 75. 2 Lev. 108. 3 Inst. 173. 174. Trials per Pais 231.

^a Ex diuturnitate temporis omnia presumuntur solemniter acta. 1 Inst. 6. b. 2 Inst. 362.

such Paper-Books cannot be exemplified under the Great Seal, or other Seal in Courts of Record, but the Original must be produced; for a Leiger-Book itself is but a Copy. Therefore it must be absurd to offer a Copy of a Copy. Original Letters must be shewed,

^a 2 Roll. Abr. 686, 687.
Trials per Pais 165, 218.

^b Trials per Pais 180.
Contra, 1 Cro. 411.
^c Trials per Pais 173, 232.

^d 2 Ld. Ray. 873.
1 Salk. 285.
S. C.
2 Salk. 690.
1 Ld. Ray. 732 S. C. 745.
^e 9 Rep. 31.
Hob. 188.
^f Raym. 84.

not a Copy of them. ^a A Pedigree drawn by a Herald at Arms, for one that claims to be Heir, &c. will not be accepted as Evidence, without shewing the Records or ancient Books from whence it was taken. A Regard will be had to very ancient Books. But a Copy of an Inscription on a Grave-stone has been admitted in Evidence, to prove a Pedigree. ^b A Church-Book ought not to be allowed in Evidence. [But a Parish-Register, or a Copy or Extract thereof, proved to have been examined, and to be a true Copy, is Evidence.] ^c A Shop-Book is no Evidence after a Year. [See 7 Ja. 1. cap. 12.] Methinks the Book only of a Merchant or Trader should be no good Evidence to prove a Debt due to himself; though it is good Evidence for the adverse Party to prove a Debt against him. [It hath been held ^d not to be Evidence, of itself, even within the Year.] The Book of ^e Domesday brought into Court, is good Evidence, to prove Lands to be *antient Demesne*. An Almanack has been allowed sufficient Evidence to prove a Day to be *Sunday*. ^f An Almanack, wherein a Father had writ the Day of the Birth of his Son, was allowed as good Evidence, to prove the Non-Age of his Son.

Proceedings in Courts not of Record, as County-Courts, Hundred-Courts, Courts-Baron, &c. may be denied, and tried by a Jury. They cannot be proved by the Rolls, but must be proved by Witnesses; and then the Rolls may be Evidence too. A Copy of the Court-Rolls of a Court-Baron regularly will not be admitted in Evidence, ^a though Copies of the Court-Rolls are the only Evidence, in Point of Alienation, concerning the Tenements of Copyholders. The Court-Rolls themselves must be shewn. But there hath been an unsettled Practice in this Case, ^b the Judges having allowed Copies of Copyhold Admittances to be given in Evidence, where the Rolls have been in Being, as well as where they have been lost. [And this seems to be the present Practice.] If Copies of Court-Rolls are shewed, to prove a customary Estate, the Enjoyment thereof also as such, ought to be proved. Upon Motion a Copyholder hath obtained a Rule, for the Steward of a Court-Baron to grant Copies, and that the Court-Rolls may be produced at Trials; because all the Tenants of a Manor have an Interest in the Court Rolls. But this has been also denied.

^c Lit. 75.

^d Trials per Pais 178, 228.

^e 1 Vent. 66.
Trials per Pais 167, 168, 207, 208, 234, 239.
^f Chanc. Caf. 64.

^g 1 Ld. Ray.

311.

^h 2 Ld. Ray.

1166.

ⁱ 4 Mod. 146.

1 Salk. 278.

S. C.

^j 2 Mod. 231.

2 Str. 960.

961.

^a A Bill by a Complainant in the Court of Chancery has been allowed as Evidence against him, but looked upon to be but slight Evidence [*Qu. **] ^b A Defendant's Answer is Evidence against himself, though not against others [unless they claim under him] if the Bill is proved to have been filed. *Depositions* of Witnesses in Chancery betwixt the same Parties may be accepted if the Witnesses are dead ^c, proving the Bill and Answer filed ^d. A Decree is no Evidence in a Court of Common Law. [But *Qu. if* ^e Decrees as well as Sentences of Ecclesiastical Courts, have not been often admitted; and if made in a Cause where the Court had a competent Jurisdiction, it seems to be absurd not to admit them.] An Affidavit made before a Master in Chancery, is not to be allowed

as Evidence, though the Party is dead; unless one can make Oath, that such an *Affidavit* was made in his Presence; it may be allowed as a Note or Letter. *Affidavits* may be read in Courts upon Motions, but not upon Trials. [See 5 Geo. 1. *ch.* 24. to prove the Bankruptcy, &c.]

* *Depositions* in the Ecclesiastical Court cannot be given in Evidence; [but *Qu.* if this must not be understood, if taken in a Cause where the Court hath no Jurisdiction, as in a Cause relating to Lands or the like] but a *Sentence* may in a Cause of Tithes, &c. and the *Sentence* may be alledged summarily. [See 29 Car. 2. *ch.* 8. as to Evidence of *Augmentations* to small Vicarages and Curacies by the Register's Book, &c.] A *Probate* of a *Will* as to *personal Estate* shall be admitted. But if Issue is taken upon it, as that the Seal is forged, or that there was *Bona Notabilia*, it shall be tried by a Jury. A *Will*, under which Title to Land is made, must be shewed not a Copy of it, or the Probate, or any Proceedings about it in the Spiritual Court; unless perhaps the Original cannot be found. Yet if the *Will* is proved in the Chancery, examined Copies of the *Depositions* taken there, will be admitted in Evidence, [that is, if all the Witnesses are dead, or if the *Will* is so ancient as that it must be presumed they are not living, or if the original *Will* is lost; for otherwise it is not the best Evidence that can be had.] An Account of an Executor or Administrator allowed by the Ordinary, shall not be given in Evidence, nor any Regard had to it, upon *Plene Administravit*. The Acts of the Ecclesiastical Court have been admitted to prove the Grant of an Administration. In a *Quare Impedit* a Copy of a *Retainer*, which was entered in the Court of Faculties, was offered in Evidence on the Behalf of a Chaplain, but was not allowed.

By 7 & 8 W. 3. *ch.* 7. If any Person shall make a false or double Return of a Member of Parliament, he shall forfeit 300 l. to be divided betwixt the King, the Poor of the Place, and the Informer, and the Party prosecuting may give in Evidence the Book of the Clerk of the Crown, or a Copy thereof.

2. Of * Witnesses.

Witnesses cannot testify a Negative, but only an Affirmative. [But a Witness may as well testify that A. was not present at such a Place, as that he was, or the like; and as the Issue admits of a Negative or Affirmative, there may be Proof on each Side, so that this Rule, if understood according to common Speech, is at least too general.]

Witnesses must swear to speak the Truth, and nothing but the Truth of what they have heard or seen, not what they believe or remember, or to the best of their Remembrance. [The Oath usually

* *Judex non potest esse testis in propria causa.* 4 Inst. 279.

Plus valet unus oculatus testis, quam auriti decem. Ibid.

Testibus deponentibus in pari numero, dignioribus est credendum. Ibid.

Allegans contraria non est audiendus. Ibid.

Juramentum in parte verum, in parte falsum, non est admittendum. Ibid.

Allegans suam turpitudinem non est audiendus. Ibid.

administered to Witnesses, is general, *to speak the Truth, the whole Truth, and nothing but the Truth*: But a Witness may testify to the best of his Remembrance or Belief, in Cases where, from the Nature of the Thing, or the Length of Time since the Transaction, it cannot be expected he should be more positive; but as to what he has heard, unless it be from the Party himself as Evidence against him, such *Hearsay* Evidence, in general, is not admissible.]

^a 1 Inst. 6.
^{a. & b.}

^b 2 Salk. 689.

^c Hob. 81.

¹ Ventr. 349.

^{Kely.} 37, 38.

^d 1 Inst. 6. b.

³ Inst. 219.

³ Lev. 426,

^{427.}

^e 2 Salk. 689.

¹ Ld. Ray. 39.

^f Pendock, on

Demise of

Mackinder,

v. Mackinder

C. B. Hil. T.

²⁸ G. 2.

To a Jury one Witness is sufficient. But if a Witness is ^a *infamous* (*i. e.*) attainted of a false Verdict, or of a Conspiracy, at the Suit of the King, or convicted of Perjury, where a Pardon cannot restore his Credit, [See 5 *El. ch.* 9.] [*Qu.* if convicted of Perjury at Common Law only] or convicted of a *Præmunire*, Forgery upon the Statute of 5 *El. ch.* 14. (not upon the Statute of the 1 *H. 5. ch.* 3.) or convicted of cheating at Cards and Dice on the Statute of 9 *Ann. ch.* 14. or convict of Felony, and not ^a pardoned, (A Burning of the Hand upon Conviction, is in the Nature of a Statute-Pardon,) [See 18 *El. ch.* 7.] or if one by Judgment hath lost his ^d Ears, or stood in the Pillory or Tumbrel, or hath been stigmatized, or branded, or whipt, &c. [*Qu.* unless the Judgment be *pro Crime falsi*, as for Perjury, Forgery, or for stealing, or the like; for it is now generally agreed that it is the Crime, and not the Punishment that makes a Man infamous.] All these ought to be rejected from giving their Testimony while the Judgment is in Force. But the Record of these Convictions or Attainders must be produced in Court. You shall not be allowed to ask the Witness any Questions, to accuse himself of any of these Crimes. You may impeach his Credit by other Witnesses as to his Character and Reputation in general; but shall not be admitted to make Proof of particular Crimes, whereof he never was convicted; for this is not a proper Time for his Trial.

¹ 1 Inst. 6. b.

³ Inst. 108.

⁴ Inst. 279.

^b 1 Inst. 6. b.

³ Cro. 488,

^{492.}

¹ Vent. 243.

^{244.}

^{Hutt.} 116.

^{Raym.} 1.

¹ See p. 424,

^{ante.}

¹ 1 Wms.

^{288, &c.}

¹ 2 Ld. Ray.

^{1008.}

¹ Salk. 286.

¹ Str. 101.

² 2 Ld. Ray.

^{1166.}

¹ Ibid.

¹ Str. 34.

^a An Infidel (not a Jew, for he shall be sworn on the Old Testament) one of *non-sane* Memory, or not of Discretion, a Party interested in the Suit, a ^b Wife for or against her Husband, *et econtra*, because they are but one Person (except in Case of Treason, and as to the Wife, upon the Statute of 3 *H. 7. ch.* 2. for forcibly taking away and marrying her) the Party to an usurious Contract against the Usurer, in an Information upon the Statute of Usury, ought also not to be heard as a Witness. [But an Infidel, that is, one who is neither Jew nor Christian, according to the later Determinations, may be admitted to be a Witness.] In Chancery, where a Witness at the Time of his Examination was ^k disinterested, and he afterwards became interested, and Plaintiff in the Cause; his Depositions were allowed to be read. [But *Qu.* if in such a Case they can be read at Common Law.

^m A Grantee, who is a bare Trustee, is a good Witness to prove the Execution of the Deed to himself.

ⁿ If the Obligee in a Bond makes the surviving subscribing Witness his Executor; in an Action brought by him on the Bond, though he cannot be examined himself, yet Evidence may be admitted to prove his Hand, as a Witness dead in Law. [So if a subscribing Witness becomes infamous ^o.]

² 2 Str. 833.

• Kinsmen,

* Kinsmen, tho' never so near, Tenants, Servants, Masters, Counsellors, Attornies, one of the Jury upon Trial, one that is Bail to the Arrest, not to the Action, and all others that are not infamous, or want Understanding, or not Parties in Interest, may be Witnesses. ^{1 Inst. 6. b.} ^{2 Roll. Abr. 685.} ^{1 Sid 315.}

A Legatee may be admitted to prove a Will, if his Legacy is but small; or if he hath received his Legacy, or released it. [See 25 G. 2. *ch.* 6. For avoiding and putting an End to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning real Estates.] Kinsmen, Servants, &c. may be sworn; but their Credit shall be left to the Jury. [See 7 & 8 W. 3. *ch.* 34. 1 Geo. 1. *ch.* 6. 8 Geo. 1. *ch.* 6. Concerning the solemn Affirmation of Quakers.]

A Witness, laying a Wager, that the Party for whom he is to be a Witness, will carry the Cause, shall not make him incapable to be a Witness. For then by such Art no unwilling Witness could be made use of.

* In an Action against the Hundred upon the Statute of Winchester, ^{2 Roll. Abr. 685, 686.} ^{1 Mod. 73, 74.} the Party robb'd may be a Witness for himself. If a Master delivereth Money to his Servant, and his Servant is robb'd, he may be admitted to prove the Delivery of the Money to his Servant, tho' the Master is Plaintiff in the Action. (2y.) For he might have had other Witnesses, to prove the Delivery. A Lessor, that lives out of the Hundred, may be a Witness for the Hundred; for his Tenant of the Land pays the Contribution to the Loss by Robbery, if a Tax is levied. Hundredors, tho' they have no Lands, and pay no Taxes, cannot be Witnesses for the Hundred; because when the Money recovered against the Hundred comes to be levied, they may be worth something; and because they are compellable to Watch and Ward. Sojourners, Servants, and those that receive Alms, may be Witnesses.

* Members of Corporations shall be admitted, or refused, to give Evidence, in Actions brought by Corporations, as their Interest is either small or great, whereby it may be presumed, whether they will be partial, or not. But to avoid such Debates, it is the best way to disfranchise them. [See 3 W. & M. *ch.* 11. 1 An. *ch.* 18. and B. 1. *ch.* 7. ante, Concerning the Accounts of Church-wardens, Overseers of the Poor, and of decay'd Bridges.] ^{2 Lev. 231, 236.} ^{2 Str. 1069.}

* An Informer may be a Witness, tho' he is to have Part of the Forfeiture, (i. e.) where other Witness cannot in the nature of the Thing be had, but not otherwise. ^{3 Mod. 114.} ^{Fortes. Rep. 248.} ^{1 Str. 316.} ^{1 Vent. 197.}

* A Counsellor, Attorney, Solicitor, ought not to be examined against their Clients, because they are obliged to keep their Secrets. But of their own Knowledge before Retainer, they may be examin'd as Witnesses, if serv'd with a Subpoena.

The King cannot be a Witness under his Sign Manual. ^{2 Roll. Abr. 686.}

Things done in a foreign Country may be given in Evidence to a Jury. And upon Trial of Things done beyond Sea, the Testimony of a publick Notary from thence is good Proof. (2y.) ^{Hob. 213.} ^{contr.} ^{6 Rep. 47.} ^{2 Roll. Rep. 346.} ^{2 Cro. 342.}

To prove the Confession of the Party, is oftentimes slender Evidence, if there is no Proof of a Dealing betwixt the Plaintiff and Defendant. However a Confession must not be taken as to Part only. As if it be sworn, that the Defendant confessed the Debt, ^{2 Trials per Pais 209,}

but said at the same Time that he had paid it, the whole saying must be taken together.

If a Witness is not able to travel, a Judge may excuse his Non-appearance, and certify his Examination. Where a Witness cannot be present at the Trial, by the Consent of the Plaintiff and Defendant, or by Rule of Court, he may be examin'd upon Interrogatories at a Judge's Chamber.

^a 1 Inst. 6. b. Outlawry in a personal Action is no Exception against a Witness, tho' it is against a Juror.

³ Cro. 522, 540. By 5 El. ch. 9. If one served with Process of Subpoena out of a Court of Record to testify as a Witness (being tendered convenient Charges, and having no reasonable Let) shall make Default, he shall forfeit to the Party grieved ten Pounds and his Damages.

By 29 Car. 2. ch. 3. A Deviser of Lands, &c. must be in the Presence of three subscribing Witnesses at least.

² Str. 810. ³ Id. Ray. 1528. In criminal Causes if a Witness refuses to appear upon a Subpoena, the Court may put off the Trial, and grant an Attachment against him for his Contempt. [See 7 & 8 W. 3. ch. 3. 1 An. St. 2. ch. 9.]

See what Evidence by Writings or Witnesses may be admitted upon general or special Issues, 2 Roll. Abr. 676 to 687. Trials per Pais, ch. 15. Nelson's Law of Evidence per Tot.

In many Cases by Statutes special Evidence may be given upon the general Issue as before observed, [See of Issues, ante, and of Evidence and Witnesses, ch. 5. post.]

^a 1 Inst. 6. b. Many Times Juries are induced, together with other Matter, by ^b Presumption; whereof there are three Sorts, (viz.) Violent, probable, and light.

^a 1 Inst. 6. b. ^{373. a. & b.} Violent is often full Proof; as if one is run through the Body with a Sword in a House, whereof he instantly dieth, and it was proved by a Witness, that one was seen to come out of the House with a bloody Sword, and no other Man was at that Time in the House. So if all the Witnesses to a Deed are dead, continual and quiet Possession is a violent Presumption of the Truth of it. But the Deed may receive further Credit by Comparison of the Hands and Seals. Again, if a Defendant pleads Payment to a Bond, and it appears, that the Debt is of so long standing by the Bond, and it hath not been demanded, nor Interest paid, for many Years [for twenty Years or more] it shall be presumed that the Money was paid, though the Plaintiff hath the Bond in his Custody. If a Rent is behind for twenty Years, and the Landlord makes an Acquittance for the last Year that is due, all the Rest are presumed to be paid, &c. [2y. if the like Presumption would not lie merely on the Acquittance for the last Year.] [See 19 Car. 2. ch. 6. 6 An. ch. 18, where an absent Person shall be presum'd to be dead, with respect to one in Remainder, Reversion, or Expectancy of any Estate after his Death.]

^a 1 Inst. 6. b. Probable Presumption proves but little, and light Presumption not at all.

In general, the Court ought not to judge too hastily upon bare Presumptoin in Case of Life and Death.

A Wrong

* A Wrong shall never be presum'd.

No Proofs shall be admitted against the Presumption of *Law* ^{1 Inst. 232. b.}
in many Cases, though the general Rule is otherwise. ^{1 Inst. 373. a. & b.}

Note, That Evidence is never *pleaded*; but the Matter of Fact ^{9 Rep. 9.} only; which if it be denied, the Evidence shall be given to the Jury, not to the Court.

There may be a *Demurrer to Evidence*. As if the Plaintiff ^{9 Rep. 104. 1 Inst. 72. a.} shews in Evidence any Records, Deeds, or *Writings*, or any Sentence in the Ecclesiastical Court, upon which a Question of Law doth arise, and the Defendant offereth to demur in Law upon it, the Plaintiff must join in Demurrer, or waive his Evidence. So if the Plaintiff produces *Witnesses*, to prove a Fact, upon which a Matter of Law arises, if the Defendant admitteth their Testimony to be true, there also the Defendant may demur in Law upon it. So may the Plaintiff demur upon the Defendant's Evidence. In these Cases the Counsel of the Plaintiff and Defendant must agree the Matter of Fact in Dispute, and the Jury must be discharged and the Matter of Law referred to the Judges to determine. But if Evidence is given for the King in an Information, or other Suit, and the Defendant offers to demur upon it, the King's Counsel are not obliged to join in Demurrer, but the Court ought to direct the Jury, to find the special Matter. And indeed because Juries usually of late find a doubtful Matter specially, Demurrers upon Evidence are seldom used.

There may be also a *Bill of Exceptions* to the [Directions concerning the] Evidence; as when one of the Parties for the Insufficiency of the Evidence on the other side (as he conceives) doth offer to demur upon the same, and the Judge doth not agree to it; then the Judge ought upon Request to seal the Bill of Exceptions tendred to him in Writing; which upon a Writ of Error may be heard. [See *West. 2. cb. 31.*]

In *criminal* Cases no Bill of Exceptions to the Evidence is to be allow'd. For the Statute above-mentioned extends only to Civil Causes. ^{9 Rep. 13. 2 Inst. 426. 427. 428. 1 Salk. 288.}

Note, That when the Trial is by twelve Men, the Judgment is ^{1 Inst. 6. b.} not given upon Witnesses, or other Kind of Evidence, but upon the Verdict, as the Verdict is given upon the Evidence. ^{3 Inst. 26. 27.} The Evidence to the Jury is no Part of the Trial. For by Law the Trial here is not by Witnesses, but by Verdict of the Jury. Evidence to a Jury and Trial by a Jury are different.

Oftentimes when the Evidence hath been heard, the Parties doubting of the Verdict, do consent that a Juror shall be withdrawn or discharged. But if not, Then

5. The Jury must give their Verdict.

After the Evidence given upon the Issue, ^{1 Inst. 237. b.} the Jury ought to be kept together in some convenient Place without Meat or Drink,

* *Omnia presumuntur legitime facta, donec probetur in contrarium.* 1 Inst. 232. b.
Injuria non presumitur. Ibid.

Odiosa et inbonesta non sunt presumenda. 10 Rep. 56. 1 Inst. 78. b.

* *Stabitur presumptioni, donec probetur in contrarium.* 1 Inst. 373. b. 2 Rep. 48. 4 Rep. 71.

Fire, or Candle; otherwise than with Leave of the Court. They ought not to be allow'd to speak with any Stranger, unless with the Bailiff that attends them; and with him only after they are agreed upon their Verdict.

^a 1 Inst. 226. a. *Verdict* (*Vere dictum*) is the Answer of the Jury concerning the Matter of Fact referred to them by the Court upon the Issue. This Answer they may make without Testimony, or against Testimony, if they themselves know the Fact. Every one of the twelve Jurors must agree together before there can be a Verdict; and then, when they are agreed, it must be delivered by the Foreman.

^b 1 Inst. 226. b. A Verdict may be either *General* or *Special*. *General*, which is positively given either in the Affirmative or Negative; as Guilty or Not guilty, &c. *Special*, where the Jury find the special Matter, or the Fact at large, and leave it to the Judges, to determine what is the Law, that arises from the Fact. It may be either upon a general or special Issue. Likewise this special Verdict may be either in Civil, or Criminal Causes, that concern Life or Member. And the Court cannot refuse a special Verdict, if it is pertinent to the Matter in Issue. But a Verdict finding Matter uncertainly, or ambiguously, is insufficient, and no Judgment shall be given upon it.

^c 1 Inst. 227. b. There is also a *publick* and *privy* Verdict. *Publick*, which is given in open Court. *Privy*, which is given out of the Court, before any of the Judges of the Court. It is call'd a privy Verdict, because it ought to be kept secret and privy from each of the Parties litigant, till it is affirmed in open Court. But the Jury may vary from their privy Verdict; and tho' they found for the Plaintiff by the privy Verdict, they may find for the Defendant afterwards in open Court by their publick Verdict. After the Verdict is recorded, they cannot vary from it; but before it is recorded, they may vary from it.

^d 3 Inst. 110. In *criminal* Matters, as Treason, Felony, Larceny, the Jury cannot give a privy Verdict, but must give it openly in Court.

^e 1 Inst. 227. a. Tho' the Verdict doth not find the precise Issue, yet if the Substance or Matter of the Issue is found, it may be good. As if in *Assise of Darrein Presentment*, the Plaintiff alleges the Avoidance of the Church by Deprivation, and the Jury finds the Avoidance by Death, the Plaintiff shall have Judgment; for the Avoidance, is the Matter of the Issue. And this Rule holds in criminal Cases; as in an Indictment of Murder, and Plea Not guilty, the Verdict may find *Manslaughter*; because the Killing is the chief Point, and the Malice set forth is only Circumstance.

^f 1 Inst. 227. b. A Jury sworn and charged in Case of Life and Member, cannot be discharged, till they give a Verdict. But in civil Cases a Subject or common Person (not the King) may be nonsuit; and then upon Non-appearance of the Plaintiff to attend the Verdict, the Jury may be discharged without giving any Verdict at all.

But if a Verdict is given, the *Poslea* must be returned by the Judge of *Nisi Prius* on the Back of the Record. The Substance of the Return is, *Quod Poslea*, &c. (*viz.*) That afterwards the Plaintiff and Defendant appeared by their Attornies before the Judge of *Assise*, and the Jury was sworn, &c. and found this Verdict,

dict. &c. and gave such Costs. But Costs of Increase are to be taxed by the Prothonotary.

Notwithstanding all this, the Verdict may be set aside: 1. If the Jury after their Evidence given at the Bar, and before they are agreed on their Verdict, do eat or drink at the Charge of the Plaintiff, if the Verdict is given for him; but otherwise if it is given for the Defendant; and so *Vice Versa*. If after they are agreed of their Verdict, they eat or drink at the Charge of him for whom they do pass, it shall not avoid the Verdict. They may eat and drink at the Cost of both Parties, if they agree to it; or by Licence of the Judge. If they eat or drink at their own Charges, it is only fineable: The Verdict also may be set aside, if they throw up Cross or Pile, or cast Lots, whether they shall find for the Plaintiff or Defendant, &c. 2. If the Plaintiff, or any in his Behalf, after the Jury are gone from the Bar, do deliver any Letter, &c. to any of the Jury concerning the Matter in Issue, which was not given in Evidence, it shall avoid the Verdict, if it is found for the Plaintiff. But not if it is found for the Defendant, and so *Converso*. And if a Witness, before sworn on the Part of the Plaintiff or Defendant, is sent for by the Jury after they are gone from the Bar, and repeats again his Evidence to them, and afterwards they give their Verdict for him whose Witness he was, the Verdict is void. 3. A Verdict may be set aside by the Court, if it appears to the Judge before whom the Cause was tried to be given against Evidence, or against his Direction, or where they give excessive Damages, &c. and the Court may order a new Trial. 4. If one of the Jury dies before the Verdict, or if they cannot all agree, the Verdict of the Rest is void, and a new Inquest must be awarded. 5. The Verdict may be set aside by Writ of Attaint. [See *infra*.] It might be noted, that in some of these Cases, the Trial, &c. is recorded, and the Verdict set aside by Judgment of the Court upon Record; in others (as in the Case of a Verdict against Evidence) the Trial is set aside by Rule of Court, and the Return of the *Distringas*, &c. is not entered, as being supposed void.

See of *Embracery*, B. 3. ch. 3. ante.

IX. The *Judgment* (*Judicium, quasi Juris Dictum*) is the Determination, Decree, or Sentence of the Court upon the Suit. Regularly, it ought to be given according to the Original Writ.

A Judgment is either *Interlocutory* or *Final*. *Interlocutory*, as upon Dilatory Pleas, where the Judgment in many Cases is *Respondet Ouster*, (i. e.) Answer over to the Merits of the Cause. [Or where it is provisional, before the ascertaining the Damages to be recovered.] [See 8 & 9 W. 3. ch. 11. where if the Plaintiff or Defendant dies after an Interlocutory Judgment, the Action shall not abate.] The Judgment against the King is never *Final*. [But see 6 Ed. 1. or the Statute of Gloucester, 18 Ed. 1. or Statutum *de quo Warranto*.]

Judicium redditur in invitum. 5 Rep. 28.

Interest Reipublice res judicatae non rescindi. 2 Inst. 360.

Res judicata pro veritate habetur. 1 Inst. 39. a. 2 Inst. 360, 573.

Interest Reipublice ut judicia rata sint. 2 Inst. 84, 360.

Judgment may be given upon *Default*, upon *Confession*, upon *Demurrer*, and upon *Trial* of the Issue. *Outlawry* is a Judgment in itself.

1. Judgment may be suffered to go by *Default*, as upon *Nil dicit*. *Default* is taken for Non-appearance in Court. But the *Default* may be saved in several Instances. A Recovery by *Default* against an Infant is erroneous. But the Infant must reverse it by Writ of Error during Minority.

2. By *Confession* of the Defendant, by entering *Cognovit Actionem*, or that he acknowledges the Action, or by Consent of the Attorney for the Defendant, by entering *Non sum Informatus*, &c. This is often done by Consent, with a Stay of Execution till a certain Time, to save Charges, where the Action is just.

In these Cases, where the Judgment is without Trial, or Interlocutory, and Damages only are to be recovered, and not a Debt certain, there must be a Writ of *Inquiry* of Damages executed before the Sheriff, or his Under-Sheriff, of which the Plaintiff is to give the Defendant Notice, and of the Time and Place of the executing the same. The Sheriff thereupon summoneth a Jury of Twelve Men, or of a fewer Number (it is the constant Practice to have twelve upon this Jury, tho' the Number is not mentioned in the Writ) (which cannot be challenged) examines Witnesses, and makes a Return on the Writ, in order to final Judgment and Execution.

If one is under an Arrest, and gives a Warrant of Attorney to confess a Judgment, and no Attorney for the Defendant is then present to subscribe the Warrant, the Court will set aside the Judgment, supposing it to be obtain'd through Force or Fear. [But *Qu.* If he was not under Arrest at the Suit of the same Person.] If one gives a Warrant to confess a Judgment, and dies before it is entered up, this is a Countermand of the Warrant. But if the Judgment is signed on the same Day he dies, tho' after his Death, it is good: [Or if it is regularly enter'd at of a Term preceding his Death, tho' in fact not entered up till after his Death, it is good, and this Kind of Warrant cannot be revoked.]

By 4 Ann. ch. 16. All the Statutes of Jeofails shall be extended to Judgments upon Nil Dicit, Confession, or Non sum Informatus in any Court of Record, so as there be an Original Writ, or Bill, and Warrants of Attorney duly filed.

3. Upon *Demurrer*, as when the Defendant in an Action of Debt pleads an ill Plea in Bar, and the Plaintiff demurs in Law upon it, and the Court gives Judgment for the Plaintiff to recover his Debt, and Damages and Costs. [See 4 Ann. ch. 16.] But if it were in an Action of the Case, a Writ of *Inquiry* of Damages must be awarded before final Judgment. If Judgment upon the Demurrer is for the Defendant against the Plaintiff, the Judgment is, That the Plaintiff *Nihil Capiat per Breve*, or *per Billam*, and that the Defendant *Eat inde sine Die*. [See 3 W. & M. ch. 14. Concerning Heirs, and 4 Ann. ch. 16. as to Costs on Demurrers.]

4. Judgment

4. Judgment may be given upon *Trial* of the Issue, according to the various Methods of Trial above-mention'd, where the Jury upon the Trial having assessed the Damages and Costs, the Court gives Judgment for the same, and also for Costs of Increase, which Judgment is final.

There may be a *Stay* or *Arrest* of Judgment, for want of due Notice of Trial; or because the Plaintiff before the Trial treated the Jury, or for that the Record differs from the Deed pleaded in some material Point, &c. or you may arrest Judgment for that which may appear upon the Issue-Roll; as for some material Defect in Pleading, which is Matter of Substance, tho' there is a Verdict. [But see 5 Geo. 2. ch. 13. *post.*] Therefore to move in Arrest of Judgment, is to shew Cause why Judgment should be stopp'd. But regularly no Motion for Arrest of Judgment ought to be made but within the first four Days in the Term, [or before the Rule given in the King's Bench upon the *Posse* expires, if there be four Days within Term, in civil Cases, but any Time before Judgment signed in criminal Matters. There is no Rule for final Judgment given in the Common Pleas, but you stay the same Time there as in the King's Bench before you can sign final Judgment, that is, four Days, not reckoning Sunday.]

Here all Matters of Fact must be made out by *Affidavit*. [See 29 Car. 2. ch. 5. See also 17 Car. 2. ch. 8. Where the Death of either Party between Verdict and Judgment, shall not be alledged for Matter of Error.]

At the Common Law the Judges may amend the Misprisions of Clerks in their Judgments, or any Part of the Record, in the same Term. But of another Term they could not before 14 Ed. 3. ch. 6. [See 8 H. 6. ch. 12. what Defects in Records may be amended.]

By 5 Geo. 1. ch. 13. Where any Verdict hath been given in any Action in any Court of Record in England or Wales, the Judgment shall not be staid, for any Defect in Form or Substance in any Bill, Writ original, or judicial, or for any Variance in such Writ from the Declaration or other Proceedings.

See 13 El. ch. 5. Concerning fraudulent Judgments, to avoid the Debt, &c. of another, 29 Car. 2. ch. 3. and 4 & 5 W. & M. ch. 20. Acts for the better Discovery of Judgments; and from what Time Judgments affect Lands, and may be good against Purchasers and Mortgagees, and have Preference against Heirs, Executors, or Administrators. 8 Geo. 1. ch. 25. For setting down the Time of signing Judgments in the Principality of Wales and Counties Palatine. And see 5 Ann. ch. 18. Concerning the Registering of Judgments for the West-Riding of the County of York; 6 Ann. ch. 35. For the East-Riding; 8 G. 2. ch. 6. For the North-Riding; and 7 Ann. ch. 20. For the County of Middlesex.

* If the Plaintiff or Defendant prevails in the Suit, they shall be allow'd their Costs, (i. e.) legal Costs of the Suit; but not Costs and Expences of Travel or Loss of Time. Costs are given by Statutes; for the Common Law does not give Costs in any Case. [For Damages and Costs of Suit, see the 6 Ed. 1. ch. 1. & 14. 23 H. 8. ch.

* *Ubi damna dantur, victus victori in expensis condemnari debet.* 2 Inst. 289.

15. 8 El. ch. 2. 18 El. ch. 5. 4 Ja. 1. ch. 3. 5 & 6 W. & M. ch. 12. 8 & 9 W. 3. ch. 11.] In which last Statute Costs of Suit are granted in several Actions; as where there are several Defendants, and one is acquitted; upon Demurrers; if Judgment is affirmed for the Defendant upon a Writ of Error; [See 3 H. 7. ch. 10.] In Waste, and in Debt upon the Statute for Tithe, where the single Value or Damage found by the Jury shall not exceed 20 Nobles; in all Suits upon Writs of Scire Facias, Prohibition, wilful, and malicious Trespasses, certified to be such. [See also 4 An. ch. 16. For Costs upon Insufficiency of Matter in Demurrers join'd, at the Discretion of the Court; and upon a Verdict on any Issue in a Cause, where there are several Matters pleaded, unless the Judge certify, that the Party had a probable Cause to plead such Matter as shall be found against him.]

By 43 El. ch. 6. In personal Actions in the Courts at Westminster (not being for Land or Battery) if the Judge will certify, that the Debt or Damage does not amount to 40s. or above, the Plaintiff shall have no more Costs than Damages, but less at Discretion of the Court.

a 2 Ld. Ray. 831, 1588. By 21 Ja. 1. ch. 16. In Actions on the Case for Words no more Costs than Damages, if the Jury assess Damages under 40s.

By 22 & 23 Car. 2. ch. 9. In all Actions of Trespass, Assault and Battery, and other personal Actions, where the Judge shall not certify, That a Battery was proved, or the Title of the Land chiefly in Question; no more Costs than Damages, if the Jury find the Damages under 40s. [But see 8 & 9 W. 3. ch. 10.]

See 11 & 12 W. 3. ch. 9. Which extends the 22 & 23 Car. 2. ch. 9. before-mentioned to the Courts in Wales, and the Counties Palatine of Chester, Lancaster, and Durham.

No Costs against the King; [See 24 H. 8. ch. 8.] nor against Executors or Administrators; nor against one that sues in Forma Pauperis. [See 11 H. 7. ch. 12.]

By some Statutes there are treble or double Damages or Costs given; as by 7 Ja. 1. ch. 5. 21 Ja. 1. ch. 12. There are double Costs given to Justices, Mayors, and other Officers, where Actions are brought against them. By 2 W. & M. Sess. 1. ch. 5. Treble Damages and Costs upon a Rescous of a Distress for Rent, &c. double Costs upon a Judgment after a Verdict affirmed on a Writ of Error, by 13 Car. 2. ch. 2.

b 1 Ld. Ray. 19, 342.

* 2 Inst. 289.
10 Rep. 116.
2 Str. 1048.
1 Ld. Ray. 19.

Note, * That when a Statute doth increase Damages to the double or treble Value, &c. where Damages before were given, there the Plaintiff shall recover his double and treble Damages and Costs; and the Costs being Parcel of the Damages shall be doubled or trebled. But where double or treble Damages are in an Action newly given, where no Damages were formerly recoverable, there the Plaintiff shall recover those Damages only, and no Costs, unless the Costs too are expressly given by the Statute.

There are no Costs given in a Quare Impedit. [See West. 2. or 13 Ed. 1. ch. 15.]

By 23 H. 8. ch. 15. He that sues in Forma Pauperis [See 11 H. 7. ch. 12.] shall not pay Costs, but shall suffer such Punishment as the Justices or Judge of the Court shall think fit.

See 2 Inst. 112, 200, 288, 289. Danv. Abr. Tit. Costs, Tit. Damages.

X. After Judgment Process of *Execution* doth begin. It begins ^{Of Execution.} where the Action doth end.

^a *Execution* is the obtaining of actual Possession of any Thing acquired by Judgment of Law. At Common Law, where a Subject ^{1 Inst. 154. a.} sued Execution upon a Judgment for Debt or Damages, he could ^{2 Inst. 394.} not have the *Body* of the Defendant or his Lands in Execution, (unless in special Cases) but only his Goods and Chattels, and his Corn ^{3 Rep. 11, 12.} and other present Profit that grew upon his Land: For this Reason ^{Finch 470.} he had only a *Fieri facias* to levy upon Goods and Chattels, and a *Levari facias*, to levy the Debt or Damages upon the Lands and Chattels. Both were to be sued out within the Year. But now Execution may be otherwise by Statutes (*viz.*) by *Capias ad Satisfaciendum* in many Cases against the *Body*, and by *Elegit* against the future Profit of Land. ^{471.}

Execution is either in *personal*, *real*, or *mixt* Actions.

1. In ^b *personal* Actions, Execution may be three Ways, (*viz.*) ^{1 Inst. 289. a.} By *Capias ad Satisfaciendum*, *Elegit*, and *Fieri Facias*. ^{3 Rep. 11, 12.}

1. By *Ca. Sa.* or by *Capias ad Satisfaciendum*, ^c to imprison the ^{See of Writs} Body after Condemnation till Satisfaction. It lies not against Peers ^{anc.} of the Realm, or their Wives, except perhaps in some special Cases, nor against Executors or Administrators for the Debt of the Testator or Intestate, except a *Devasavit* is returned; and then a *Ca. Sa.* lies against the Body, or *Fieri Facias* against their Goods. Regularly it lies only against such Persons, against whom a *Capias* doth lie at the Commencement of the Suit. [See 5 & 6 *W. & M. ch. 12.* An Act to take away the Process for the *Capiatur Fine* in the Courts at *Westminster*.]

If one is in Execution on a *Ca. Sa.* no other Execution can be sued against him, his Lands, or Goods. But,

By 21 *Ja. 1. ch. 24.* The Party at whose Suit any Person shall stand charged in Execution for Debt or Damages recovered, his Executors or Administrators may, after the Death of the Person so charged in Execution, sue forth new Executions against the Lands, Goods, and Chattels of the Person deceased. Howbeit this Act shall not extend to Lands sold Bona Fide (after the Judgment) when the Money raised thereon is paid, or secured to be paid to Creditors in Discharge of due Debts.

[See 1 *Ja. 1. ch. 13. infra*, and the Statutes concerning *Escapes*, in p. 78, *ante*. See also 32 *G. 2. ch. 28.* for the Relief of Prisoners in Execution, not charged with more than the Sum of one hundred Pounds.]

2. An ^d *Elegit* is a judicial Writ given by Statute, either upon a ^{1 Inst. 289. b.} Recovery for Debt or Damages, or upon a Recognizance in any ^{Reg. Orig.} Court that hath Power to take it. For, ^{199, 301.}

^a *Executio est fructus et finis legis.*

Juris effectus in executione consistit.

Parum est laesam esse sententiam, nisi mandetur executioni.

Executio juris non habet injuriam. 1 Inst. 289. b.

Ea quæ in curia nostra rite acta sunt, debite executioni demandari debent. 2 Inst. 84.

By West. 2. or 13 Ed. 1. ch. 18. He that recovereth a Debt or Damages, or upon a Recognizance, in the King's Court, may at his Election have a Fieri Facias of the Goods and Chattels of the Debtor, or a Writ of Elegit to the Sheriff, to deliver to him all the Chattels of the Debtor (except Oxen and Beasts of the Plough) and the Moiety of his Land, by reasonable Price and Extent, till the Debt is levied.

^a 2 Inst. 395. Executors and Administrators of a Plaintiff or a Recognizee, or Successors of a Cognizee, have this Election, though not named in the Statute; otherwise of an Assignee. [See of *Scire facias*, *infra*.]

^b 2 Inst. 395. Though the Sheriff is only mentioned in this Act, a Serjeant at Mace, and every other immediate Officer to a Court of Record, is included by the Equity of the Act, who by Precept in the Nature of an Elegit may extend Lands, &c.

⁴ Rep. 65. Where there are two Judgments, and the Plaintiff is in Possession by Virtue of an Elegit on the last Judgment, yet the Plaintiff in the first Judgment may afterwards sue out an Elegit upon his first Judgment, and have the Lands delivered to him, and shall recover the same from the Plaintiff in the last Judgment, though he had the first Extent.

^c 1 Inst. 102. By the *Moiety of the Land*, only such Land is to be understood, which the Defendant had at the Time of the Judgment given, or of the Recognizance acknowledged, unless his Land hath been before conveyed away by Fraud to deceive Creditors. I say, at the Time of the Judgment; that is, where the Action is brought in Respect of the Person, not of the Land. But if an Action of Debt is brought against an Heir, and he alieneth hanging the Writ, the Land, which he had at the Time of the Original purchased, shall be charged. [See 3 W. & M. ch. 14. *infra*.] By Virtue of these Words the *Moiety*

^a 2 Inst. 396, of the Land, the Sheriff may extend Lands in ancient Demesne, a Term for Years, an Annuity, Rents, &c. The Sheriff may extend or sell a Lease, because it is a Chattel. But Copyhold Lands cannot be extended by Elegit; for it would be prejudicial to the Lord, if any Stranger should have Interest in the Lands holden by Copy without Admittance of the Lord. The Plaintiff may have Execution against the Body, Goods and Chattels of a Copyholder. [See for the Time of binding the Property of Goods, 29 Car. 2. ch. 3. *infra*.]

^b 4 Rep. 74. By reasonable Price and Extent.—Price refers to Goods and Chattels: Extent refers to Land. And this Appraisement and Extent upon the Elegit must be found by Inquest of twelve Men returned of Record. An Obligee cannot pray, that the Extenders shall take the Land, &c. at the Rate at which they appraise them in an Elegit; but on a Statute-Merchant, or Staple he may. The Goods are not to be sold, but are to be delivered to the Party at a reasonable Price upon the Appraisement. If upon an Elegit there is only Execution to be had on the Goods, because there are no Lands; if it happens that the Goods are not sufficient, the Plaintiff may have a *Capias*. For here the Elegit is in Effect but a *Fieri facias*; otherwise if Lands were extended.

¹ Hob. 58, 59. Till the Debt is levied.—Yet if the Party pays and satisfies the Debt of Record, he shall enter into his Land. And so the Tenant of the Land may enter, when the Tenant by Elegit is satisfied by the

² Cro. 338.

³ 339.

¹ Str. 226.

² Ld. Ray.

^{1451.}

Contra,

² Inst. 395.

² Inst. 395.

^{396.}

⁴ Rep. 67.

the Extent, or Receipt of the Profits or Rents. But not in Case of an Extent upon the Statute: For he must have a *Scire facias*.

If the Chattels are sufficient to pay the Debt, and it appeareth so to the Sheriff, then the Sheriff ought not to extend the Land.

Before the Extent is filed, * The Court may stay the filing of the Writ, and grant another, if they find any Fraud or Partiality. ^{1 Ld. Ray. 346, 718.}

An *Elegit* lies in *Wales, &c.* for that the King's Writs run not in *Wales, &c.* is to be understood of Original Writs.

See of *Estate by Elegit*, B. 2. ch. 1. Of *Purchase*, B. 2. ch. 3. And the *Catalogue of Writs supra, verb. Elegit*, 32 H. 8. ch. 5. For Remedy where Lands in Execution are evicted or recovered by elder Title, and the Exposition of that Act, 1 *Inst.* 289. b. 290. a. 2 *Inst.* 678, &c. 4 *Rep.* 66.—13 *El.* ch. 5. Concerning fraudulent Judgments and Executions of Lands and Tenements, Goods Chattels, to defraud Creditors, &c. 16 & 17 *Car.* 2. ch. 5. Concerning Extents upon Judgments, Statutes, or Recognizances, where Part of the Lands extendible are omitted, &c. and 29 *Car.* 2. ch. 3. where Execution may be upon Lands held for one in Trust; and when the Writ of Execution shall bind the Property of Goods, *infra*.

3. ^b *Fi. fa.* or *Fieri facias* (from the Words in the Writ *Quod b* 1 *Inst.* 290. b. *Fieri facias de Bonis, et Catallis, &c.*) [See *West.* 2. ch. 18. *supra.*] ^{351. a.} lies against the Goods and Chattels of him against whom Judgment ^{5 Rep. 92, 93.} has been given for Debt or Damages. It also lies against Executors ^{1 Ld. Ray. 252.} or Administrators, to be levied of the Testator's Goods. [See of ^{2 Cro. 555.} *Scire facias, infra.*] But by *Fieri facias* the Sheriff cannot break ^{556.} open Doors, to take the Goods. ^{See of Writs, ante.}

By the Seizure of the Goods ^c, the Sheriff hath a Property in ^{2 Ld. Ray. 1075.} them; and after the Debt levied, the Sheriff is Debtor to the Plaintiff.

This Writ is only against the Goods and Chattels. By Virtue of it a Term for Years may be sold, as well as any other Goods, and without an Inquest or Jury. Also Corn growing may be sold. And the Sale shall take Effect, ^d though the Judgment is afterwards ^{8 Rep. 96.} reversed; else no one would buy. But the Plaintiff shall be restored ^{143.} to the Value. The Sheriff cannot deliver ^{1 Roll. Abr. 893.} the Goods taken by him in Execution to the Plaintiff in Satisfaction of his Debt; because ^{1 Cro. 278.} his Authority is, to sell the Goods. Goods pawned, or Goods of a ^{1 Ld. Ray. 346.} Stranger, in the Possession of the Defendant, Things annexed to the Freehold, Goods bought *Bona Fide* pending the Action, shall not be subject to the Execution. ^e The Sheriff, &c. at his Peril ^{1 Dalt. Sher. 60.} must take Notice, whose Goods they are. But if the Sheriff inquires by a Jury, where the Property is lodged, and it is found that they are the Defendant's Goods, when they are not, this will excuse the Sheriff. [In an Action of Trespass perhaps; but *Qu.* if it will in an Action of Trover brought by the true Owner.]

If you levy only Part of the Debt on a *Fieri facias*, you may have a *Capias ad Satisfaciendum* for the Residue.

* If the Defendant is a beneficed Clerk, and the Sheriff returns ^{1 Inst. 4.} *Quod est Clericus Beneficiatus, nullum habens laicum feodum*, a Writ ^{472. 627.} goes to the Bishop of the Diocese, to levy the Debt and Damages ^{2 Roll. Abr. 474.} *De Bonis Ecclesiasticis*; who thereupon sends forth a Sequestration of the Profits of the Clerk's Benefice, directed to the Church-wardens,

dens, &c. to gather up the same; and to pay them over, to him that had the Judgment, till the Debt is paid. But this Writ of Sequestration must be renewed every Term, and the Bishop usually takes Bond of the Plaintiff to save him harmless.

^a Finch 472, 473, 474, 475. ¹ Inst. 289. b. ² Inst. 678. Note, ^a That there is an Execution on *Body, Lands, and Goods*, upon *Statutes-Merchant, Staple, or Recognizance* in the Nature of a Statute-Staple. The Manner of this Execution is directed by the 11 Ed. 1. 13 Ed. 1. St. 3. 27 Ed. 1. St. 2. ch. 9. 23 H. 8. ch. 6.

[See where one may have Execution upon a Recognizance, after the first Day of Failure, without staying till all the Days are past, in p. 188, & 289, and Of Actions of Debt, *ante*.]

By 1 Ja. 1. ch. 13. If one in Execution is delivered by Privilege of Parliament, when the Privilege ceases, the Plaintiff, his Executors, or Administrators, may sue out a new Execution against him.

By 16 & 17 Car. 2. ch. 5. When any Judgment, Statute, or Recognizance for Payment of Money, shall be extended, it shall not be avoided or delayed, because Part of the Lands extendible are omitted; saving to the Party whose Lands are extended, his Remedy for Contribution. This Act is not to give any Extent or Contribution against an Heir within Age, &c.

By 29 Car. 2. ch. 3. Sheriffs may deliver in Execution all Lands, whereof others shall be seised in Trust for him against whom Execution is had upon a Statute, Judgment, &c.

No Writ of Execution shall bind the Property of Goods, but from the Time of its Delivery to the Sheriff, or Coroners; who upon Receipt thereof (without Fees) shall indorse the Day of the Month, and the Year when they received it.

By 3 W. & M. ch. 14. Execution upon a Judgment, where an Heir hath made over Lands descended to him, may be taken against such Heir for the Debt of his Ancestor, as if it was his own Debt.

[See 8 An. ch. 14. Concerning the Payment to a Landlord of one Year's Rent before Execution, &c. p. 197, *ante*.]

2. In real or mixt Actions, the Writs of Execution are, 1. An *Habere facias seisinam*, to put one in Possession of Freehold Lands recovered; which is done by the Delivery of a Bough of a Tree, Clod of the same Land, or of a Ring of a Door to give Possession of a House, &c. in the Name of Seisin. 2. *Habere facias Possessionem*, to put a Plaintiff in actual Possession of his Term again, when he hath been ejected out of his Term, and hath recovered it by Judgment in Ejectment. The Sheriff in executing both these Writs, may break open Doors, and deliver Seisin or Possession thereof to the Plaintiff. For after Judgment it is not the House of the Tenant or Defendant. [See Of the Sheriff, B. 1. ch. 7, *ante*.]

See 29 El. ch. 4. 3 Geo. 1. ch. 15. For the Sheriff's Fees for executing any Writ of *Capias ad Satisfaciendum, Fieri facias, Elegit, Habere facias Seisinam, Habere facias Possessionem, &c.*

^b Lit. 505. ^c Finch 469, 477. ¹ Inst. 290. b. ² Inst. 395. ⁴⁷¹. ² Ld. Ray. 806. ¹ Str. 301. ^c 2 Inst. 469, &c. Note, ^b That if any of these Writs, whether in personal or real Actions, are not executed within a Year and a Day after the Judgment; then to revive the Judgment, and to obtain Execution, there must be a Writ of *Scire facias* out of the same Court where Judgment was given, to shew Cause why the Execution should not be awarded. [See ^c West. 2. ch. 45.] But if the Plaintiff sueth out any of them

them within the Year, * he may continue them after the Year, 'till * 1 Str. 109. he hath Satisfaction. If Judgment is against a Testator, there must issue a *Scire Facias* against the Executor (though within the Year) to shew Cause, why Execution should not be awarded. The like against an Administrator of an Intestate. And so on the Plaintiff's Part, if Heir, Executor, or Administrator, because the Person is alter'd. If one recovers against a Feme Sole, and she is married within the Year and Day, a *Scire Facias* must go against the Husband, to shew Cause, &c.

By 4 An. ch. 16. *Payment is a good Plea in Bar to a Scire Facias upon a Judgment for Debt.*

If you proceed not upon the *Scire Facias*, an Action may be brought upon the Judgment.

Where the Plaintiff hath obtained Judgment against the Defendant, in an Action where special Bail hath been given, the Plaintiff may take the Defendant in Execution, or prosecute his Bail.

A Defendant cannot ^b plead to any of these Writs of Execution. ^b Lit. 505. But if he hath any Matter since the Judgment, to discharge him of ¹ Inst. 290. b. Execution, he may have an *Auditâ Querelâ*; or plead in Bar of ² Inst. 470. Execution to a *Scire Facias*; as a Release of all Actions or Executions, Outlawry, &c.

Upon Judgment against the King in a Petition, he is presently out of Possession.

^c In Court-Barons Execution is only by Distress and Impounding, ^c 1 Roll. Abr. 887.

In all Cases where the Defendant cannot be taken, or hath no Land or Goods to pay the Debt, &c. he may be outlaw'd after Judgment in the *Common Pleas*; and when a Suit is commenced by Original in the *King's Bench*, or is removed into that Court by Writ of Error out of the *Common Pleas*, the Defendant too may be outlaw'd after Judgment. ^{Finch 470, 471.}

XI. If any one hath just Cause to be relieved against these Proceedings, he may have *Writs* in the Nature of *Appeals* to reverse them. ^{Of Writs in Nature of Appeals.} This may be done by Writ of Error, Writ of false Judgment, Writ of Attaint and *Auditâ Querelâ*.

1. A ^d Writ of Error lieth where one is grieved by any Error ^d F. N. B. 20. in the Foundation, Proceedings, Judgment, or Execution in any Court ^{D.} of Record, that hath Power to hold Plea of Debt or Trespass above ¹ Inst. 288. b. 40 s. It must be returnable in the *King's Bench*; * for no Writ of ⁵ Rep. 111. Error is returnable in the *Common Pleas*. ⁶ Rep. 111, 12.

It lies not upon an interlocutory Judgment. ¹¹ Rep. 39, 41.

By 31 Ed. 3. St. 1. ch. 12. *Erroneous Judgments in the Exchequer shall be examined before the Lord Chancellor and Treasurer, and some of the Justices; (but see 31 El. ch. 1. 16 Car. 2. ch. 2. and 20 Car. 2. ch. 4. whereby it is sufficient if either the Lord Chancellor or Treasurer be present) and if any Error is found they may correct the Rolls, and afterwards send them into the Exchequer.* ^{Finch 480. Cont. F. N. B. 20;}

By 27 El. ch. 8. 31 El. ch. 1. *A Writ of Error upon a Judgment in any Action of Debt, Detinue, Covenant, Account, Action upon the Case, Ejectione Firmæ, or Trespass, first commenced in the King's Bench is returnable in the Exchequer-Chamber, other than where the King is Party. And the Cause of Error shall be heard and de-*

terminated before the Justices of the Common Pleas, and the Barons of the Exchequer; except Error concerning the Jurisdiction of the King's Bench, or for any Want of Form in the Proceedings. Upon Judgment affirmed or reversed, the Record shall be sent back to the King's Bench to proceed, and to award Execution thereon.

The Party grieved may be heard again by a further Writ of Error in the Upper House of Parliament.

Query, If the Statute of 27 El. extends to a Judgment in the King's Bench upon a Scire Facias only? For it seems to be *Casus Omissus*.

^a 3 Cro. 142.

¹ Ventr. 49.

Contr.

¹ Cro. 294.

² Ld. Ray.

954.

⁶ Finch 482.

483.

⁶ F. N. B. 21.

³ Rep. 15.

² Str. 975.

² Ld. Ray.

683.

^a No Writ of Error lies to reverse a Judgment in an Action *Quia tam*, &c. in the Exchequer-Chamber because the King is Party; nor upon the Statute *De Scandalis Magnatum*.

^b If in the King's Bench the Proceedings are commenced by original Writ, the Writ of Error is returnable directly before the King and the Lords in Parliament.

^c There is also another Writ of Error, which is when the Record is already in Court, and therefore called a Writ of Error *De Recordo Quod Coram Vobis Refidet*. It lies on a Judgment in the King's Bench, for any Error in the Record, as want of an Original, [24.] &c. or touching Matters of Fact, as Nonage, Death of the Party, &c. Here is no need of bringing a Writ of Error in Parliament, to reverse the Judgment in this Court, if the Errors are only Matters of Fact, because it may be brought in the same Court to reverse it. Error in Fact is not the Fault of the Judges, therefore it may be decided by them. This may be done in the Common Pleas, in the same Term without Writ. [24.]

Upon a Judgment given in the King's Bench in Ireland, the Writ of Error shall be sued and returned in the King's Bench in England. [See 6 G. 1. ch. 5.] So a Writ of Error must be returned upon a Judgment given in the Counties Palatine.

[By 3 Ja. 1. ch. 8. No Execution shall be stayed by Writ of Error on any Judgment in any Action of Debt upon single Bond, or upon any Obligation with Condition for Payment of Money only, or upon any Action of Debt for Rent, or upon any Contract sued in any of his Majesty's Courts of Record at Westminster, or the Counties Palatine, or the Great Sessions in Wales (or by 13 Car. 2. St. 2. ch. 2. after a Verdict on Action of Debt for not setting out Tithes, or on any Action upon Promise for Payment of Money, or any Action of Trover, Covenant, Detinue, or Trespass personal; or by 16 & 17 Car. 2. ch. 8. after Verdict on any Action), unless the Party bringing the Writ enter into a Recognizance with two Sureties in double the Sum recovered, (or by 16 & 17 Car. 2. ch. 8. on any Writ of Dower or Ejectment after Verdict, in such Sum as the Court shall think fit) to prosecute the Writ with Effect, and satisfy all Damages and Costs.]

By 5 G. 1. ch. 13. All Writs of Error, wherein there shall be any Variance from the original Record, or other Defect, may be amended by the Court, where such Writs are returnable.

Where any Verdict hath been given in any Court of Record in England or Wales, the Judgment shall not be reversed for any Defect in Form or Substance in any Bill or Writ original, or judicial, or any Variance in such Writ from the Declaration or other Proceedings.

This Act not to extend to any Appeal of Felony or Murder, or to Process on any Indictment, Presentment, or Information.

[See 3 H. 7. *cb.* 10. 13 Car. 2. *St.* 2. *cb.* 2. 16 & 17 Car. 2. *cb.* 8. 8 & 9 W. 3. *cb.* 11. 4 An. *cb.* 16. For Recovery of Cofts upon Writs of Error for the Plaintiff or Defendant.]

Though a Judgment is reversed, yet the Plaintiff may bring a new Action for the same Cause.

By 10 & 11 W. 3. *ch.* 14. No *Fine*, or common Recovery, nor any Judgment in any real or personal Action, shall be reversed for any Error therein, unless the Writ of Error or Suit for reversing such *Fine*, Recovery, or Judgment, be commenced, and prosecuted with Effect, within twenty Years. Saving the Right of Infants, Femes Covert, Persons Non Compos, in Prison, or beyond the Seas.

2. A Writ of *“false Judgment* lieth for false Judgment in a ^{F.N.B. 17;} Court not of Record. ^{18.}

3. A Writ of *Attaint* lies against a Jury, and is to examine ^{F.N.B. 104;} whether a Jury of twelve Men gave a false Verdict, or contrary ^{Inst. 294. b.} to Evidence, in a Court of Record upon Issue joined, that upon ^{Finch 484. &c.} Conviction of the Jury the Judgment following upon it may ^{Ld. Ray.} be reversed. But this Writ of Attaint is almost out of Use; and instead thereof Motions are usually made for new Trials, when a Verdict is against Evidence. [See 11 H. 7. *cb.* 21. 23 H. 8, *cb.* 3.] ^{469.}

4. *“An Audita Querela* lies, where one being in Danger of Execution, or is actually in Execution, may be relieved upon good Matter of Discharge, which hath happened since the Judgment. As if the Plaintiff after Judgment releases to the Defendant all Executions, ^{F.N.B. 102.} &c. The Defendant is driven to his *Audita Querela*; for he cannot ^{Inst. 290. b.} plead this Release to any of the three Writs of Execution above-^{Stt. 1198.} mentioned. ^{Ld. Ray.} ^{439.} ^{See the Catalogue of Writs, ante.}

These are the *general* Parts of the Proceedings in *Civil* Suits or Causes. I shall only add, that *“Forms* of Writs, Declarations, Pleas, ^{Inst. 168. a.} Issues, Judgments, and Executions, do much contribute to the right ^{Inst. 351.} Understanding of the Law, and the Reason of it; which therefore ^{387.} a Student must endeavour to be acquainted with.

CHAP. V.

Of the Proceedings in Criminal Causes, (viz.) Of the Process for the Arrest or Outlawry of the Criminal, of Bail, Indictments, Approvers, Appeals, Informations, Arraignment, of the Behaviour of the Offender upon his Arraignment, of Trial, Conviction and Attainder, Judgment, Forfeiture, Arrest or Reversal of Judgment, and falsifying Attainders, Execution, Reprieve, Restitution.

TO shew the Proceedings in Criminal Causes, or Pleas of the Crown, It will be Necessary, to Give a General Account of the Process for the Arrest or Outlawry of the Criminal, Of Bail, Indictments, Approvers, Appeals, Informations, Arraignment, Of the Behaviour of the Offender upon His Arraignment, Of Trial, Conviction and Attainder, Judgment, Forfeiture, Arrest or Reversal of Judgment, and Falsifying Attainders, Execution, Reprieve, Restitution.

Of the Process for the Arrest or Outlawry of the Criminal. 2 Rep. 157. See of Writs in ch. 4. ante.

I. The Process is so called, because it proceedeth or goeth forth upon former Matter, either Original or Judicial. * Process largely taken, is all the Proceedings in Real and Personal Actions, and Criminal Pleas. But if taken strictly, it is all the Proceedings after the Original, out of the Plea-Roll, before Judgment. In this Sense Pleas of the Crown are not included; therefore I take it in the larger Meaning.

An Arrest is the Apprehending or Restraining of One's Person by Process in Execution of the Command of some Court or Officer of Justice, as I have said before in the former Chapter concerning Writs and Arrests in Civil Causes. To this Arrest all Persons, Ecclesiastical or Lay, Men or Women, are subject in Criminal Cases. This Arrest is the Beginning of Imprisonment. But,

By Magna Charta, or 9 H. 3. ch. 29. No one shall be taken or imprisoned, or disseised of his Freehold or Liberties, or free Customs, or be outlaw'd or banish'd his Country, or in any Sort destroyed, nor will we pass upon him, or condemn him, unless by lawful Judgment of his Peers, or according to the Law of the Land.

Let us consider the several Parts of this Chapter.

^a 2 Inst. 46. &c.
³ Inst. 209.

^b No one shall be taken or imprisoned, i. e. attached, arrested, or restrained of his Liberty, but according to Law, either by Command or Order of a Court of Record, or by lawful Warrant, or the King's Writ.

^c 1 Inst. 46.

Or disseised of his Freehold, &c. i. e. * His Lands or Tenements, Goods or Chattels, shall not be seized into the King's Hands, or he shall not be disseised of his Lands or Tenements, or be dispossessed of his Goods or Chattels, but according to the Law of the Land.

Or

Or Outlaw'd, i. e. Put out of the Law, or deprived of the Benefit of the Law, but according to the known Law of the Land.

Or Banish'd his Country, but either by Authority of Parliament, or in Case of Abjuration for Felony by the Common Law, where one took an Oath before the Coronor, to leave the Realm for ever.

But Abjuration, being founded on the Privilege of the Sanctuary of the Church, or Churchyard, is wholly taken away by the 21 *Ja.* 1. *ch.* 28. [See 35 *El.* *ch.* 1. Concerning Recusants.]

Or in any Sort Destroy'd, i. e. Forejudged of Life, or Limb, disinherited, or put to Torture or Death, or suffer in any Way that tends to his Destruction, but according to Law.

All Torture, or Torments of Persons accused are against the Common Laws of England; neither can it be warranted by any Prescription or Statute. But it is said, that Irons may be put upon Persons imprison'd for any Cause. [24. Unless for Treason or Felony, or where the Gaoler hath just Reason to fear an Escape.] [See *West.* 2. *ch.* 11. 7 *Ja.* 1. *ch.* 4.]

Unless by lawful Judgment of his Peers. It is said Judgment, not Verdict, because the Lords of Parliament are not sworn, but give their Judgment upon their Honour. His Peers, i. e. His Equals. For as every one of the Nobility (being a Lord of Parliament) is a Peer to all the other Lords of Parliament, tho' they are of several Degrees; so the Commons are Peers to one another, tho' distinguished into Knights, Esquires, Gentlemen, Yeomen, &c.

But this Clause is to be understood, when one accused does appear and plead, and is willing to have his Case tried by his Peers. Otherwise the Proceedings may be by *Capias*, Outlawry, &c. as the Law directs.

Or according to the Law of the Land, i. e. According to the Common Law, Statute-Law, or the Custom of England, or by due Process and Course of Law.

Note, That these Words, *According to the Law of the Land*, do refer to all the precedent Matters in this Chapter of *Magna Charta*. And therefore in every Branch of it you must add, *Unless by lawful Judgment of his Peers, or according to the Law of the Land*. [See the *Petition of Right*, 3 *Car.* 1. *ch.* 1.]

Now Process according to Law is of two Sorts, (*viz.*) before Presentment or Indictment, and after Presentment or Indictment.

1. The Process before Presentment or Indictment, is either by the King's Writ, or by Warrant.

By the King's Writ, to take one without Summons, upon a Suggestion; as by the Writ *De Vi Laica Removenda*, those that resist, may be forthwith arrested; by *Ne Exeat Regno*, Persons going beyond Sea without Leave, may be stopp'd and arrested upon Suggestion, &c.

By Warrant, either Express, or By Law. Express, as where there hath been a private Information, or a Witness has deposed against an Offender, he may be taken up by a Warrant from the Privy Council, a Secretary of State, or a Justice of Peace, and committed to Prison. By Law, as when a private Person arrests and apprehends one that he suspects to have committed Treason or Felony, when Treason or Felony has been committed. Thus when Treason or Felony is committed (for Treason or Felony must have been

done) and the common Fame is, that *A.* is Guilty; or if a great Quantity of Arms, or stolen Goods, are found in his Custody; it is lawful for any one, that suspects *A.* to be an Offender, to apprehend him. But whether the Suspicion is just or lawful, may be determined on an Action of false Imprisonment. [It should seem that where the Person turns out to be *in fact* Guilty of such Treason or Felony, the Arrest by a private Person, whatever might be his Ground of Suspicion, is justifiable; but where he turns out to be innocent, the Justification must depend upon the Notoriety, or the Degree of Probability of the Party's Guilt, his general Character, the Apprehender's having or not having any previous Malice towards him, and upon so many other Circumstances, that it is difficult, if not impossible, to lay down any precise Rules in this Case; tho' in order to justify a private Person's Arrest of another *without Warrant*, where he turns out to be innocent, the Circumstances creating the Suspicion must appear to have been very strong, and the Apprehender stand intirely free from any selfish or revengeful Motives.] A private Person may arrest a Night-walker, and detain him 'till Morning; that, if he can, he may make it appear, he is a Person of good Fame. [But *Qu.* If the Arrest of a Night-walker, even by a legal Constable, much less by a private Person, upon *a bare Suspicion only*, without the Party's having been Guilty of any Breach of the Peace or any unlawful Act, be justifiable.] A private Person may arrest one that is breaking the Peace by an Affray. * But after the Affray is ended, an Offender cannot be arrested without an express Warrant. It is regularly true, that no private Person can of his own Authority arrest another for a Breach of the Peace, after it is over, as he may in Treason or Felony; but it seems reasonable ^a that for inferior Offences, scandalous, and prejudicial to the Publick, an Arrest of the Offender by a private Person should be allow'd, after the Offence is committed, in order to bring him before a Justice of Peace [where the Party is caught in the Fact.] Arrests ^b are not only *allow'd* to private Persons, but oftentimes *commanded* by the Law. For (as I before hinted) Persons *present* at the committing of a Felony, must use their Endeavours to apprehend the Offender, under Penalty of Fine and Imprisonment. [See 3 *H. 7.* *ch. 1.* For the amercing of a Township, when a Murderer escapes.] Upon *Hue and Cry*, every Man, by the Common Law as well as by Statute, *may* and *must* arrest the Person suspected, even though the Hue and Cry is *feign'd*. [*Qu.*] And so in *Aid* of an *Officer*, that hath an express Warrant, or a Warrant by Law, every one must endeavour to arrest a Malefactor. In such Cases a private Person may break open a House, if upon Demand he cannot be admitted, to take the Offender. But upon *a Suspicion* a private Person cannot break open the Door of a House, though he may enter, if the Door is open. If a Justice of Peace makes a Warrant upon *a bare Surmise*,^c and by Virtue thereof one breaks a House, to search for a Felon or stolen Goods (though it is usually practised) it is against *Magna Charta*. When a Felon is known or suspected, a Justice of Peace may send his Warrant to the Constable, to go along with the Party, that gives the Information of the Felony, or that suspects one to have committed a Felony, to keep the Peace in apprehending the Felon; but it is the Arrest of the Party, who

* See Hawk.
P. C. B. 2.
p. 76, 77.

b 2 *Ld. Ray.*
1301.
2 *Sir. 884.*
S. C.

c *Crompt. Jur.*
179.
H. P. C. 91.

d 2 *Inst.* 52.
2 *Roll. Abr.*
546.

e 2 *Inst.* 177.
3 *Inst.* 53, 117.
118, 139.
4 *Inst.* 177.
H. P. C. 89.

f See p. 380.
ante.

g Hawk. P. C.
B. 2. p. 76.

h 4 *Inst.* 176.
177, 178.
5 *Rep.* 91, 92.
H. P. C. 94.
12 *H. H. P. C.*
150, 151.
See p. 82.
ante.

cannot break open any House, to arrest the Felon, except in Cases aforesaid, where he is *commanded* by Law to apprehend him.

[By 17 G. 2. ch. 5. *Private Persons may apprehend Beggars and Vagrants.*]

* When one is arrested by a private Person, he must be brought to the Constable; but if the Constable cannot be found, to a Justice of Peace. In the mean Time, a private Person may detain the Offender, or Person suspected, in a House, in the Stocks, or Cage, 'till he is delivered to the Constable or Justice.

Note, That whatsoever a private Person may do, an Officer as a private Person may also do; as a Justice of Peace, Constable, &c. Thus a Constable without Process may imprison a Person, suspected of Felony, in a House, Stocks, or Cage, 'till he can bring him before a Justice of Peace. And moreover the Constable (with or without Warrant) may break open Doors to take an Offender, [if ante. within the House] after Demand to be admitted, where Felony is committed, or a dangerous Wound given. [See the Statute of *Winchester*, or 13 Ed. 1. St. 2. ch. 4. as to the Power of *Bailiffs* of *Towns* and *Watchmen*.] But this, I say, is not to be done by Virtue of his Warrant from the Justice. [2y.] Indeed a Constable in such Cases hath greater Authority than a private Person, [2y. without a Warrant] and the Law takes an especial Notice of him; so that on that Account he differs from a private Person; but he cannot justify an Arrest for a Breach of the Peace out of his Presence, without a Warrant for so doing.

* The King cannot arrest any Man for Suspicion of Treason or Felony, as any of his Subjects may. Because, if the King does Wrong, the Party cannot have his Action. If the King commands me by Word of Mouth, to arrest a Man, and accordingly I do arrest him, he shall have his Action of False Imprisonment against me, altho' it was done in the King's Presence. The King cannot do it by any such extrajudicial Command; but must do it by Writ, or by Order or Rule of some of his Courts of Justice, according to Law.

2. * After Presentment or Indictment found in Treason or Felony, or on an Appeal of Death, [or Mayhem] the first Process is a *Capias*, directed to the Sheriff, to take and imprison the Offender.

* On an Indictment, in Treason or Felony, an Appeal of Death, or Breach of the Peace, a *Capias* out of the *K. B.* lieth against a Peer.

* Here the Sheriff, or others in Aid of him, may break open Doors to take the Offender, if upon Demand they cannot be admitted; for here the King's Writ contains a *Non omittas propter aliquam Libertatem*.

But if the Offender cannot be taken, then an *Exigent* is awarded in order to an *Outlawry*, which lies in all Indictments of Treason, Felony, Appeals of Felony or Mayhem, and on all Returns of Rescous, and also in all Indictments of *Trespass* *Vi & Armis*, or any other Crime of a higher Nature. [For the *Capias* and *Exigent*, see 5 Ed. 3. ch. 11. 25 Ed. 3. St. 5. ch. 14. 6 H. 6. ch. 1. 8 H. 6. ch. 10. 10 H. 6. ch. 6. For the Addition of the Estate and Degree, Mystery, Town, or Place, and of the County of the Offender, in Process of Outlawry in Indictments and Appeals, see 1 H. 5. ch. 5. And see 4 & 5 W. & M. ch. 22. for a Writ &c.

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a Writ of Proclamation upon issuing any Exigent in criminal Matters according to the Form of 31 *El. ch. 3.*

^a Dalt. ch. 193. p. 529.

Upon an Indictment on a penal Statute, or in Trespass *Vi et Armis*, or other Crimes of an inferior Nature, a *Venire Facias* is the first Process (which is but a Summons to make the Party appear) and if the Party is return'd sufficient, a *Distringas* goeth forth; and so a Distress infinite till the Party appears. But if the Sheriff returns *Nihil*, then a *Capias* is to issue out against the Offender; After that an *Alias* and *Pluries*, and then an *Exigent* and *Outlawry*. A *Subpœna* goeth first out of the Crown-Office on a criminal Information, and then a *Capias*, against private Persons, or *Distringas* against Aggregate Bodies, upon Non-Appearance. But for the proper Process on Informations on penal Statutes, it must be as in an Action of Trespass *Vi et Armis*. [See 21 *Ja. 1. ch. 4.*]

These are the common Processes in criminal Causes, to make an Offender appear. But sometimes there are special Processes appointed by Statutes; as upon 33 *H. 8. ch. 9.* For unlawful Games; 5 *El. ch. 4.* Against a Servant, that runs away into another County; 22 *H. 8. ch. 5.* Where Land in one County is chargeable, to repair a Bridge in another County; 5 *El. ch. 12. §. 8.* Concerning Foresters, &c.

Hawk. P. C. B. 2. ch. 22.

It may not be improper, to mention here a Process, to bring in an Offender, awarded by the Discretion of the Judges upon a Suggestion, or their own Knowledge, without any Indictment, Appeal, or Information, viz. an *Attachment*; which is usually granted in Cases of Abuse and Contempt, especially by the Courts in *Westminster-Hall*, against inferior Judges, Sheriffs, Bailiffs of Liberties, Attornies, Jurors, &c. where they may proceed in a summary Way by Interrogatories upon Oath, or of their own Knowledge, against a Person present in Court; or send the Attachment forth against one absent, upon a Complaint on Oath or *Affidavit*, and commit him, till he answers Interrogatories.

If an Offender is taken upon Process, he is presently to be committed to the common Gaol, ^b [See 5 *H. 4. ch. 10. 11 & 12 W. 3. ch. 19. 5 An. ch. 9. 6 Geo. 1. ch. 19.*] or else he is to be bound in a *Recognizance* singly, or with Sureties or Bail, according to the Nature of the Offence, to appear at a Day in Court, to answer for his supposed Offence; the Informer being likewise bound to prosecute, or to give Evidence against him, or both to prosecute and give Evidence, at the next General Gaol-Delivery or Quarter-Sessions, &c. [See 1 & 2 *Ph. & M. ch. 13. 2 & 3 Ph. & M. ch. 10. 10 & 11 W. 3. ch. 23.*]

By 3 *Ja. 1. ch. 10.* Every Person committed to any common or usual Gaol by any Justice or Justices of Peace, for any Offence or Misdemeanor, having Means or Ability thereunto, shall bear all Charges of Conveying, both of himself and of those that convey him thither. If he refuses so to do, the Constable of the Township where the Offender inhabits, or from whence he is committed, or where he hath any Goods (being within the same County) upon a Warrant under the Hand and Seal of a Justice of Peace, may sell so much thereof, as in the Discretion of the said Justice shall be thought sufficient, to satisfy the said Charges; the Appraisement to be made by four of the honest Inha-

Inhabitants of the Parish or Tything where such Goods shall be, and the Overplus to be render'd to the Offender.

If the Offender shall not have, or be known to have, any Goods within the County, to satisfy the Charges, the Constables, Churchwardens, and two or three other the honest Inhabitants of the Parish, &c. where the Offender was taken, or, in Default of Constables or Churchwardens there inhabiting, four of the principal Inhabitants shall make an indifferent Tax or Assessment to pay the said Charges, the said Taxation to be allowed under the Hand of one or more Justices of the Peace, &c. [But see 27 G. 2. ch. 3. in p. 88, ante.]

While he is in Prison, the Gaoler is bound to give him Sustenance, and must not suffer him to die for Want of it. [See 14 Ed. 9 Rep. 87. ch. 5. and 12 G. 2. ch. 29.]

[See 1 & 2 Ph. & M. ch. 13. 2 & 3 Ph. & M. ch. 10. For the Examination of Felons; and of the Warrant and Mittimus, B. 1. ch. 7. ante, Tit. Justices of the Peace. See also of the Privy Council, and Secretaries of State, ch. 1. ante.]

II. When the Offender appears, or is taken upon Process, it must be considered, whether he ought to be admitted to Bail. Therefore let us enquire, *what is Bail, who may be bailed, and by whom.*

I. *Bail* are Sureties taken by a Person authorized, that an Offender shall appear at a Day, and answer, and be justified by Law. This Sort of Bail is different from Bail in Civil Causes, taken by Sheriffs, &c. *Mainperners* (*Manuceptores*) are only Sureties, who in Case the Criminal does not appear, (though he was never arrested or in Prison) are to forfeit their Recognizances. But Bail is a Custody; for no Man is bailed, but he that is under an Arrest, or in Prison. Therefore the Bail may seize the Prisoner, if they suspect he will fly, and carry him before a Justice, to find new Sureties, or to be committed in Discharge of the Bail. The like may be done by the Justices in Case of insufficient Bail. No one is bailed, but he that is arrested or in Prison. But one may be mainperned, that never was arrested or in Prison. Hence it appears, that every Bail is a Mainprise, but that every Mainprise is not Bail. The Bail ought to be two Sureties at the least. In some Cases, as on a *Habeas Corpus* after a Commitment for Treason or Felony, the Practice in the K. B. is to require four. If the Bail is insufficient, the Justice of Peace that took it, is finable by the Justices of Gaol Delivery, if the Criminal doth not appear. Insufficient Bail is where the Bail is not of Ability to pay the Sum, in which they were bound. [See 27 Ed. 1. ch. 3. *De Finibus levatis*.] Therefore the Justices may examine the Sureties upon Oath, concerning their Abilities in Respect of their Estates. [See 1 & 2 Ph. & M. ch. 13.] Bail is either in a certain Sum, as 40 l. each, at least, with the Criminal in double the Sum; or *Body* for *Body*, in which Case, if the Offender does not appear, the Bail shall not be executed, but only fined. But however, the Principal is always bound in a certain Sum. [See 1 W. & M. Sess. 1. ch. 2. against *Excessive Bail*.]

This is the Description of Bail in Criminal Cases.

2. As to the Persons that may be *bailed*; it is allowed, that by the *Common Law*, all Persons might be admitted to Bail, till they were convicted, almost in every Case. Upon Conviction the Offence does appear.

See Hawk P. C. B. 2. P. 95. 96. By the *Common Law* Persons were bailed by the Writs *De Homine Replegiando* and *De Odio et Atia*, directed to the Sheriff, who was to take Pledges for them in his County-Court, except for the Death of a Man, or by the Command of the King, or his Justices, or for the Forest. [See 1 Ed. 3. St. 1. ch. 8. 7 Ri. 2. ch. 4.] In these Cases the Sheriff was not to intermeddle in his Court, but the Remedy was by *Habeas Corpus*, and so these were bailed at *Common Law* in the Courts at *Westminster*. But,

By *West. 1. or 3 Ed. 1. ch. 15.* Persons outlawed, those that have abjured the Realm, Approvers, such as are taken with the Mainer, Prison-breakers, Thieves openly defamed and known, such as be appealed by Provers during the Life of such Provers, (if they be not of good Fame) House-burners, Counterfeiters of the King's Seal or Coin, Excommunicated Persons (taken upon the Certificate of the Bishop) Persons taken for manifest Offences, Traitors against the King's Person, are not repleviable by *Common Writ*, or without *Writ*.

To explain this Statute.

Persons outlawed, and those that have abjured, &c. ^b An Outlaw in Felony cannot be bailed, because he is attainted in Law. For the Intendment of the Law in admitting Persons to Bail, is, because it is uncertain, whether the Party is guilty, or no; which cannot be said when one is attainted. But a Person attainted by Outlawry of any Felony may appear in Person, and plead *Misnomer*, or alledge Error in Avoidance of the Outlawry, be it on Indictment or Appeal, and the King's Bench may bail him. Thus one cannot be bailed, if he is attainted by Verdict as well as by Outlawry. Outlawed and excommunicate Persons seem to be put for Examples only in the Statute; implying that all other Persons under the like Circumstances are excluded.

Approvers, [See *infra*.] These appear to be guilty by their own Confession.

Such as are taken with the Mainer. For in this Case, *Non stat indifferenter*, whether the Party is guilty or no, being taken with the Mainer or Mainer, i. e. with the Thing stolen as it were in his Hands.

Thieves openly known and notorious; where there is plain Evidence against them.

Prison-breakers. For it is presumed, that he that is innocent, will never fly or break Prison.

Persons taken for manifest Offences, under the Degree of Felony, but of a dangerous Nature. Yet the Practice is otherwise.

These are under violent Presumptions of Guilt.

House-burners, *Counterfeiters of the King's Seal or Coin*, and *Traitors against the King's Person*, are excluded the Benefit of Bail, by Reason of the Heinousness of their Crimes.

^c 2 Inst. 189, 315. By *Common Writ*, or without *Writ*, i. e. ^a The Sheriff shall not replevy them by the *Common Writs De Homine Replegiando*, *Writ of Mainprise*, or *De Odio et Atia* (which are disused) or *Ex Officio* without *Writ*. [See 28 Ed. 3. ch. 9. *post*.]

By the same Statute, those that are indicted of Larceny by Inquests taken before Sheriffs or Bailiffs by their Office, or of light Suspicion, or for Petty Larceny, not being before guilty of other Larceny; accessory to any Felony; or accused of some other Trespas, for which he ought not to lose Life or Member; a Man appealed by a Prover, after the Death of the Prover (if he be no common Thief, nor defamed) shall be let to Bail before the Sheriff by good Sureties, for which the Sheriff shall be answerable.

But then those indicted of Larceny ought to be of good Reputation, and there should be no strong Presumption, that they are guilty. By Inquests taken before Sheriffs or Bailiffs, *1. c.* Before Sheriffs in their Turns, or Lords in their Leets, &c. [See *1 Ed. 4. ch. 2.* By which the Sheriff shall deliver all Presentments and Indictments taken in his Tourn, to the Justices of the Peace at the next Sessions.] *2 Inst. 290.*

Light Suspicion; If they are of a good Character, and are not suspected of Crimes expressly excepted by the Statute.

Petty Larceny; If there is any Colour of their being Not Guilty.

All Accessories before and after the Fact are bailable, if there are not very strong Presumptions of Guilt. *Principals suspected* only of Burglary and Robbery, though indicted may be bailed. [But see *who may take Bail, infra*, and *31 Car. 2. chap. 2. §. 21.*] *2 Inst. 190; H. P. C. 100. Dalt. ch. 166. p. 421, 422.*

The Party accused of Trespas, or any Offence below Felony, must be bailable; unless ousted by Statute; or unless Judgment be given. For if one hath been indicted, convicted, and hath had Judgment, he cannot be bailed. *H. P. C. 98, 101.*

These are sufficient Hints for the Exposition of *West. 1. ch. 15.* which though it relates only to Sheriffs, &c. yet I find that the Superior Courts are often governed by it. *4 Inst. 178, 179.*

He that hath dangerously hurt another, may go under Bail till the Party is dead. *H. P. C. 99; Dalt. ch. 166, p. 420.*

[By *29 El. ch. 5. §. 21.* and *31 El. ch. 10. §. 20.* *Subjects or Denizens sued or informed against in any of the Courts at Westminster, on any penal Statute, in Cases bailable by Law, shall not be required to put in Bail, but may appear by Attorney.*]

In many Offences Bail is expressly ousted by particular Statutes, as well as by *West. 1. ch. 15.*

By *23 H. 6. ch. 9.* Sheriffs, &c. shall not admit to Bail, such as are in Prison by Condemnation, Execution, Capias Utlagatum, Excommunication, Surety of the Peace, or committed by the special Command of any Justice, and Vagabonds refusing to serve.

Bail is also taken away by particular Statutes, from unlicensed Alehouse-keepers, from Persons arresting in the Name of another, Bankrupts refusing to answer before the Commissioners, Father and Mother of Bastards not performing Justice's Order, Collectors of Money for repairing Bridges, Constables, &c. neglecting their Duty, Killers of Deer and Conies, Dyers convicted of using Logwood, Engrossers, Destroyers of Fish, Forgers, Foresters, unqualified Persons destroying the Game, Players at unlawful Games, Persons guilty of fraudulent Conveyances, Hatters taking above Two Apprentices, Destroyers of Hawks, Surveyors neglecting their Duty

Duty concerning the *Highways*, those that *refuse* a Distrainer seizing Horses, in Waggon or Carts travelling for Hire, above the Number allowed, *Inn-keepers* selling at unreasonable Gain, *Labourers* going from Work before it is finished, Absenters from *Musters*, Refusers of the Oath of Allegiance when tendered, Persons guilty of *Perjury* in any Court of Record, or of persuading and procuring Soldiers to desert, *Physicians* committed by the College of Physicians in *London*, Refusers to pay Rates to the Poor where no Distress can be made, Overseers of the Poor refusing to pass their Accounts, &c. Depravers of the *Common Prayer*, &c. Disturbers of *Preachers*, *Recusants*, Incorrigible *Rogues*, Deniers of the *Christian Religion*, the *Trinity*, or the Inspiration of the *Scriptures*, Unlicensed *Schoolmasters*, &c. Seamen quarrelling and fighting in his Majesty's Yards, &c. upon Non-payment of Fine, Misbehaviour of *Servants* and *Apprentices*, *Sheriffs* neglecting Duty concerning the Election of Knights of the Shire, *Transporters* of Horses without Licence, and of live Sheep, *Takers* away of *Women* unmarried, and under sixteen Years of Age, &c. These *Statutes* are partly mentioned under their particular Heads, and in their proper Places. [But see *Dalton*, *cb.* 177, and *Nelson's Justice*, &c. *Tit. Bail.*]

Note, That if an Offender is committed to Prison, he may be brought up by Writ of *Habeas Corpus*, to the Court of King's Bench; * which may bail him in all Cases, unless Bail is ousted by a particular Statute.

3. To shew *who* may take Bail, or bail Offenders, observe that Bail may be taken by ^b Virtue of a Writ, or *Ex Officio*. By Writ, as by the Writ of *Odio et Atia*, Writ of *Mainprize*, *Hominum Replegiando*, *Habeas Corpus*, ^c *Ex Officio*. 1. By the Justices of the King's Bench, who may in an original Prosecution by Indictment or Appeal before them (or upon an Indictment or Commitment returned to them by *Habeas Corpus* or ^d *Certiorari*) take Bail, where another Court cannot ^e; as in Case of Murder, Appeals of Death, [See 3 *H.* 7. *cb.* 1.] or in Cases prohibited by *West.* 1. *cb.* 15. * For that Statute, beginning with *Sheriffs*, and other inferior Officers, extends not to Judges of any Superior Courts, who have Liberty of admitting to Bail by the Common Law. [But the Court will not ^f admit a Person to Bail, who is expressly declared by that Statute to be irreplevifable, without some particular Circumstances in his Favour.] Nay, it is affirmed ^g, that this Court may, (upon good Cause) admit Persons to Bail, that are imprisoned by the King's *Special Command*, or by the Order of his *Privy Council*, and this Power is either expressly admitted, or at least implied in the following Statutes; so that there seems to be no Doubt thereof at this Day. [See *Magna Charta*, *cb.* 29. 25 *Ed.* 3. *cb.* 4. 28 *Ed.* 3. *cb.* 3. 42 *Ed.* 3. *cb.* 3. The *Petition of Right*, 3 *Car.* 1. *cb.* 1. and 16 *Car.* 1. *cb.* 10.] or by Order of either House of *Parliament*, if they manifestly appear to have exceeded their Jurisdiction, [*Sed Qu.* *] [or after a *Prorogation* or *Dissolution* ^h.] Or ⁱ by Order of *Chancery* in some Cases, [*Quare*,] or by Order of inferior Courts. [See for the Power of other Courts in *Westminster-Hall*,

^b H. P. C. 103, 104.
^c See p. 17, ante.

^d *Staud.* 18.
^e H. P. C. 98.
^f 99, 103.
^g 2 *Inst.* 185.
^h 186, 189.
ⁱ Kely. 90.
^j H. P. C. 104.
^k Hawk. P. C. B. 2. p. 114.
^l 1 *Str.* 2, 3.

^m Hawk. P. C. B. 2. p. 107.

ⁿ 2 *Ld. Ray.* 1105.

^o 1 *Ld. Ray.* 1107, 1108.
^p Hawk. P. C. B. 2. p. 111.

*Hall, 31 Car. 2. ch. 2.] 2. By Justices of Gaol-Delivery, who may take Bail, where Justices of the Peace cannot take it; as of a Person convict of Manslaughter *Se Defendendo*, or by Misadventure, or of a Person convict of Manslaughter that hath a Pardon to plead. [See again 31 Car. 2. ch. 2. whereby for Treason or Felony, plainly and specially expressed in the Warrant of Commitment, the King's Bench, Sessions of Oyer and Terminer or Gaol Delivery, may Bail upon Prayer, in Court, of the Offender, to be brought to his Trial, if not indicted during the next Term or Sessions after Commitment, and see p. 17. ante.] 3. By Justices of the Peace, where they have Cognizance of the Cause.*

By 3 H. 7. ch. 3. Two Justices of the Peace (1 Quor.) have Power to let to Bail Persons arrested for light Suspicion of Felony, or others bailable by Law, until the next Quarter-Sessions or Gaol-Delivery, and there shall certify the same, in Pain of 10l. (And 1 Ri. 3. ch. 3. which gave Power to one Justice of the Peace to bail Prisoners, is thereby repealed.)

By 1 & 2 Ph. & M. ch. 13. No Justice or Justices of the Peace can let any to Bail, which are forbidden to be bailed by West. 1. ch. 15. And none arrested for Manslaughter or Felony, or Suspicion of Manslaughter or Felony, being bailable by Law, shall be let to Bail by any Justices of the Peace, but in open Sessions, or by two Justices at least (1 Quorum) being both present together at the Time of such Bailment; which shall be certified in Writing with the Examination of the Prisoner taken before Bailment, at the next general Gaol-Delivery, under the Penalty of a Fine to be set on them by the Justices of Gaol-Delivery. The Justices of Peace and Coroners within the City of London and County of Middlesex, and in other Cities, Boroughs, and Towns corporate, may follow their Customs, as to letting Prisoners to Bail; but must certify their Bailments, Bonds, and Examinations to the next Gaol Delivery for the County, City or Town.

[And by the said Statute, and 2 & 3 Ph. & M. ch. 10. Persons accused of Manslaughter and Felony, being sent to Gaol for want of Bail, are to be examined, and the Accusers to be bound over, &c.]

This Statute of 1 & 2 Ph. & M. ch. 13. seems to admit that for Manslaughter, and all other Homicides, except Murder, or for Felonies, the Offender may be bail'd by Justices of the Peace. But if in Case of Manslaughter, tho' it be *Se Defendendo*, and it does appear so to the Justices, yet if the Party accused confesses the Fact upon Examination, or it is apparently known, that he kill'd another, they cannot bail him. [See West. 1. ch. 15. *supra*.]

If it is uncertain, that he was the Slayer, and the Charge is but Manslaughter, they may bail him; for the Act supposes, that in some Cases Manslaughter is bailable by Law. So in the Case of Felony.

After Indictment and Process issued thereupon in Cases under Felony, or in Case of Trespass, Misdemeanor (where Bail is not prohibited by a particular Statute) one may be bailed by two Justices of the Peace, whereof one to be of the Quorum. Others say by one Justice.

As to refuse Bail, where the Party ought to be bail'd, is a Misdemeanor, and fineable; so to admit Bail, when it ought not to be admitted, is punishable by the Justices of Gaol-Delivery by

Fine, or as a negligent Escape at Common Law; [or by Informa-
 tion in the Court of King's Bench] and is likewise punishable by
 several Statutes [See West. 1. ch. 15. 27 Ed. 1. ch. 3. 4 Ed. 3.
 ch. 2. 1 & 2 Ph. & M. ch. 13. 31 Car. 2. ch. 2.]
 If one is brought before a Justice, and it does not appear, that
 a Felony is committed, he may discharge him; but if a Felony has
 been committed; and the Party is only suspected, he must bail him
 or commit him to the Common Gaol. [See 6 Geo. 1. ch. 19. in
 p. 79. ante.]

By 28 Ed. 3. ch. 9. Inquests before Sheriffs, are taken away, and
 the Power to admit to Bail upon Indictments before them. [See 1 Ed. 4.
 ch. 2. ante.]

Of Indict-
 ments.

III. If any Court of Record commits one for a Contempt done
 in Court, they may discharge him by like Order at their Pleasure;
 But if they commit him for Treason, Felony, or other Crime,
 or Suspicion thereof; he cannot be discharged till he is indicted
 and acquitted, or Ignoramus found, or he is delivered by Pro-
 clamations.

And so it is, if any be taken and imprisoned by lawful Warrant,
 or the King's Writ, he cannot be discharged without legal Proceed-
 ing, but by the King only; though one taken by the King's Writ
 in a private or civil Action, may be discharged and set at Liberty by
 the Plaintiff, even tho' in Execution. [But see 31 Car. 2. ch. 2. the
 Habeas Corpus Act, p. 17. ante.]

1 Inst. 126. b.
 West's Symb.
 3 pt. sect. 1.
 Bacon 19.
 Kely. 8.

Now an Indictment or Endictment (from *Endenveru*, to accuse)
 is a Bill or Accusation drawn up in Writing at the Suit of the King
 for some Offence, either criminal or penal, and prefer'd to a Grand
 Jury of twelve Men or more, upon their Oaths, and found by
 them before a Judge, having Power to punish the Offence, being
 sufficiently grounded to put the Offender upon Trial by a Petty
 Jury of twelve Men. The Prosecutor and his Witnesses give
 Evidence to the Grand Jury upon their Oaths. The King's
 Counsel, as Prosecutors, may manage the Evidence before the Grand
 Jury.

2 Inst. 739.

A Presentment is that which the Grand Jury find and present
 to the Court, without any Indictment delivered to them. This is
 afterwards reduced into the Form of an Indictment. When a Of-
 fence is found by Jurors returned to inquire of that particular Of-
 fence, it is called an Inquisition.

Hawk. P. C.
 B. 1. p. 216.
 2 H. H. P. C.
 155.

Bacon's
 Elem. 19.
 3 Inst. 30, 31.

I cannot find that a Grand Juror ought to be a Freeholder;
 [but *Qu.* and see West. 2. ch. 38. and 21 Ed. 1. St. 1.]

When the Grand Jury find the Bill of Indictment, they write
 on the Back of the Bill, *Billa Vera*; But if they think it a ground-
 less Accusation, they indorse *Ignoramus*; and then the Party is dis-
 charged without further Answer. Upon the Allowance, or Finding
 of the Bill by the Grand Jury, the Party is said to be indicted. For
 no one shall be convicted by Verdict, unless the Offence is found by
 twenty-four Men at the least (*viz.*) By twelve, or above, of the
 Grand Jury indorsing *Billa Vera* upon the Bill of Indictment (for
 if twelve agree, they shall conclude the lesser Number) and by twelve
 (not more or less) of the Petty Jury upon Trial. The Grand Jury
 cannot find *Billa Vera* for Part, and *Ignoramus* for the rest. It must
 be the one or the other for the whole.

The

The *Grand Jury* can regularly inquire of nothing but what ariseth within the *County* for which they are returned, [unless specially enabled by Act of Parliament] and the Trial must be by a Jury of the proper *County*, [unless otherwise provided by Act of Parliament.] By special *Custom* Indictments of Offences committed in one *County* may be tried in a Place out of it; as Indictments of Offences in *Middlesex* are by Custom tried at the Sessions-Hall at *Newgate* in *London*, as well for *Middlesex* as *London*. [But see of Trial by the *Country*, *post*.]

A Grand Juror may be challenged for Cause by one before he is indicted. ^{3 Cro. 134; 135, 147.}

The *Grand Jury*, or those Indictors, ought not to be *de Medietate Linguae* in any Case, nor ought they to have a Keeper, or be without Victuals, as in the Case of a *Petty Jury*.

If one of the *Grand Jury* is outlawed, or taken at the Nomination of another, it avoids the whole Indictment. [See 11 H. 4. ^{33.} Roll. Abr. ² ch. 9. 3 H. 8. ^{77.} ch. 12.] If one of the *Grand Jury* discovers to a Stranger the Evidence given to him and the rest of the Jurors, this is an Offence punishable by Fine and Imprisonment upon an Indictment.

Indictments may be of High Treason, Petit Treason, Felony, Trespas, and all Sorts of Misdemeanors or Pleas of the Crown; but of no Injuries of a private Nature, unless they some way or other concern the King and the Publick. Offences by *Common Law* and those against a *Statute Law* are indictable. Where a Statute prohibits an Act of a publick Grievance, or commands a Thing of publick Conveniency, an Offender against such a Statute is punishable by way of Indictment, as well as at the Suit of the Party grieved [unless it is a new Offence made such by the Statute, and a particular Manner of proceeding against the Offender is appointed, without any general Words, such as, *or otherwise*.] Indictments must be at the Suit of the King, and no other. ^{Hawk. P. C. B. 2. p. 211. 2 Ld. Ray. In-991.}

It is the best Way to join several Offenders in the same Crime in the same Indictment, where the Offence doth wholly arise from the joint Act of all the Defendants. On such an Indictment some may be acquitted, and others convicted. [Some Offences are held to be several in their Nature, and in such Cases Judgment cannot be given upon a joint Indictment.] ^{2 Roll. Abr. 707, 708. 2 Str. 921.}

In every Indictment these Things are requisite.

1. Indictments (being in the Nature of Declarations for the King against Offenders) ought to be certain to a general Intent, and must not be supplied by Implication or Argument. Precise Certainty to every Intent is to be observed, tho' the Law will not allow Exceptions that are too nice. ^{4 Rep. 44. 5 Rep. 121. 1 Inst. 303. 2 West. Symb. 5. 79. H. P. C. 207. 2 Roll. Abr. 79, 80, 81. Hawk. P. C. B. 2. ch. 25.}

2. Further,

By 1 H. 5. ch. 5. An Indictment ought to set forth the Christian Name, Surname, and Addition of the Estate and Degree, Mystery, Town or Place, and the County of the Offender, &c.

The Christian Name and Surname.

But when the Name of one kill'd is unknown, or Goods are stolen from a Person that cannot be known, it is sufficient to say one unknown was kill'd by the Person indicted, or that he stole the Goods of one unknown. And if there is a Mistake in spelling of the Offender's

* Kely. 11, 12. fender's Name, if it sounds like the true Name, it is good*. And it is good if the Party is indicted by another Name, if the Party is known by both. A Misnomer of the Defendant's Name of *Baptism* may be pleaded in Abatement of an Indictment; but not of his *Surname*, as in an Appeal. [2y.] The Inhabitants of a Parish, tho' no Person is particularly named, may be indicted for not repairing the Highway.

Estate and Degree; whether of the Nobility, or under the Nobility.

Mystery (i. e.) Art, Trade, or Occupation.

The *Place of Abode*, or the *Dwelling Place* of the Party indicted (both *Town* and *County*) is expressly required. If the *County* is named in the Margin of the Indictment, it is well enough, [2y.]

* 1 Cro. 606, * Except in Cases of Felony, where it must be always named in the Body of the Indictment. 738, 751.

If no *Town* is named, or any Place where the Fact was done, the Indictment is void. [See 9 H. 5. cb. 1. 18 H. 6. cb. 12.] But

* H.P.C. 264. a * Mistake of the Place in laying the Offence is not material upon the Evidence, if the Fact is proved at some other Place in the same County.

The Statute says that the Indictment shall abate for any of these Omissions, by the *Exception* of the Party. For though an Offender hath not such Addition as the Act requires, yet if he appeareth upon the Process and Pleads, taking no Advantage thereof by Exception, he hath lost the Benefit of this Act. [See for the Exposition of this Statute, 2 Inst. 665, &c.]

* 2 Inst. 670,
1 Ld. Ray.
345.

* See Hawk.
P. C. B. 2.
ch. 23.

Generally there is the same Law concerning Additions in Indictments and Appeals, though in some Things Appeals require more Strictness. [See of *Appeal*, *infra*.]

* 1 Inst. 283. a.
2 Inst. 318,
319.
3 Inst. 230.
4 Rep. 41, 42.
West's Symb.
Indict. §. 70.
Kely. 16.
H. P. C. 264.

3. * The Certainty of the Time wherein the Offence is done, as the certain *Day* and *Year*, is to be expressed. But the Crown is not bound to set down the very Day, when Treason, Felony, &c. was committed. The very Day need not be proved upon Trial. [See of *Evidence*, *post*.]

In Cases of *Omission*, it is not necessary, to set down the Day and Year; as in an Indictment for not scouring a Ditch, &c.

4. The *Nature* of the Offence must be set forth, whether it be Treason, Felony, Trespas, Penal Statute, &c. Sometimes you must use *special Words*. In Treason the Indictment must say *Proditorie*, and conclude *Contra Ligeantiae suae Debitum*, in an Indictment of High Treason against the King's Person. In Murder it must say *Murdravit*, for that is a Word of Art which implies Malice. If the Killing was by a Blow with the Hand, or by shooting; you must also say *Percussit*, not if it was by Poisoning. [See of *Appeal*, *post*.] In Burglary, *Burglariter*, or *Burgulariter*; or *Burgalariter*; in Rape, *Rapuit*, not *Carnaliter Cognovit* [only]; in Felo y and *Mayhem*, *Felonice* only; but in *Mayhem* *Felonice Mayhemavit*; in Larceny, *Felonice Cepit*, not *Felonice Abduxit* or *Asportavit*, without *Cepit*. Things living must be set down, as Horse, Ox, &c. Dead Things are to be called *Bona et Catalla*, but you must express what Goods and Chattels. And in all these Cases, and in *Trespas*, the Indictment ought to be *Vi et Armis*, and conclude *Contra Pacem*.

* 4 Rep. 39.
5 Rep. 121,
122.
7 Rep. Calvin's Case,
5, 6, 10.
West's Symb.
§. 70.
H. P. C. 206,
207.
1 Ld. Ray 1.
Sh. Par. Caf.
186.

cem. [But see 37 H. 8. ch. 8. 4 Ann. ch. 16.] In Offences against the Peace only, as Conspiracies, Deceits, &c. These Words *With Force and Arms* are not necessary. In a *Forcible Entry*, the Words *Manu forti* amount to it. If the Offence is created by a ^a Statute, ^a 4 Rep. 48. it must conclude *Contra Formam Statut'*, &c. The Recital of a ^b publick Statute is not necessary, but rather dangerous; for a Misrecital thereof will spoil the Indictment. The Substance and material Words in such Statute must be set down, concluding *Contra Formam Statut'*, &c. ^b Inf. 98. b.

5. The ^b Value of the Thing by which the Offence was committed, must be expressed. It seems necessary to value Things stolen, that it may appear, whether it is Grand Larceny or Petit Larceny. In *Trespass* the Value may aggravate the Offence. But Things *Ferae Naturae* ought not to be valued, if they were not in Parks or Warrens. If the Indictment is of living Things, you must say *Pretii*, &c. If of dead Things, you must say *Ad Valentiam*, &c. [*Quære* the Difference.] But it is said that one dead Thing only must be *Pretii*, not *Ad Valentiam*. ^b West's Symb. Of Indictments, §. 70.

By 23 Geo. 2. ch. 11. In every Information or Indictment for wilful and corrupt Perjury, it shall be sufficient to set forth the Substance of the Offence charged, and by what Court, or before whom the Oath was taken (averring such Court or Person to have competent Authority to administer the same) together with proper Averments to falsify the Matter wherein the Perjury is assigned, without setting forth the Bill, Answer, Information, Indictment, Declaration, or any Part of any Record or Proceeding, either in Law or Equity, other than as aforesaid; and without setting forth the Commission or Authority of the Court or Person before whom the Perjury was committed.

And in every Information or Indictment for Subornation of Perjury, or for corrupt Bargaining or Contracting with others, to commit wilful and corrupt Perjury, it shall be sufficient to set forth the Substance of the Offence charged, without setting forth the Bill, Answer, Information, Indictment, Declaration, or any Part of any Record or Proceeding, either in Law or Equity, and without setting forth the Commission or Authority of the Court or Person before whom the Perjury was committed, or was agreed or promised to be committed.

^c An Indictment lies upon a private Statute, where no particular ^c 8 Rep. 60. Penalty is provided, and the Offender shall be tried and imprison'd; if such Statute concerns a Multitude of Persons. But if it concerns one particular Person only, an Action on the Case doth lie, not an Indictment.

^d If there is an Indictment and Inquisition against one for the same ^d Kely. 108. Offence, one found by the Coroner's Inquest, and another by the Grand Jury, he may be tried on both at the same Time. For if one is indicted for Murder, and convicted of Manslaughter, or acquitted, and at the same Time there is a Coroner's Inquest, he may plead his former Conviction or Acquittal in Bar of the other. If an Indictment is void for Insufficiency, or if the Trial is in a wrong County, ^e another Indictment may be drawn for the same Offence, ^e 4 Rep. 40. whereby the Insufficiency may be cured, and the Indictment laid ^f H. P. C. 244. in another County, though Judgment was given.

By the Common Law the Court may *quash* any Indictment for ^g Str. 442. any such Insufficiency in the Caption or Body of it, as will make ^h Ld. Ray. 548, 710. the

the Judgment erroneous. By Insufficiency in the *Caption* I mean a Default in shewing before whom the Indictment was taken, their *Jurisdiction*, the *Place* where, the *Number* of the Jurors, the *Day* and *Year* when the Court was holden, &c.

^a 1 Rep. 121. ^b 3 Inst. 129. ^c H. P. C. 189. ^d 1 Cro. 108. ^e 3 Cro. 465. False *Latin* shall not quash an Indictment. For tho' an original Writ or an Appeal may abate for false *Latin*, yet judicial Writs, Fines, or Indictments shall not, if the Word is *Latin*; but if the Word is not *Latin*, or allow'd by Law as a Word of Art, or insensible, there if it is in a Point material, it makes the Indictment insufficient; as *Murdredum* for *Murdrum*, *Burgariter* for *Burglariter*, &c. [See 4 G. 2. ch. 26. *infra*.] But nothing which may be rejected as *Surplus*, shall vitiate an Indictment.

By 7 & 8 W. 3. ch. 3. All Persons indicted of High Treason, (except for Counterfeiting the Coin, Great Seal, Privy Seal, Sign Manual, or Privy Signet) or for Misprision of such Treason, shall have a Copy of the whole Indictment (but not the Names of the Witnesses) five Days at least before his Trial, to advise with Counsel thereon, &c. [See 7 Ann. ch. 21. *infra*.]

This Indictment must be found within three Years after the Offence committed, except in Treason for an Attempt of an Assassination on the Body of the King by Poison, or otherwise.

No Indictment for any of the Offences aforesaid, nor any Process, nor any Return thereon, shall be quash'd on the Motion of the Prisoner, or his Counsel, for miswriting, mis-spelling, false or improper *Latin*, unless Exception for the same be made by the Prisoner, or his Counsel, before any Evidence given in Court. Nor shall any such miswriting, mis-spelling, false or improper *Latin*, after Conviction, be Cause to arrest Judgment, though any Judgment given upon such Indictment, may be reversed upon a Writ of Error, notwithstanding this Statute. [See more of this Statute Of Evidence to the Petty Jury, *infra*.]

[But these Niceties about Abbreviations, and the *Latin* of Indictments are taken away by 4 G. 2. ch. 26. which directs, That all Indictments, Informations, Inquisitions, Presentments, and all Proceedings whatsoever in any Courts of Justice, shall be in the English Language, and in Words at length and not abbreviated.]

By 10 & 11 W. 3. ch. 23. No Clerk of Assize, Clerk of the Peace, or other Person, shall have more than Two Shillings for drawing an Indictment against a Felon, upon Pain to forfeit 5*l*. to the Party grieved, with full Costs of Suit. If they draw any Bill defective, they shall make a new one without Fee, under the same Penalty.

See 5 & 6 W. & M. ch. 11. To prevent Delays of the Proceedings at the Quarter-Sessions of the Peace by removing Indictments by *Certiorari* into the King's Bench before Trial, &c.

[By 5 Geo. 2. ch. 19. The Quarter-Sessions have Power to amend Orders, removed before them by Appeal, as to any Defect in Form; and the Prosecutor of a *Certiorari* to remove the Order of any Justices into the Court of King's Bench, is to enter into a Recognizance of Fifty Pounds, to prosecute with Effect.]

Of Approvers.

^b 3 Inst. 129.

H. P. C. 192.

193, 194, 195.

196, 197.

Hawk. P. C.

B. 2. ch. 24.

IV. ^b An Approver (*Probator*, *Prover*) is a Person indicted of Treason or Felony, and in Prison for the same, and not disabled to accuse, who upon his Arraignment before any Plea pleaded, [2*y*. if

if not at any Time before Verdict[†] and before competent Judges, ^{2 H.H.P.C.} does confess the Indictment, and takes a corporal Oath, to reveal ^{228.} all Treasons and Felonies, that he knoweth of, and therefore prays a Coroner to enter his Appeal or Accusation, against those that are Partners in the Crime contained in the Indictment. He is sworn to discover all Treasons and Felonies; yet he is not an Approver in Law of any but the Offence whereof he is indicted. [See 28 Ed. 1. *Stat. de Appellatis.*]

This Accusation of himself, and Oath, make his Accusation of another of the same Crime to amount to an Indictment; and if his Partners are convicted, the King is to pardon him. [See 5 H. 4. *cb. 2.*] But it being in the Discretion of the Court, to suffer one to be an Approver, this Method of late hath not been put in Practice.

V. An ¹ *Appeal* (from *Appeller*, to accuse, or from *Appello*, to call) is an Accusation of one against another, to attain him of Felony, by Words ordained for it. This is always at the Suit of the Subject. It is the Party's private Action, prosecuting also for the Crown in respect of the Felony. The Plaintiff is call'd the Appellant, and the Defendant the Appellee. ^{Of Appeals. 1 Inst. 123. b. 287. b. Hawk. P. C. B. 2. ch. 23. Finch 310, 311. 1 Inst. 123. b. 287. b. 2 Inst. 316, 317.}

It may be brought in *three Cases*. 1. For a Wrong to one's Ancestor, whose Heir Male he is, and that is only for the Death of his Ancestor. 2. [†] For Wrong to the Husband; and this is to be prosecuted by the Wife only, for the Death of her Husband. 3. For Wrong done to the Appellants themselves, as for Robbery, Rape, Mayhem. This last Sort of Appeal is disused, because the Process is more nice and chargeable than by Indictment.

An Appeal of *Death* is of *two Sorts* (*viz.*) Of *Murder*, and of *Manslaughter*. And these must be brought by the Wife for the Death of her Husband, or by the Heir Male for the Death of his Ancestor. An Appeal lieth not for a Killing *Se Defendendo* or by Misadventure.

¹ The Wife ought to be a Wife *de Jure*; and therefore one may plead, that she was never lawfully married to the Party slain. She must also be a Wife *de Facto* (*i. e.*) in Possession as well as in Right, without Elopement, (*Qu.*) Divorce, &c. If she does not continue a Widow, but marries before or pending the Appeal, the Appeal is lost. If she marries after Judgment, she cannot pray Execution; for the Loss of a Husband is the Cause of the Appeal. [But *Qu.* What ought to be done with the Appellee in such a Case.] A Husband cannot have an Appeal of the Death of his Wife, but the Heir only. ^{1 Inst. 33. b. 2 Inst. 68, 69. 317, 384. H. P. C. 181. 3 Mod. 157. See Hawk. P. C. B. 2. p. 164.}

The ¹ Heir must be Heir Male, tho' he derives by a Female. For no Female, except a Wife, can maintain an Appeal. And he must be Heir according to the Course of the Common Law, and Heir at the Time of the Killing of his Ancestor. If the Appeal is against the Heir as Guilty of the Killing, the next Heir Male shall have the Appeal. If the Wife kills the Husband, the Heir shall have the Appeal. But if the Person kill'd by a Stranger hath a Wife surviving, the Heir shall not have it, tho' she dies within the ^{1 Inst. 25. a. & b. 33. b. 2 Inst. 68. H. P. C. 181, 182, 183.}

[†] Nullus capiatur aut imprisonetur propter appellum femine de morte alterius quam viri sui. Magna Charta, ch. 34.

Year. And if the Heir dies after the Death of the Ancestor, another Heir shall not have the Appeal. No one can bring an Appeal of the Death of a Person attainted of Treason or Felony, except his Wife; because such a one has no Heir. Therefore if the Person kill'd had two Sons at the Time of his Death, and the Elder is attainted of Treason or Felony, neither of the Sons can have an Appeal.

^a 2 Inst. 183,

420.

⁴ Inst. 73.

⁹ Rep. 119.

H. P. C. 179,

180.

² Ld. Ray.

1289.

An Appeal may be brought either by original *Writ* out of the Chancery, or by *Bill*. By *Bill*, in the King's Bench, before Justices of Gaol-Delivery, if the Appellee is in Prison before them, before Commissioners of Oyer and Terminer, before Justices of Nisi Prius, and before the Justices of the King's Bench, or before the Sheriff and Coroner in the County-Court. But the Sheriff and Coroner can only take and enter the Appeal and Count, and proceed no further; it must be removed by *Certiorari* into the King's Bench. [See 3 H. 7. *cb.* 1.] An Appeal may also be brought before the Constable and Marshal, of a Felony done out of the Realm.

^b 3 Inst. 5, 31,

132.

H. P. C. 180.

There can be no Appeal of Treason in Parliament, for it is ousted by the 1 H. 4. *cb.* 14.

By Mag. Chart. or 9 H. 3. *ch.* 34. No Man shall be taken or imprison'd, upon the Appeal of a Woman, for the Death of any other than her Husband.

² Inst. 182.

By West. 1. or 3 Ed. 1. *ch.* 14. The Accessory in an Appeal shall not be outlaw'd, before the Principal is attainted.

By the Statute of Gloucester, or 6 Ed. 1. *ch.* 9. If the Appeller declares the Deed, the Year, the Day, the Hour, the Time of the King, and the Town where the Fact was done, and with what Weapon, the Appeal shall stand, so that he sue within a Year and a Day after the Fact. [See 1 H. 5. *ch.* 5. and 2 Inst. 665. &c.]

Let us explain this Statute.

^c 2 Inst. 318.

⁵ Rep. 122.

The Deed — Whether it was by Wound or without Wound. If by a Wound, four Things are necessary to be set forth in the Appeal. 1. In what Part of the Body the Wound was given. 2. Of what Length and Depth, [where the Wound is of such a Quality, as to be ascertained by that Description] so that it may appear to the Court, that the Wound was mortal. But if a Leg or Arm is cut off, there the Length and Depth cannot be shew'd. 3. That the Party wounded died of that Wound. 4. It must appear, that he died of that Wound within a Year and a Day, after the giving of the Wound. If without Wound, it is either by Weapon or without. By Weapon, as by Blow, Bruising, &c. Without Weapon, as by Poisoning, Drowning, Burning, Strangling, &c. In both these Cases the Circumstances must be set forth.

The Year, i. e. The Year of the Reign of the King.

The Day, — The Natural Day, containing twenty-four Hours. And therefore, if the Fact was done in the Night, you must say, *In Nocte ejusdem Diei*. The Killing must be alledged, to be the

⁴ 2 Inst. 318.

³ Inst. 53.

⁴ Rep. 41, 42.

² Inst. 318.

¹ Ld. Ray.

21, 22.

Day that one died, not the Day of the Wound or Blow.

The Hour, — In the Count upon the Appeal one may say about Ten of the Clock, &c. But you must not say about the Day,

Year, or that the Wound or Blow was about any Part of the Body. It is difficult to alledge the true Hour, and not so of the Day, Year, or the Part of the Body. And yet the Plaintiff in the Appeal is

not

not bound to prove the precise Hour, or the Day alledged. In *Indictments* the Hour need not to be alledged. *Between the Hours of ten and eleven* is unintelligible, for there is no Time between the Hours.

The Time of the King.—¹ This is added, notwithstanding Mention was made of the Year before, wherein the Blow, &c. was given; for here the Year wherein Death ensued, is to be shewn, that it may appear that he died of the Blow, &c. within the Year and Day. ¹ Inst. 125. ² Inst. 319.

The Town.—If the Murder or Homicide was in a Town. Otherwise if out of a Town, the Place, if known, out of any Town, must be alledged as known in such a County. If the Fact was done in a City, the Parish must be alledged. But in the Country, if a Parish contains several Towns, alledge it in a Town. [See 2 & 3 Ed. 6. ch. 24. Of Trial by the Country, *post.*]

With what Weapon.—¹ One certain Weapon must be alledged in the Count, yet if it be proved in Evidence, that the Wound was given with any other Weapon, the Offender shall be found Guilty. But upon such a Count, or in an Indictment, it cannot be given in Evidence that the Party was poison'd or drown'd, &c. where no Weapon at all was used; it being Murder or Homicide of another Kind. [See of Evidence to the Petty Jury, *infra.*]

[Tho' this Statute requireth, that the Weapon be mentioned, it must be understood, where one is kill'd with a Weapon.

So that he sues within a Year and a Day.—¹ The Year must be computed according to the Calendar, and not according to twenty-eight Days to the Month; the Day is to be intended of the natural Day, and the whole Day is to be taken in. By Common Law the Appeal was to be brought within a Year and a Day.

If the next Heir of the Dead is within Age, he must nevertheless bring his Appeal of Death within a Year and a Day, according to this Act.

After the Fact.—*i. e.* ¹ After the Felony committed by Homicide, or by the Death; not after the Stroke, or Wound. ² Inst. 320. ³ Inst. 53.

By 3 H. 7. ch. 11. An Indictment for Murder may be tried, without staying for the Appeal. ⁴ Rep. 41, 42. Cont. S. P. C. 63.

Although the Principal or Accessory is acquit within the Year and Day, he shall be remanded to Prison, or let to Bail, until the Year and Day is out. And whether they be attainted or acquitted, yet the Wife or next Heir of the slain may within the Year and Day (the Benefit of the Clergy being not before had) prosecute an Appeal against them, any such Attainder or Acquittal notwithstanding.

If there is an Indictment and Appeal depending together, the Judges ought to proceed first upon the Appeal, if the Prosecutor desires it, and prosecutes without Fraud. The Indictment may be preferred to the Appeal, if the Court shall find that there is like to be a faint Prosecution of the Appeal, in order to acquit the Party. For the Acquittal upon a faint Prosecution will conclude the King.

If the Murderer is acquitted upon the Indictment, or found Guilty and pardon'd by the King, yet the Wife or Heir may have an Appeal. But if the Party is found Guilty of Manslaughter, and hath the Benefit of his Clergy, no Appeal lieth. It is said to be unreasonable, ⁴ Rep. 40, 41, 46. ³ Inst. 131. H. P. C. 245. Kely. 94, 107, 108.

sonable, that the Appeal should interpose presently after the Conviction, to prevent the Judgment and Execution in Manslaughter. For if that should be admitted, then an Appeal might prevent Judgment and Execution upon a Conviction of Murder, as well as Manslaughter. It is said, that a Verdict finding one guilty of Homicide *Se Defendendo* on an Indictment of Murder, may be pleaded to an Appeal of the same Death, as it was at Common Law. For that 3 *H. 7. ch. 1.* mentions only Persons acquitted or attainted, as subject to Prosecution upon an Appeal. [See of Pleas in Bar, *infra.*]

^a 1 *Inst.* 262. b. ^a An Appeal is to be arraigned by the Counsel in French, but entered in Latin. The Count must be, that the Appellant appears in propria Persona; but the Appeal may be prosecuted by Attorney and Counsel; and defended by Attorney and Counsel. [See 3 *H. 7. ch. 1.* and see also 4 *Geo. 2. ch. 26.* 6 *Geo. 2. ch. 14.* Whereby all Proceedings in Courts of Justice are to be in the English Language.]

^b Kely. 37. One standing mute in an Appeal of Murder hath the same Judgment as on an Indictment.

^c 1 *Sid.* 325. Evidence given for or against the Defendant in an Indictment is no Evidence in an Appeal.

If one is acquitted, he shall have his Damages against the Appellant. [See *West. 2. or 13. Ed. 1. ch. 12.* and the Exposition thereof, 2 *Inst.* 383, &c.]

The Jury may find the Defendant Guilty of Manslaughter, or Not Guilty generally. If in an Appeal of Murder the Defendant is found Guilty of the Murder, Judgment is that he shall be hanged; and the King cannot pardon it. But if he is acquitted upon the Appeal, he may be arraigned upon an Indictment at the King's Suit. [Though an Acquittal upon an Appeal may be pleaded in Bar to an Indictment for the same Murder or Manslaughter, see of Pleas in Bar, *infra.*] [See of Pardon and Judgment, *infra.* and *Danvers's Abridg. Tit. Appeal, 488, &c.*]

^a 1 *Ld. Ray.* 556.

^a 4 *Rep.* 40.

² *H. H. P. C.* 250.

Hawk. P. C.

B. 2. p. 374.

Of Informations.

^a *Finch* 340.

341.

Show. 109.

110.

Hawk. P. C.

B. 2. ch. 26.

VI. There may be an Information for the King against a Criminal, as well as an Indictment, whereby a pecuniary Mule, or other Penalty, may be inflicted. It does not lie for a capital Crime, or for Misdemeanor of Treason. [See and see 5 *Geo. 2. ch. 30.* Concerning Bankrupts; for they may be convicted upon Indictment or Information, and suffer as Felons without Clergy. And in many Cases of Felony created by late Acts of Parliament, the Conviction may be upon Information.]

^a Terms of the Law, v. Information.

An Information for the King is the same with the Declaration of a common Person. It differs from an Indictment, in as much as that is to be found by the Oath of twelve Men at least, and this is only the Allegation of the Officer, &c. It is not always exhibited directly by the King, or his Attorney General, or the Clerk of the Crown in the Court of King's Bench, (who is Coroner, and Attorney for the King in that Court) but sometimes by a common Person, who informeth as well for the King as for himself, upon some penal Statute. This is different from an Action on a penal Statute. Therefore remember, that Informations are of two Kinds (*viz.*) At the Suit of the King only, and partly at the Suit of the King

King and partly at the Suit of the Party, which is called an Information *Qui tam*.

Information may be also for Offences and Misdemeanors at Common Law; where the Offender is liable to pay a Fine to the King, as for Batteries, Cheating, Rescous, seditious Words, Conspiracies, Libelling, Riots, Extortion, Nufances, Contempts, &c.

When the Clerk of the Crown exhibits an Information, it is generally by Order of Court. But when the Attorney General does it, it is *Ex Officio*.

By 18 El. ch. 5. Every informer upon a penal Statute shall exhibit his Suit in proper Person, and pursue the same only by himself, or by his Attorney in Court, by Way of Information or original Action, and not otherwise, and shall have no Deputy.

A Note of the very Time of exhibiting the Information shall be made, and from thenceforth it shall be accounted a Record; before which Time no Process shall issue out upon it; and upon every such Process the Informer's Name shall be indorsed, and also the Statute upon which the Information is grounded.

No Informer shall compound with the Defendant before Answer, nor after Answer, but by Consent of the Court, on Pain of the Pillory and ten Pounds, and to be incapable of being Informer or Plaintiff in any Suit or Information upon any popular or penal Statute. If he discontinues, or is nonsuit, or hath Verdict or Judgment against him, the Court shall give the Defendant his Costs, Charges and Damages.

This Act shall not extend to Officers, who have lawfully used to exhibit Informations, nor to Informations upon the Statutes of Maintenance, Champerty, buying of Titles, or Imbracery, as to the Parties grieved, nor to Informations by Persons to whom any Forfeiture is given in certain, and not generally.

No Suit by Bill or Plaint by a Party grieved, suing upon a Clause relating to himself only, is within this Statute. * i Cro. 434.
645.

[See 21 Ja. 1. ch. 3. and the Exposition thereof 3 Inst. 186, 187, being a Statute against those that obtain Power to dispense with penal Laws, and the Forfeitures thereof.]

[See 29 El. ch. 5. and 31 El. ch. 10. as to Appearance to an Information upon a penal Law by Attorney, without Bail, under Title Bail, ante. Also 31 El. ch. 5. 21 Ja. 1. ch. 4. where the Offence shall be laid in the proper County, and again 31 El. ch. 5. where the Information shall be brought in due Time, ante, ch. 4. See 21 Ja. 1. ch. 28. For the Repeal of many obsolete Statutes whereby Informers did vex the People.]

By 4 & 5 W. & M. ch. 18. The Clerk of the Crown in the Court of King's Bench shall not, without express Order in open Court, exhibit, receive, or file any Information for Trespass, Battery, or other Misdemeanors, or issue out any Process thereon, before he hath taken, or hath had delivered to him, a Recognizance from the Informer, with his Place of Abode, Title, or Profession, to the Person against whom such Information is to be exhibited, in the Penalty of twenty Pounds, to prosecute with Effect, and to abide such Order as the Court shall direct; which Recognizance the said Clerk of the Crown, or a Justice of Peace of the Place where the Cause of such Information arises, may take; and the Clerk of the Crown shall enter the same upon Record, and file a Memorandum thereof in his Office, for all Persons

to resort to without Fee. And in Case the Defendant appears and pleads to issue, and the Prosecutor doth not, within one whole Year after Issue joined, procure the same to be tried, or if upon such Trial a Verdict pass for the Defendant, or if the Informer procures a Noli Prosequi, to be entred, the Court may award to the Defendant his Costs^a, unless the Judge shall at the Trial in open Court certify upon Record, that there was a reasonable Cause for such Information. And in Case the Informer shall not, within three Months after the Costs taxed, and Demand made thereof, pay the same, then the Defendant shall have the Benefit of such Recognizance to compel him thereto.

^a 2 Str. 1042,
1131.

This Act shall not extend to any other Informations, than those in the Name of his Majesty's Coroner or Attorney in the Court of King's Bench, commonly called the Master of the Crown-Office.

So that the Informations by the Attorney General remain as they were at Common Law.

If the Information is tried at the Bar, the Defendant shall not have Costs by this Statute; for the Judges cannot make a Certificate to themselves, that there was reasonable Cause for Information.

See 9 An. ch. 20. To make the Proceedings upon Informations in the Nature of a *Quo Warranto* more speedy and effectual.

^b Hawk. P.C.
B. 2. p. 259.
1 Salk. 372.
1 Str. 185,
1103.

Informations^b are never quashed for Insufficiency, as Indictments may be. A prior Suit depending may be pleaded to an Information on a penal Statute: So may a Pardon, a Release, a Recovery in a former Suit. [See 4 H. 7. ch. 20.] The General Issue may be, *Not Guilty*, *Nil Debet*, &c. [See 2 Ja. 1. ch. 4. and see of *Actions upon Statutes*, and where *Actions* must be laid, &c. in ch. 4. ante.]

I proceed to the *Arraignment* of the Prisoner upon *Indictments* and *Appeals*, whether Principal or Accessory.

Of the Arraignment of the Criminal.
^c 1 Inst. 262. b.
263. a.
Raym. 408.
Hawk. P. C.
B. 2. ch. 28.
^d 2 Inst. 315,
316.
^e 3 Inst. 34, 35.
H. P. C. 212.
Kely. 10.
^e 3 Inst. 35.
8 E. 2. cor.
432.
Lawyer's
Trial 4.

VII. An *Arraignment* (from *Arraigner*, to set in Order) of a Prisoner, is to take care, that the Prisoner does appear, to be tried, and to hold up his Hand at the Bar for the Certainty of the Person, and to plead a sufficient Plea to the Indictment. The Prisoner is to hold up his Hand only in *Treason* and *Felony*; but this is only a Ceremony; if he owns that he is the Person, it is sufficient without it; and then upon his Arraignment his^d Fetters are to be taken off, [after he has put himself upon the Country;] and he is to be treated with all the Tendernefs imaginable. No Man is said to be arraigned, but at the Suit of the King, upon an Indictment found against him, or other Record, wherewith he is to be charged. We may arraign an *Affise* or *Appeal*, but the Tenant or Appellee is not arraigned; because these are at the Suit of the Subject.

The Arraignment of a Criminal must be in *English*. See 37 Ed. 3. ch. 15. But Appeals are said not to be within this Statute; for they are to be arraigned in *French*, and the Plea of the Defendant is to be read in *French*. *Quare* The Reason of this Difference. [But now by 4 G. 2. ch. 26. All Proceedings in Courts of Justice must be in English.]

If the *Principal* is acquitted, or convict of Manslaughter, or *Se Defendendo*, or before Attainder hath his Clergy, or is pardon'd, or dies, the *Accessory* shall not be arraign'd. [But see 1 *Ann. St.* 2. *cb.* 9. 5 *Ann. cb.* 31. which are taken Notice of in *B.* 3. *cb.* 2. *ante*, Concerning *Principal* and *Accessory*; where more relating to the *Arraignment* of *Principal* and *Accessory* is mention'd.] By these Statutes the antient Law concerning Arraignment of *Principal* and *Accessory* is very much alter'd. [See *Dalt. cb.* 185. *p.* 515, 516, 517. For the Solemnity of the *Arraignment* and *Trial* of a Prisoner.]

VIII. The Prisoner either stands *mute*, or *confesses* the Fact, or Of the Behaviour of the Criminal upon his Arraignment.

1. If one arraigned of Petit Treason or Felony stands *mute*, or answers nothing at all, it shall be inquired, whether he stands *mute* on Purpose, or whether he is dumb. If he stands *mute* out of Stubbornness, or if he hath cut out his Tongue, or he does not plead directly to the Fact, or does not put himself upon a Trial by God and his Country, if a Commoner, or if a Peer by God and his Peers, after he has pleaded Not guilty, he shall be put to the Penance. The Penance in Cases of Petit Treason and Felony is the *Pain Fort et Dure*, with Forfeiture of Goods. But before the Judgment passes, the Court orders his Thumbs to be tied together with Whipcord, and to be drawn together by the whole Strength of two Men, to give the Criminal a Taste of the Pain to be endured, if he will not then comply. This is the Practice at *Newgate* Sessions, if he continues stubborn. The Judgment of *Pain Fort et Dure* is, by the Common Law, that the Man or Woman shall be remanded to Prison, and laid there in some low and dark Room, where they are to lie naked on the Ground, with Hands and Legs extended; and there shall be laid upon their Bodies as much Weight as they can bear, and more, till they are dead. This Punishment some have endured, because it works no Attainder, or Forfeiture of Lands, or Corruption of Blood. [But he forfeits his Goods.] In an Appeal of Felony, if the Prisoner stands *mute*, he shall have Judgment to be pressed, as upon an Indictment. And this is by the Common Law. But upon standing *mute* obstinately in Case of High Treason, the Criminal shall have such Judgment, as if he had been convicted by Confession or Verdict. [See *West. I. (cb.* 12.)] This Statute does not extend to High Treason, the highest Offence; nor to Petit Larceny, the lowest of all Felonies. For such Offenders shall have like Judgments, as if they had confessed their Crimes.

The 28 *H. 8. ch.* 15. allows the *Pain Fort et Dure* in Case of Piracy, where a Pirate stands *mute*.

By 33 *H. 8. ch.* 12. (entitled, The Bill for the Household) Traitors, Felons, &c. standing *mute* upon their Arraignment within the King's Palace, shall be deemed Guilty of the Offence, of which they are indicted.

* *Idem est nihil dicere, et insufficienter dicere.* 2 *Inst.* 178.

[See 3 W. & M. ch. 9. 1 Ann. St. 2. ch. 9. In what Cases a Prisoner standing *mute* loseth Clergy, which he had at Common Law, and consequently shall in those Cases undergo the Punishment of *Pain Fort et Dure* in p. 401 & 405. ante.] *Quare*, What shall be done with the Prisoner, if he peremptorily challenges above twenty Jurors, whether the Challenge shall be over-ruled, or the Prisoner hang'd, or pressed to Death? [See of Challenge, *post*.]

[In some late Statutes, it is enacted, that the Prisoner, for the Offences within those Acts, shall suffer the same Punishment upon standing mute, as if he had been convicted.]

2. If the Prisoner *confesses* the Fact, the Court has nothing more to do than to proceed to * Judgment against him. The Confession may be receiv'd, and the Plea of Not guilty may be withdrawn, though recorded. But there is a Confession indirectly made, or implied, as well as directly or express. An indirect or implied Confession is, where the Defendant, in a Case not Capital, doth not directly own himself Guilty, but will own his Guilt, and submit to a small Fine, rather than contend. In which Case, if the Court thinks fit, they may in Discretion accept of such Submission to the King's Mercy. By which indirect Confession the Defendant shall not be barr'd, to plead Not guilty to an Action for the same Fact, as he will be where he directly and expressly confesses the Indictment. [See of Judgment, *infra*.]

3. If the Prisoner *pleads* upon his Arraignment, he either pleads *Sanctuary*, the *Benefit of the Clergy*, *demurs* to the Indictment, pleads in *Abatement*, or in *Bar*, or he pleads the *General Issue*.

1. The Plea of *Sanctuary* with *Abjuration* is taken away by the 21. Ja. 1. ch. 28. as before observed. [See the Exposition of *Magna Charta*, ch. 29. *supra*, and *Stauford's P. Cr.* B. 2. ch. 40.]

2. Or he pleads the *Benefit of the Clergy*. But the Use is not to put the Offender to pray the Benefit of the Clergy, till he has otherwise pleaded. [See of the *Benefit of the Clergy*, B. 3. ch. 2. *ante*, where the particular Offences are set down, in which the Benefit of the Clergy is allowed, and where ousted by Act of Parliament.]

3. A *Demurrer* is, when the Criminal joins Issue upon a Point of Law in an Indictment, allowing the Fact to be true, as laid in the Indictment or Appeal. If the Indictment, or Appeal, proves to be good in Law, in the Opinion of the Judges, they proceed to Judgment and Execution, as if the Party had been convicted by Confession or Verdict. [2y. * If in Capital Cases he shall not be allowed to plead over to the Felony, &c.] For he shall not be put under the *Pain Fort et Dure*, though by his Demurrer he refuses to put himself upon the Inquest according to the Letter of the Law;

* *Confessus in judicio pro judicato habetur.* 11 Rep. 30. 4 Inst. 66.
Cum confitente mitius est agendum. *Ibid*.

yet he is out of the Reason of the Law, because a Demurrer is allow'd to be tried by the Judges, and not by the Inquest. [See again *West. 1. ch. 12.*]

4. In *Abatement*, * as that there is a Misnomer in his Christian or Surname. If the Prisoner pleads Misnomer of his Surname to an Appeal, it goes in Abatement. But in Case of an Indictment, he shall be put to answer the Treason or Felony. [2y.¹] Misnomer in the Christian Name goes in Abatement to an Indictment, but then the Prisoner must give his true Name, and by that Name he may be forthwith indicted.

5. Or he pleads in Bar; * as *Auterfoits Acquit*, *Auterfoits Convict* before Judgment, *Auterfoits Attaint*, or a Pardon.

1. *Auterfoits Acquit*, i.e. That he was heretofore acquitted of the same Treason or Felony. For one shall not be brought into Danger of his Life for the same Offence, more than once. * In an Appeal of Death, *Auterfoits Acquit* upon an Indictment of the same Death, is no Bar. [See 3 H. 7. ch. 1.] But *Auterfoits Acquit* in an Appeal, is a good Bar to an Indictment, unless the Appeal was erroneous in Substance, or by a wrong Person. Acquittal upon a void Indictment is no good Plea, when indicted again; nor if one is heretofore Acquit as Principal, can it be a Bar to an Indictment against him as Accessory after the Fact. * If it is found in an Indictment or Appeal of Death, that one kill'd another in his own Defence, he is acquitted of the Felony for ever. * One acquitted of Burglary and stealing the Goods of one Man, may be indicted for Felony, for stealing the Goods of another out of the same House.

2. *Auterfoits Convict* before Judgment, i.e. That he was heretofore convicted. * *Auterfoits Convict* by Confession or Verdict of Manslaughter in an Indictment, is a Bar in an Appeal of Murder, if the Person so convicted is admitted to his Clergy, or at least hath pray'd it, tho' not call'd to Judgment. [See 3 H. 7. ch. 1.] A Conviction of Manslaughter in an Appeal of Death may be pleaded in Bar of a subsequent Indictment for the same Death.

A Conviction on an Indictment of Felony may be pleaded to an Indictment for the same Felony. But *Auterfoits Convict* upon an Indictment in this and the like Cases, is said to be no Plea in Bar, where one is not call'd to Judgment; as Conviction of Manslaughter upon an Indictment of Murder is to an Appeal for the same Death, without being call'd to Judgment, if the Party prays his Clergy. The Difference is wholly owing to 3 H. 7. ch. 1. which leaves the Benefit of the Clergy as it was at Common Law. [See 8 El. ch. 4. 18 El. ch. 7. and of the Benefit of the Clergy, B. 3. ch. 2. ante.]

3. *Auterfoits Attaint*, i.e. Heretofore attainted for the same Offence, or for another Offence.

For the same Offence; * This is a good Plea in Bar to free one from answering again, tho' the Record is erroneous; [if the Attaint is not actually reversed.] If one is attainted by Outlawry in Treason or Felony, he shall not answer to a new Indictment, or Appeal, for the Treason or Felony for which he is outlaw'd; if the

Outlawry in Treason or Felony is not void. For if one is already attainted, to what Purpose shall he be attainted a second Time?

^a 3 Inst. 213. But in an Appeal of Death at the Suit of the Party, *Auterfoits* H. P. C. 246, *Attaint* upon Indictment of the same Death is no Plea: But in ^{247.} Case of Indictment at the Suit of the King, *Auterfoits Attaint* is a good Plea. *Heretofore* attainted of Murder is a good Plea to an Indictment, &c. of *Petit Treason* of the same Death. So if one is attainted of *Manslaughter*, it is a good Bar to an Indictment of Murder, and *Converso*, of the same Death.

^b 3 Inst. 213. For another Offence. If one is attainted of Treason, he cannot be afterwards attainted of a former Treason. *Auterfoits Attaint* of one Felony is a Bar to an Arraignment of a former Felony, except in some particular Cases: As, One indicted of a Robbery by one of the Persons robbed, and attainted thereon, may again be indicted by another Person robbed at the same Time; because by 21 H. 8. ^c See Hawk. P. C. B. 2. p. 373, &c. ^d H. P. C. 248. *ch. 11.* the Party shall have Restitution of his Money or Goods. If one is attainted of Petty Larceny, he may be afterwards attainted of Felony, for which he may have Judgment of Death; because it is a higher Offence, and it is to have another Judgment. If one is adjudged to the Penance, *Pain Fort et Dure*, yet he may be prosecuted for any former Felony, because the Judgment of Penance was not given for the Felony but for Contumacy. ^e 3 Inst. 213. Besides, the ^f 1 Inst. 391 a. Penance is no Attainder.

In what I have said of the Plea of *Auterfoits Attaint*, you must suppose it not to be reversed for Error; or that the Attainder at the Suit of the King cannot be pleaded with respect to a Prosecution upon an Appeal (though in all other Cases the Plea is of the same Force as it was at Common Law) or that one attainted of Felony is not afterwards indicted of *High Treason* committed before or after his Attainder; or that it must not be understood with a Relation to several Indictments of Larceny, since 21 H. 8. *ch. 11.* which entitles every Prosecutor to a Restitution of his Goods, if the Offender is found Guilty, as before hinted; or that an Indictment for a *Trespass* is a Bar to an Indictment of Larceny for the same taking, &c. For a Bar in an Action of an inferior Nature will not bar another, that is of an higher Nature. In all these Cases *Auterfoits Attaint* is of no Force.

¹ 1 Inst. 274. b. 4. One may plead a Pardon in Bar. A Pardon (*Perdonatio*) ³ Inst. 233. is a Work of Mercy, whereby the King either before Conviction or ^{Hawk. P. C. B. 2. ch. 37.} Attainder, or afterwards, forgiveth any Crime, Offence, Punishment, Execution, &c. Pardons of Treason, Felony, &c. come from the King, [See 27 H. 8. *ch. 24.*] who by the Common Law had Power to pardon all Offences; but this Power is in some Cases restrained by Statutes. [See *infra*.]

A Pardon is either of *Course* or of *Grace*. ² 2 Inst. 316, ^{317.} Of *Course* and Right, as for a Person Convict of Homicide *Se Defendendo*, or by Chance-medley, upon an Indictment for Homicide *Se Defendendo*, or upon an Indictment or Appeal of Murder. ^{H. P. C. 250.} [See 6 Ed. 1. *ch. 9.*] ^{Kely. 122, 123.}

Of *Grace*, where some Things are required for their Allowance by the Common Law, and by Statute. By Common Law, as when they are conditional, and not absolute, as upon Condition of Transportation, &c. By Statute, For,

By 27 Ed. 3. St. 1. ch. 2. *In a Pardon of Felony upon Suggestion, the Suggestion, and the Name of him that makes it, must be comprised.*

By 13 Ri. 2. St. 2. ch. 1. *In a Pardon for Murder, or for the Death of a Man slain by Await, Assault, or Malice prepensed, Rape, or Treason, the Offence committed must be specified in the Pardon, otherwise it shall not be allowed.* [See 16 Ri. 2. ch. 6.]

* A general Pardon of all Murders, Robberies, &c. to one indicted and convicted of Murder, Robbery, &c. is not good, without Recital of the Indictment and Conviction. For it shall be intended, that the King knew not of that Conviction. But if the Party is neither indicted nor attainted, a Pardon of all Felonies in general (except as in the Statute of Rich. 2. abovementioned is excepted) is good. [2y.*]

By 5 & 6 W. & M. ch. 13. *The Statute of 10 Ed. 3. ch. 2. For finding Sureties for the good Abearing, upon a Pardon of Felony, is repealed.*

Provided, That if any Charter of Pardon is pleaded for any Felony, the Justices before whom such Pardon shall be pleaded, may at their Discretion remand or commit such Person to Prison, there to remain till he enters into Recognizance with two sufficient Sureties, for his good Behaviour for any Time not exceeding Seven Years.

Femes Covert and Infants shall find two sufficient Sureties only.

See 4 Geo. 1. ch. 11. where the King may pardon or dispense with Transportation, and allow of the Return of an Offender.

Pardons of Grace are either *general* or *particular*. 1. *General*, either by *Act of Parliament*, or by *Charter of the King*. A general Pardon by *Act of Parliament* must be taken Notice of by the Court, if it is absolute, though the Party waives it, or does not plead it. But if it hath Exceptions of Offences or Persons, the Court cannot take Notice of it; neither can the Party have Benefit thereof, unless he pleads that he is none of the Persons excepted. But commonly Advantage is given to the Offender by the *Act* itself, without pleading. The *Charter of the King* must be always pleaded under the Great Seal; and the Party may waive the Benefit of it if he pleases. But general Pardons are most commonly made by *Act of Parliament*; and of late Years have very rarely been granted by the *Charter of the King*. It shall always be taken most beneficially for the Subject, and most strong against the King. A Pardon of all Misdemeanors, Trespasses, Offences and Contempts, will pardon any Crime which is not Capital. 2. *Particular*, as at the Coronation, or at any other Time, of any Offence, as also of any exemplary Punishment. If absolute without Condition, it needs not any Writ of Allowance (*viz.*) That he has found Sureties, &c. [See 5 & 6 W. & M. *supra.*] But it must be shewed under Seal.

The Acceptance of a Pardon is an Argument of Guilt; and he that pleads it, confesseth the Fact. [2y.]

* Gloves are due to the Judges on Allowance of a Pardon. If a Peer hath a Pardon, he must plead it before the Judges, where he is indicted.

* If one obtaineth a Pardon before Conviction, he shall forfeit nothing. [See a Form of a general, and of a particular, Pardon, 3 Inst. 234, 235.]

Let us now see where the King cannot pardon.

^a Finch 234. The King cannot pardon an Offence that is *Malum in se*, ^a before it is committed.

^{235.} The King ^b cannot pardon the Defendant in an Appeal of Death, whether attainted by Outlawry or Judgment; for the Appeal is at the Suit of the Party. But if in Appeal of Murder the Defendant is found guilty of Manlaughter, the King may pardon the Burning of the Hand; for that is collateral, and by the Statute of the 4 H.

^c See Hawk. 7. ch. 13. [2y. ^a] A Pardon of all ^d Felonies extends only to Petit Treason and common Felonies, and not to High Treason.

^{393.} No Pardon of Felony shall be extended beyond the express Words. Therefore a Pardon of all Felonies is no Bar to Execution, if a Felon is attainted. And a Pardon of all Attainders, or of Executions, does not pardon the Felony.

^{238, 240.} If one is outlawed, and the King pardons him the Outlawry and all his Goods; it is void for the Goods, for he must have a Grant of them.

A Pardon of all Felonies does not extend to Piracy.

A Charter of Pardon after Attainder in Treason or Felony, does not restore the Blood. That must be by Parliament. [See of Restitution, *infra*.]

² Inf. 200. The King cannot pardon a common Nuisance, nor a Recognizance to keep the Peace, before the Peace is broken; nor an Informer's Part upon any penal Statute after the Action is brought by him; nor Damages recovered; nor where any legal Interest is vested in the Subject.

³ Inf. 237. When Sentence is given in a Cause *Pro Reformatione morum*, or *pro Salute Animæ*, in the Ecclesiastical Court, and Costs taxed for the Plaintiff, tho' the King may pardon the Offence (whether the Proceedings are *Ex Officio*, or betwixt Party and Party, as for Defamation, &c.) he cannot pardon as to the Costs; because a particular Interest is vested in the Plaintiff, by taxing the Costs; which he hath a Right to, tho' the Day of Payment of them is assigned after the Date of the Pardon. But if one is imprisoned on a Writ of *Excommunicato Capiendo* for Contumacy in not paying Costs, and afterwards the King pardons all Contempts, the Party shall be discharged of his Imprisonment; because it is grounded on the Contempt, which is pardoned, therefore a new Monition for Payment of Costs must issue forth.

⁵ Rep. 50. A Suppression of Truth, or a false Suggestion, doth avoid a pardon. [See 27 Ed. 3. St. 1. ch. 2.] for the King was not rightly informed. It is a general Rule, that where the King appears to have been deceived, his Grant is void.

By 12 & 13 W. 3. ch. 2. No Pardon under the Great Seal is pleadable to an Impeachment by the House of Commons.

The King cannot by his Pardon restore a *Simonist* to his Church; [See 5 & 6 Ed. 6. ch. 16. 31 El. ch. 6.] nor a corrupt Officer to his Office: [Though it may save him from any Criminal Prosecution on Account of such corrupt Bargain.]

^a Non potest Rex gratiam facere cum injuria aliorum. Bracton, Lib. 3. fol. 122. 3 Inf. 236, 237.

Divers Acts of Parliament have restrained the King's Power of granting Charters of Pardon in several Cases. But it has been said that the King may dispense with these Statutes by a *Non Obstante*, be those Statutes general or special. [But whatever was the Power of the Crown formerly in this Case, or whether it had any such Power or not, it is now settled and declared by ¹ *W. & M. Sess. 2. c. 2.* ² *Inst. 236.* ³ *Roll. Abr. 179.* ⁴ *See p. 19. ante.* *That no Dispensation by Non Obstante of or to any Statute, or any Part thereof, shall be allowed.*]

A Pardon may be obtained by *Discovery of Accomplices*. [See the ¹ *4 & 5 W. & M. ch. 8.* ² *10 & 11 W. 3. ch. 23.* ³ *6 Geo. 1. ch. 23.* ⁴ *f. 8.* For the *Discovery of Highway-men*, or those guilty of *Burglary*, *House-breaking*, or of *Felony*, not within the Benefit of the Clergy, in stealing a Horse, Money, Wares, or Goods. ⁵ *6 & 7 W. 3. ch. 17.* For the *Discovery of Accomplices in counterfeiting or clipping the Coin.* ⁶ *5 An. ch. 31.* For the *Discovery of those guilty of Burglary*, or the felonious breaking and entering any House in the Day-time. ⁷ *6 Geo. 1. ch. 21.* For the *Discovery of Accomplices in forcibly hindring, beating or wounding an Officer of the Customs in the Execution of his Office, &c.* ⁸ *8 Geo. 1. ch. 18.* and ⁹ *9 Geo. 2. ch. 35.* For *Discovery of Accomplices in smuggling the Customs, &c.*]

Thus far of Pleas in Bar.

6. One may plead the *General Issue*. The General Issue is a ¹ *H.P.C. 254.* Plea to the *Fact, Not Guilty*. If you take Issue, the immediate Consequence is a Trial.

IX. I have described before, what is meant by *Trial*, [See of ¹ *Of Trial in Trial, ch. 4. ante.*] Here in Criminal Cases it is either by *Peers*, or ² *Criminal Cases.* by the *Country*.

1. The *Trial* of a ¹ *Peer* of the Realm must be *Per Pares*, by ² *his Peers.* The Method of Trial of a Peer differs from the Trial ³ *of one under the Nobility.* For 1. There may be twelve *Peers* or ⁴ *above*, to try the Fact. [But there *must* be twelve at least; and it is ⁵ *not necessary* that all the Peers present should agree in Judgment, but ⁶ *the Majority of them, such Major Part being twelve or more, may* ⁷ *determine.*] 2. The Trial may be in any *County of England.* ⁸ *The Peers are not sworn upon the Trial; [but give their Judgment upon their Honour, seriatim, beginning with the lowest.]* 4. The Prisoner cannot challenge any of his Peers. 5. They give their Verdict in the Absence of the Prisoner. 6. In Case of High Treason, all the Judgment is usually pardoned, except the Beheading.

If a Lord of Parliament does not appear, and cannot be taken, he shall be ¹ *outlawed* by the Coroner. ² *Inst. 49.* ³ *Inst. 31.*

He shall not be tried by his Peers but only at the Suit of the ¹ *King*, upon an Indictment of High Treason; or Misprision of the ² *same*, Petit Treason, Murder or other Felony, or Misprision of Fe- ³ *lony*, [or upon an Impeachment of the House of Commons.] And ⁴ *here* he cannot waive his Trial by his Peers, and be tried by the ⁵ *Country.* In the Case of *Præmunire*, &c. though it is at the Suit of ⁶ *the King*, he shall be tried by Freeholders, and not by his Peers: And ⁷ *so* in an *Appeal* of Felony at the Suit of the Party. And though one is noble, yet if he is not a Lord of Parliament, he shall be tried ⁸ *by*

by Freeholders, as a Lord of *Ireland*, *France*, &c. And so it must be with a Son of a Duke, Marquis, Earl, &c. if he is no Lord of Parliament. No Treason committed in *Ireland* by an *Irish* Peer, is triable in *England*; for he is to be tried by his Peers in *Ireland*.

The Queen being the King's Consort, and the Queen Dowager, shall be tried, in Case of Treason, by their Peers.

By 20 H. 6. ch. 9. Duchesses, Countesses and Baroneſſes, for Treason or Felony, shall be tried by such Peers as a Nobleman, Peer of the Realm, ought to be.

^a 1 Inst. 16. b.

² Inst. 50.

^a Marchionesses and Viscountesses are not named in this Act, but they shall be tried by their Peers. If a Woman, noble by Marriage, marries one under the Degree of Nobility, she shall be tried by the Country; but not if noble by Birth.

By 7 & 8 W. 3. ch. 3. f. 11. Upon Trial of any Peer or Peereſs for Treason or Miſprifion, (except on an Impeachment in Parliament, and for High Treason in counterfeiting the Coin, the Great or Privy Seal, Sign Manual, or Privy Signet) All the Peers, who have a Right to vote in Parliament, shall be summoned twenty Days at least before the Trial, every such Peer taking the Oaths made 1 W. & M. and also subscribing and repeating the Declaration mentioned in 30 Car. 2. St. 2. ch. 1.

^b S.P.C. 153.

³ Inst. 31.

When a Peer indicted of Treason or other Capital Offence is arraigned in the upper House of ^b Parliament, the Lords Spiritual withdraw, and make their Protest. [See Of Bishops, B. 1. ch. 4. and of the Court of the Lord High Steward, B. 4. ch. 1. ante.]

^c 2 Inst. 50.

Lords in Parliament are not to give Judgment against a ^c Commoner for Treason or Felony, [unless upon an Impeachment of the House of Commons.]

2. Trial by the Country (*Per Patriam*) is a Trial by a Jury of twelve Men, called the *Petty Jury*. Now to know the Law concerning *Petty Juries*, it may be proper to inquire, in what County the *Issue* ought to be tried; and then what is the Process against the *Petty Jury*; of *Challenges* to the *Petty Jury*; of the *Evidence* given to them, and of their *Verdict*. Almost such a Method was proposed in the former Chapter, concerning the Way of Trial by a Jury in *Civil Cases*.

^d 2 Rep. 93.

⁶ Rep. 47.

³ Inst. 80,

135.

1. The *Issue* in Criminal Cases, regularly ought to be tried in the ^d County, where the Offence was committed. But several Statutes have introduced an Alteration in the Law, in some Capital Cases. [See 26 H. 8. ch. 13. 35 H. 8. ch. 2. 5 & 6 Ed. 6. ch. 11. For Treasons committed out of the Realm, See of the Court by Commission according to the Statute of 28 H. 8. ch. 15, in chap. 1. ante. For Treasons and other Capital Offences committed at Sea. See also 1 Ann. St. 2. ch. 9. For Trial of Captains and Mariners destroying Ships. 11 & 12 W. 3. ch. 7. 4 G. 1. ch. 11. and 18 G. 2. ch. 30. For Trial of Pirates, Felons and Robbers. 2 & 3 An. ch. 20. For Trial of Officers and Soldiers, that either upon Land out of Great Britain, or at Sea, hold Correspondence with a

^a Ubi quis delinquit, ibi punietur. 6 Rep. 47. 3 Inst. 34, 80.

Rebel or Enemy, &c. 11 & 12 W. 3. *ch.* 12. For Trial of Governors of the Plantations for Crimes committed by them in the Plantations. And see *ch.* 1. *ante*, and the *Statutes infra*. Offences against the Statute 9 Geo. 1. *ch.* 22. called the *Black Act*, may be tried in any County.]

An Indictment being found in the proper County, it may^a by special Commission of Oyer and Terminer be heard and determined in any other County, but the Trial must be by Jurors of the proper County. And this is warranted by the Course of the Common Law; and if one is indicted of *Treason*, he may plead a foreign Plea, and it shall be tried in the foreign County. But in Petit Treason, Murder, or Felony, the *foreign Plea* shall be tried in the County where the Indictment was taken, unless this is altered by special Commission. [See 22 H. 8. *ch.* 14. §. 5.]

By 1 & 2 Ph. & M. *ch.* 10. All Trials hereafter to be had for any Treasons, shall be according to the Course of the Common Law.

By this Statute all Trials of High Treason, Petit Treason, or Misprision of Treason, contrary to the Course of the Common Law (as 33 H. 8. *ch.* 23, &c.) are abrogated. [But^b Misprision of Treason seems not to be within 1 & 2 Ph. & M.] Therefore an Alien, that liveth under the Protection of the King, there being Amity betwixt the two Kings, shall be tried for High Treason according to the Common Law, and not *Per Medietatem Linguae*, as he shall be in Petit Treason, [Qu. for it is held^c that 1 & 2 Ph. & M. extends^c to Petit Treason] Murder and Felony, if he desires it.

By 26 H. 8. *ch.* 6. Felonies committed in Wales shall be inquired of, heard and determined in the English County next adjoining. [See 34 & 35 H. 8. *ch.* 26.]

By 2 & 3 Ed. 6. *ch.* 24. Where any one is feloniously stricken or poisoned in one County, and dieth of such Stroke or Poisoning in another County, an Indictment thereof found by Jurors of the County where he dies, shall be good in Law. And the Justices of Gaol-Delivery, and Oyer and Terminer, in the County where such Indictment is taken, as also the Justices of the King's Bench, when such Indictment is removed before them, may proceed thereon, as if such Stroke, or Poison, and Death had happened in one and the same County.

Also an Appeal may be commenced, taken and sued in the County where the Party so stricken or poisoned shall die, as well against the Principal as Accessory, in whatsoever County such Accessory be guilty thereof.

Where any Murder or Felony is committed in one County, and any other Person is Accessory to it in another County, an Indictment found against such Accessory in the County where such Person is Accessory, shall be good in Law, as if the principal Offence had been committed in the same County, &c. [See 3 Inst. 135, 136. 9 Rep. 117, 118. and also B. 3. *ch.* 2. *ante*. Of Principal and Accessory.]

By 1 Ja. 1. *ch.* 11. (against Polygamy) The Parties offending shall receive such Trial and Execution, in the County where such Person or Persons shall be apprehended, as if the Offence had been committed in such county.

[See 2 Geo. 2. *ch.* 21. For Trial of Murders, where either the Stroke, or Death, only happens in England, in p. 361. *ante*.]

By the Common Law, if one guilty of Larceny in one County carries the Goods stolen into another, he may be indicted and tried in either County. [See 3 W. & M. *ch.* 9. Of Persons convicted

for stealing Goods in any other County.] If a Fact done in one County proves a * Nufance to another, it may be indicted and tried in either.

See 6 G. 1. *ch.* 23. and 16 G. 2. *ch.* 15. For Trial of Offenders, that have been transported, and do return before the Expiration of the Term for which they were transported. 8 Geo. 1. *ch.* 18. for Trial of Smuglers of the Customs.

2. As to the *Procefs* against the Petty Jury, I have spoken of it before *. At the Quarter-Sessions a *Precept* goes to the Sheriff, to summon a Sessions, and for Return of Juries, &c. and therefore no particular *Precept* is requisite, to summon a Petty Jury.

* See Ch. 4. ante. S. P. C. 154. b. ^a 2 Inst. 568. ^b The Justices of Gaol-Delivery may have their Panel returned by the Sheriff, without any *Precept*, by bare Award. But Justices of Oyer and Terminer cannot. Neither Justices of Oyer and Terminer, nor Justices of the Peace, can make their *Venire Facias* to try an Issue, returnable the same Sessions; [*Qu.*] but Justices of Gaol-Delivery may. [But see 4 & 5 W. & M. *ch.* 24. and 7 & 8 W. 3. *ch.* 32.]

* Hawk. P. C. B. 2. p. 182. The *Venue* must come from such a Place, as that all, who live in or near it, may reasonably be presumed to have some Knowledge of the Persons living in it; as of the Reputation of the Prisoner and Witnesses. It may come, not only from a Town, but from a Parish, Hamlet, or other Place, known, out of a Town.

* S. P. C. 155. ^a If a full Jury does not appear, or if they are challenged in an Indictment or Appeal, there may be a *Tales*. [But *Qu.* * as to the Power of Justices of Oyer and Terminer, or of Gaol-Delivery, to grant a *Tales*.] [See of the *Jury*, *ch.* 4. ante.]

* Kely. 16. The Sheriff usually returns fifty or sixty Jurors, because of the Challenges that may be made to them. [See *West.* 3. *ch.* 38. For Civil Causes; 7 & 8 W. 3. *ch.* 32. For *Yorkshire*; and of the *Jury*, *ch.* 4. ante.]

By 3 H. 8. *ch.* 12. The Justices of Gaol-Delivery, or Justices of the Peace (1 Quorum) in their open Sessions, may reform the Panel returned by the Sheriff to inquire for the King at Discretion; and the Sheriff shall return the Panel so reform'd. [See 33 H. 6. *ch.* 2. For *Lancashire*.]

By 7 & 8 W. 3. *ch.* 3. All Persons indicted of High Treason, or for Misprision of Treason (except for counterfeiting the Coin, Great Seal, Privy Seal, Sign Manual, or Privy Signet) shall have a Copy of the Panel of the Jurors, who are to try them, two Days at least before their Trial. [See 7 An. *ch.* 21. *infra*.]

* See Ch. 4. ante. ^a 1 Inst. 156. ^{a. & b.} 3 Roll. Abr. 645, 646. 3. Of Challenges * to the Petty Jury. ^b In Case of Life and Death the King may challenge the *Array* for Favour, but the Prisoner cannot. And as to the *Polls*, the Challenge may be either *peremptory*, or for any *just Cause*.

A *peremptory* Challenge, or without Cause, is not allowable, but only in Case of Life and Death; and then it is restrained to a certain Number, as will presently appear.

* S. P. C. 157. ^a 1 Inst. 157. b. By 33 Ed. 1. St. 4. The King shall not challenge without assigning Cause.

* 1 Ventr. 309, 310. This the King might have done at Common Law. * He need not shew the Cause of Challenge presently, or before the Clerk has gone

gone thro' the Panel (as a common Person must do) but it is Time enough after the Perusal of the Panel; and if there are enough besides, no Cause shall be shewn of the Challenge.

This Statute being general extends both to Criminal and Civil Causes.

A Prisoner at the Common Law upon an Indictment of Treason or Felony, or Appeal of Death might have peremptorily challenged thirty-five, which was under the Number of three Juries. But,

By 22 H. 8. ch. 14. No Person arraigned for Petit Treason, Murder, or Felony, shall challenge peremptorily above the Number of twenty.

If he doth, the Challenge shall be over-ruled, and the Party shall be put upon his Trial; [2y.] [See 25 H. 8. ch. 3.] But subsequent Statutes exclude from Clergy, those that peremptorily challenge above twenty.

By 3 W. & M. ch. 9. Offenders that challenge peremptorily above twenty, shall lose the Benefit of the Clergy, if, by Virtue of any former Statute, they were excluded Clergy, upon Conviction by Confession or Verdict. [See 1 An. ch. 9.] So that in this Case the Offender shall be hanged. But if the Offence is within the Benefit of the Clergy, the Challenge shall be over-ruled.

In Cases of High Treason and Petit Treason, the peremptory Challenge of thirty-five is restored by 1 & 2 Ph. & M. ch. 10.

Here if the Prisoner challengeth thirty-six peremptorily, the usual Judgment shall be pronounced against him, as if he had been found Guilty by Verdict. Tho' formerly it was held that in Petit Treason he should be pressed to Death, because he refused Trial, as if he had stood mute.

A Challenge for just Cause is not at all restrained to any Number. This may be in Respect of Honour, [See Magna Charta, ch. 29.] Defect of Birth, as Aliens born, or of Estate. [See 2 H. 5. ch. 3. 23 H. 8. ch. 13. 4 & 5 W. & M. ch. 24. which do not extend to Aliens, (2y. as to the English half of the Jury) see also 3 G. 2. ch. 25.] Or for Affection or Malice, or for Crime. [See of Challenges of a Juror, ch. 4. ante.]

There must be no Challenge on Trial by Peers.

[See 3 H. 7. ch. 14. Concerning the Compassing and Imagining to kill the King or any of the Privy Council, by any Servant of the King's Household, where there is no Challenge to be allow'd but for Malice.]

He that will have Advantage of Trial per Medietatem Linguae, must pray for it; for he cannot have Benefit of it by way of Challenge. (2y.) There is no Medietas Linguae to be allowed in High Treason, as there may be in Petit Treason, Murder, and Felony. [2y. the Reason, that Petit Treason is not held to be included under the Word [Treason] in 1 & 2 Ph. & M. ch. 10. as to this Matter, as well as to the Matter of Challenges and Evidence.] [See 1 & 2 Ph. & M. ch. 10.] Egyptians are excluded from it by 1 & 2 Ph. & M. ch. 4. [See 27 Ed. 3. St. 2. ch. 8. 28 Ed. 3. ch. 13. 8 H. 6. ch. 29.]

4. Of the Evidence to the Petty Jury. It must be always given in the Presence of the Prisoner in Treason or Felony. [See of Evidence in Civil Causes, ch. 4. ante.]

Every

Every one shall be admitted to give Evidence for the King, but always upon Oath. And regularly ^a one Witness is sufficient, where the Trial is by a Jury; it is much disputed, whether the Common Law required a certain Number of Witnesses in any Case, even in High Treason. [But see the *Statutes, infra.*]

Upon an Indictment for Battery, &c. the *Party grieved* may be a *Witness* against the Defendant because the Prosecution is at the Suit of the King. ^b A *Wife* cannot be a *Witness* against her Husband, or a Husband against his Wife, except in High Treason, [and in some other Cases] as hath been said. But an *Infant* ^c of nine Years of Age hath been allowed to be examined in some Cases. ^d A *Commissioner* in a Commission of Gaol-Delivery, &c. for the Trial of a Prisoner, may come from the Bench, and be a *Witness*, and give Evidence for or against a Prisoner. A *Juror* also may be a *Witness*. One of the *Defendants* in an Information, if no Evidence is given against him, may be a *Witness* for the other. *Confederates* in the same Treason or Felony, may be *Witnesses* against their *Companions*. But a Promise of Pardon to a Confederate on Condition to give Evidence against the rest, may take off the Force of his Evidence, if it does not wholly disable him. Traitors or Felons pardoned, even after a Conviction or Attainder, may be good *Witnesses*. A Pardon of Burning in the Hand on a Conviction of Manslaughter, as well as the Burning, restores the Party to his Credit.

A *Witness* by *Hearsay* of a Stranger will not be allowed; unless perhaps to confirm the Evidence of a *Witness* that spoke of his own Knowledge, &c. [See of *Witnesses* under *Evidence, ch. 4. ante.*]

^e A *Witness* against the King in Treason or Felony ought not to be examined upon Oath by the Common Law. [But see 31 *El. ch. 4. p. 517.* and 7 & 8 *W. 3. ch. 3. 1 An. ch. 9.*] By the two last Statutes *Witnesses* for a Prisoner are to be sworn, in like Manner as *Witnesses* for the King are obliged to be; and Process for their Appearance may be taken out in Treason and Felony. The Evidence for the Defendant in an Appeal, Indictment, or Information for a Misdemeanor must also be upon Oath.

^f Tho' the Indictment in Cases Capital or not Capital, is laid to be on *one Day*, and the Evidence is of *another Day*, either before or after, the Jury may find generally, that the Prisoner is Guilty. Yet if it is alledged, before the Offence done, the Jury ought to find the Day, when it was done; because the Forfeiture shall relate to the Day found in the Verdict. If the Indictment sets forth the Treason or Felony to be committed at *one Place*, and the Evidence is of *another Place* in the same County, it maintains the Indictment. For the Place, being laid only for the Venue, is not material upon the Evidence. Otherwise, where a certain Place is made Part of the Description of the Offence. [See 2 & 3 *Ed. 6. ch. 24. 9 Geo. 1. ch. 22.*] If the Indictment and Evidence differ in the *Kind* of Murder or Homicide, it cannot maintain the Indictment; as where an Indictment is of Poisoning, and the Evidence is of Stab-

^a In criminalibus probationes debent esse luce clariores.

^b Jurato Creditur in Judicio. 3 Inst. 97.

bing, Drowning, &c. But if the Indictment and Evidence differ only in the *Sort of Poison*, they agree well enough; for the Substance of the Indictment was the Poisoning. So if the Indictment and Evidence differ as to the *Kind of Weapon*, with which one was kill'd, they agree in Substance, and in the Kind of Homicide, and in the Cause, *viz.* by a Weapon. If the Indictment is, that *A* gave the mortal Blow, and that *B.* was present and abetting; and the Evidence varies as to the *Person*, (*viz.*) that *B.* gave the Blow, and that *A.* was present and abetting; yet this Evidence maintains the Indictment.

* Evidence in Treason may be of Overt-Acts in other Counties, ¹⁵ Kely. 15, than those laid in the Indictment; provided the Overt-Act in the County laid in the Indictment is fully proved. [But see 7 & 8 W. 3. ch. 3. §. 8. *infra*, which has made an Alteration in this Respect.] But for scandalous Words against a Peer, or other Matter transitory upon an Indictment, if upon Evidence it appears, that the Words were spoken in any other County, the Evidence does not maintain the Indictment, &c. ³³ H.P.C. 203.

* While the Evidence is giving, the Prisoner may have Counsel; ³ Inst. 29, assign'd him, for every Matter of Law arising on the Fact, or general Issue, in Cases of Treason or Felony. But otherwise he shall have no Counsel in Treason [but see *infra*] or Felony, whether he is a Peer or Commoner; because the Evidence must be so plain, that it cannot be denied, and because the Court ought to be of Counsel for the Prisoner, and to allow him all Things, that make for his Advantage. And it is lawful for any one in Court, especially one learned in the Law, (as *Amicus Curia*) to inform the Court, lest they should err. In an Appeal, whether Capital or not, and Offences under Felony, a Defendant is allow'd the same Benefit of Counsel as on any Action. ^{137, 230.} Dr. & Stud. Dial. 2. c. 48. Hawk. P.C. B. 2. p. 401.

* The Evidence of Witnesses to the Jury is no Part of the Trial, for the Trial is by the Verdict, as before is said. ⁴ Inst. 6. b. ³ Inst. 26, 27.

By 5 & 6 Ed. 6. ch. 11. *No Person shall be indicted, arraigned, convicted, or attainted, for any Treason that now is, or hereafter shall be made so by any Statute, unless the Offender be accused by two lawful Accusers, who, at the Time of the Arraignment of the Party, shall be brought in Person before the Party accused; unless he willingly without Violence does confess the Offence.* [See 1 Ed. 6. ch. 12.]

This Act extends to Petty Treason as well as High Treason. For the Words are any Treason.

* By lawful Accusers we must understand lawful Witnesses. *Without Violence, (i. e.) without Torture. Confess the same, (viz.)* upon his Examination, not before the Judge. [See 7 & 8 W. 3. ch. 3. *post.*] ³ Inst. 25, 26. H.P.C. 208.

I said before, that by 1 & 2 Ph. & M. ch. 10. *All Trials to be had, awarded, or made, for any Treason, shall be had according to the Course of the Common Law.*

Now this Act does not take away the Necessity of two Witnesses upon the Indictment, required by 5 & 6 Ed. 6. It mentions only Trials. Neither doth this Statute extend to Misprision of Treason. Therefore there must be two lawful Witnesses as well upon the Trial as the Indictment. [See 7 & 8 W. 3. ch. 3. *infra.*] ^{18, 19, 20.} S. P. C. 90. ^{164.} ³ Inst. 24. ^{25, 26, 27.} Contr. Kely. 18, 49, 9.

Petit Treason is within this Statute, as well as within the 5 & 6 Ed. 6. but is not within 7 & 8 W. 3. ch. 3. Therefore there two Witnesses must be upon the Indictment, though not upon the Trial.

By 1 & 2 Ph. & M. ch. 11. *In High Treason for Counterfeiting and Impairing the Coin current within this Realm, the Offender shall be indicted, arraigned, tried, convicted, and attainted by such like Evidence, and in such Manner and Form, as before the first Year of Ed. 6.*

This Act, in Case of High Treason concerning the Coin, hath restored the Evidence required by the Common Law, as well upon the Indictment as Trial.

By 21 Ja. 1. ch. 27. *A Mother of a Bastard Child, concealing its Death, must prove by one Witness, that the Child was born dead, otherwise Felony without Clergy.*

• Kely. 32, 33.

• Concealment is taken *Prima Facie* to be an undeniable Evidence, that the Mother murdered the Bastard-Child. But if she called for Help, and could get none; or if she confessed herself with Child before-hand, &c. and was surprized, and delivered when no one was present, she is not within the Act.

By 7 & 8 W. 3. ch. 3. *Every Person indicted, arraigned, or tried for High Treason, whereby any Corruption of Blood may be made, or for Misprision of such Treason, shall be admitted to make his full Defence by Counsel, not exceeding two, who shall have free Access to him at all seasonable Hours; and to make any Proof by lawful Witnesses upon Oath, who shall be compelled by Process to appear for him in like Manner as Witnesses are compellable to appear against him.*

No Person shall be indicted, tried, or attainted of such High Treason, or Misprision of such Treason, but by and upon the Oaths and Testimony of two lawful Witnesses, either both to the same Overt-Act, or one of them to one, and the other to another Overt-Act of the same Treason; unless the Party indicted, and arraigned or tried, willingly, without Violence in open Court does confess the same, or stands mute, or refuses to plead, or in Cases of High Treason challenges peremptorily above thirty-five of the Jury.

Where two or more distinct Treasons of divers Kinds shall be alleged in one Bill of Indictment, one Witness produced to prove one, and another Witness to prove another of the said Treasons, shall not be deem'd two Witnesses to the same Treason within the Meaning of the Act.

No Evidence shall be admitted of any Overt-Act, that is not expressly laid in the Indictment.

This Act shall not extend to any Impeachment, or other Proceedings in Parliament, nor to any Indictment of High Treason for Counterfeiting the Coin, the Great Seal, Privy Seal, Sign Manual, or Privy Signet.

By 1 An. ch. 9. *Witnesses for Prisoners, upon Trials for Treason or Felony, shall be sworn as Witnesses for the King are obliged to be, and shall be subject to the Pains and Penalties for Wilful Perjury.*

If the Witnesses must be sworn, Process surely may be taken out against them of Course.

So that it appears by these two last Statutes, that Counsel is only to be allow'd in Cases of High Treason, whereby any Corruption of Blood may be made, or for Misprision of such Treason; that

Witnesses

Witnesses for the Prisoner shall be sworn in all Cases of Treason or Felony; and that there must be two Witnesses in High Treason, wherein there is Corruption of Blood, or for Misprision of such Treason, to prove the Overt-Acts laid in the Indictment, or at least one to one Overt-Act, and one to the other, therein specified. [See of Witnesses under Evidence, ch. 4. ante, and 7 & 8 W. 3. ch. 3. As to the Prisoner's having a Copy of the Indictment in High Treason, &c. under Title Indictments, ante; and 7 Ann. ch. 21. Concerning a Copy of the Indictment for Treason, a List of the Names of the Witnesses and Jurors to be delivered to the Party indicted for High Treason, ten Days before the Trial, after the Decease of the Pretender, &c.]

By 20 Geo. 2. ch. 30. *Persons impeach'd by the Commons of High Treason, whereby any Corruption of Blood may be made, or for Misprision of such Treason, may make their full Defence by Counsel, not exceeding two, to be assigned them at their Request.*

The *Confession* of the Defendant to private Persons, or to a Magistrate, out of Court, is allow'd to be given in Evidence against the Party confessing; but this Confession cannot be made use of against any other. But where a Man's Confession is made use of against him, it ought to be taken all together, and with that Part which makes for him, as well as with that which makes against him. But 7 & 8 W. 3. ch. 3. requires two Witnesses to the Overt-Act in High Treason or Misprision of Treason, unless the Party shall willingly without Violence, *confess in open Court, &c.*

By 1 & 2 Ph. & M. ch. 13. and 2 & 3 Ph. & M. ch. 10. *One accused of Manslaughter or Felony, let to Bail, or sent to Gaol for want of Bail, must be examined, before Bailment or the sending to Gaol, and the Accusers must be bound over to give Evidence against him; and Justices must take the Examination of the Prisoner in Writing, with the Information of the Accusers, and certify them at the next Gaol-Delivery. The Coroner also, upon any Inquisition found before him, whereby any Person shall be indicted for Murder or Manslaughter, or as Accessory thereto before the Fact, shall put in Writing the Effect of the Evidence given to the Jury before him, and bind the Witnesses to appear at the next General Gaol-Delivery, and certify the Evidence and Recognizance, &c.*

The said Justices and Coroner have Power, to bind by Recognizance or Obligation, all such as can declare any Thing against the Prisoner, to appear at the next Gaol-Delivery, and there shall make Certificate of the said Recognizance or Obligation.

The 1 & 2 Ph. & M. extends only to those that are let to Bail, but the 2 & 3 Ph. & M. extends to those that are committed to Prison for Manslaughter or Felony. By these Statutes the *Informations* of the Accusers in Manslaughter or Felony, being put in Writing and certified, may be given in Evidence, as well as the *Confession* of the Prisoner. [Tho' this is not expressly mentioned in either of those Acts, yet it hath been held, that they may be read in the Cases hereafter mentioned; but *2y.* If the Defendant must not be present at the Time they are taken in order to make them good Evidence.] But the Information of a Witness in other Cases cannot be admitted, though the Witness is dead. The Examination of the Offender must not be upon Oath; but must be subscribed by him, if he confesses the Fact, and then given in Evidence upon Oath.

H. P. C.

193, 264.

Kely. 18, 19;

Mod. 167.

1 Ld. Ray.

729.

1 Salk. 281.

S. C.

Mod. 165.

H. P. C.

262, 263.

Kely. 55.

Hawk. P. C.

B. 2. P. 429.

Oath 430.

Oath by the Justices at the Trial. But the Examination of others must be upon Oath. And a Justice or his Clerk, or a Coroner upon an Inquisition of Death taken before him, may be sworn to the Truth of the Examination of those upon Oath, upon the Trial of such Inquisition, or of an Indictment for the same Felony, (but not upon an Appeal) if it is proved that they are dead, or unable to travel, or kept away by the Prisoner.

If it is a small Felony, the Examination must be certified by the Justices to the Quarter-Sessions; otherwise to the next Gaol-Delivery.

By 3 & 4 W. & M. ch. 9. A Transcript certified by the Clerk of the Crown, of the Assizes, or of the Peace, of the Tenor of the Indictment and Conviction, and of a Person's having had the Benefit of the Clergy, shall be a sufficient Proof, that such Person hath had the Benefit of the Clergy.

By 10 & 11 W. 3. ch. 23. No Clerk of Assize, Clerk of the Peace, or other Person, shall take any Fee of Persons bound by any Justice of Peace, to appear as Evidence against any Traitor or Felon, for Discharge of their Recognizance.

By 6 Geo. 1. ch. 23. A Transcript certified by the Clerk of the Assize, or of the Peace, of the Tenor of an Indictment, Conviction and Order for Transportation, shall be a sufficient Proof upon an Indictment for returning before the Expiration of the Term, that the Person hath been convicted and ordered for Transportation.

^a Hawk. P. C. B. 2. p. 431.

^b 1 Ld. Lay. 40.

^c 1 Str. 500.

Similitude of Hands upon Comparison, is little or no Evidence of one's Hand-Writing in Criminal Cases, whether Capital or not Capital. [2y. if such Evidence is admissible, especially if not attended with some Circumstances of Confirmation, as, the Papers being found in the Custody of the Prisoner, or the like.]

[The Declarations of a dying Man against his Murderers may be given in Evidence.]

Violent Presumption is in some Cases taken for full Proof. [See of Presumption, under Evidence, ch. 4. ante.]

^a Hawk. P. C.

B. 2. ch. 47.

¹ Inst. 227. a.

& b. 281. b.

282. a.

² Inst. 425.

³ Inst. 28,

30, 110.

¹ Vent. 95.

Kely. 56, 57.

H. P. C. 267.

Raym. 84,

193.

^a Hawk. P. C.

B. 2. p. 425.

^a Kely. 50.

² Ld. Ray.

1581, &c.

^a Kely. 50.

5. The Verdict in Cases Capital must be actually given, and if the Jury cannot agree upon their Verdict, they must be carried round the Circuit till they do all agree, if the Prisoner will not consent to their Discharge. If the Peers do not agree upon their Verdict, they may adjourn and go Home. [2y.] And the Verdict by the Peers is good, if only the greater Number (being Twelve) do agree. The Verdict must be given openly in Court, and not as a Privy Verdict; tho' a Privy Verdict may be given on Informations, as in Civil Cases, and in Criminal Causes where the Defendant is not to be personally present at the Time of the Verdict.

It may be found Specially; as in an Indictment of Murder, and Not guilty pleaded, the Jury may find one Guilty of Manslaughter *Se Defendendo*, or by Chance-medley, or that he was not of sound Mind and Memory at the Time of the Killing, &c. If they find *Se Defendendo*, or by Chance-medley, they must find the Manner of the Killing, that the Court may judge thereof; for the Court may judge the contrary. So in a special Verdict, or Verdict at large, for the Value or Manner of the Larceny, there is no Necessity of finding the Value of the Thing stolen as laid in the Indictment. The Jury cannot find a greater Value, but they may find a less.

Jurors have been amerced for undervaluing Goods forfeited.

The Course of laying a Fine upon Jurors^a barely for giving a^a Kely. 50.
Verdict contrary to Evidence, or contrary to the Directions of the^{Vaugh. 135.}
Court, is condemned as illegal, and disused. [See of *Verdict*, *ch. 4.*
ante.] T. Jones 50.

The Court cannot set aside a Verdict, which *acquits* a Defendant
of a Criminal Prosecution, as they may a Verdict that *convicts* him
contrary to Evidence.

X. One is *convicted*, when he confesses the Offence, or when Of Conviction
he is found guilty by the Verdict of the Jurors. This is before and Attainder.
Judgment is passed upon him. b. 1 Inst. 390. b.

He is *attainted* (*attinctus*) when Judgment is passed upon him; 391. a.
though these Words *Conviction* and *Attainder* are sometimes con- Perk. 27, 28.
founded. The Judgment may be passed on *Outlawry*, *Confession*, or
Verdict. Outlawry itself is a Judgment and an Attainder in Law.
[See of *Judgment* and of *Forfeiture*, *infra.*] * When one is at- c. 3 Inst. 213.
tainted by Judgment, for Offences that are to be punished by Death, 215.
he is dead in Law; yet his Body is subject to Arrests or Execution 1 Cro. 516.
for Debt, &c. for his Body is not forfeited to the King, till Exe-
cution. By Attainder of Treason or Felony, his Blood is *stained* 1 Inst. 8. a.
and *corrupted*, both upwards and downwards; so that he cannot 391. b. 392. a.
be Heir to any Ancestor, nor his Children Heirs to him, nor to any 3 Inst. 211;
of his Ancestors, [from whom they cannot claim but through him.] 233.
But the Sons of one attainted, born before the Attainder, may in- 1 Lev. 59;
herit one another; and though, as to those born after the Attainder, 60.
some have denied it, because the Father had no inheritable Blood 1 Vent. 413]
in him; [yet it seems to be the better Opinion that these also may
inherit to one another.] If he is of the Nobility, or a Gentleman, he
and all his Posterity are by this Attainder made ignoble and base.
This Corruption of Blood is so high, that it cannot be absolutely
restored but by Authority of Parliament. [See of *Restitution*, *postea.*]

Upon Conviction or Attainder of the Felon, the Owner ought to
have his Goods again that were stolen from him. For,

By 21 H. 8. ch. 11. *Restitution shall be made of stolen Goods, or
Money, to the Owner, after the Felon is found guilty thereof, or other-
wise attainted by Reason of the Evidence given by the Party robbed,
or Owner, or by any other by their Procurement. The Justices, before
whom the Felons are found guilty, may award Writs of Restitution for
the said Goods, in like Manner as if the Party had been attainted on
Appeal.*

* Executors and Administrators are within this Statute; and they 2 Inst. 714;
shall have Restitution, notwithstanding a Sale in Market-Overt. 3 Inst. 243.
This Statute has altered the Common Law as to that Point. But the 5 Rep. 109,
Restitution must be only of the Goods expressed in the Indictment. 110.
If Goods are stolen and not waived in Flight, or seized for the King, 6 Rep. 80.
the Party may take his Goods again without Prosecution. Kely. 48, 49;
[*Quare*, Hawk. P.C.
* Whether the Prosecutor is entitled to Restitution, if the Prisoner B. 2. p. 331;
stands mute?] 332.

XI. The *Judgment* [See what is a *Judgment*, *chap. 4. supra.*] Of Judgment
in Criminal Cases, is either by the *Common Law*, or by *Statutes*. It in Criminal
is also in Treason or Felony either *express* or *implied*. *Express*, 3 Inst. 52;
when upon Appearance, &c. an express Judgment is given; as that 210.
the Criminal shall be hanged by the Neck, &c. *Implied*, when the Hawk. P.C.
Offender B. 2. ch. 48.

Offender makes Default, and is *outlawed*; where the like Execution shall be, as in Case of exprefs Judgment. [See *Postea*.]

The Judgment in High Treason.

^a 3 Inst. 15, 17, 18, 210, 211. One and ^a the same Judgment is given in all High Treasons, except for *Counterfeiting the Coin*, and except in the Case of a *Woman*. [See *infra*.]

^b 3 Inst. 31, 52. The Offender shall be drawn upon a Hurdle, (formerly with a Rope about his Neck) to the Gallows, and there hanged by the Neck, and cut down alive, his Entrails taken out and burned, his Head cut off, his Body quartered, and his Head and Quarters disposed of at the King's Pleasure. But ^b *beheading* being Part of the Judgment, the King may pardon all the *rest* under the Great Seal; as is usually done in Case of Nobility.

^c 3 Inst. 17, 211. The Judgment for ^c *counterfeiting the Coin* is by Common Law, and is only to be drawn upon a Hurdle, and to be *hanged*. But whereas *Clipping* is made High Treason by subsequent Statutes, the Judgment is, To be hanged, drawn, and quartered, as some contend, (*2y.*) For the Practice is otherwise. [And it seems to be now settled, that the Judgment shall be the same as for counterfeiting the Coin at Common Law, upon a *reasonable* Construction of the Statutes.] The Judgment for a *Woman* in all Cases of High Treason is to be drawn on a Hurdle, and *burnt*. She ought not to be beheaded or hanged. [See of *Forfeiture*, *post*. There are several Precedents of changing this Judgment to Beheading by the King's Warrant.]

The Judgment in Misprison of Treason.

^a 3 Inst. 218. The Offender is to be condemned to *Perpetual Imprisonment*^d, [See H. P. C. 269. 1 & 2 Pb. & M. ch. 10. and see of *Forfeiture*, *infra*.]

The Judgment in Petty Treason.

For standing *mute* [See of the *Behaviour of the Prisoner* upon his *Arraignment*, *supra*.] But if it appears that the Party is *guilty*, Judgment is to be given thus, (*viz.*)

^a 3 Inst. 211. The ^a *Man* is to be drawn on a Hurdle, and *hanged*, till he is dead.

^b Pult. de Pace, &c. 213. A *Woman* is to be drawn on a Hurdle and *burnt*. ^b But if a Wife is accessory only to the Death of her Husband, both the Principal and Accessory shall be hanged. [See of *Forfeiture*, *infra*.]

The Judgment in Felony of Death, as Murder, Burglary, &c. and *Larceny* above *Twelve-pence*.

For standing *mute* [See of the *Behaviour of the Prisoner*, *supra*.] If *guilty*, ^a one Judgment in all Cases, (*viz.*)

^b 3 Inst. 53, 211. A *Man* or *Woman* is to be *hanged* till Dead. ^b This cannot be altered by the King to a Beheading, though some Examples are to the contrary. [It seems not to be clear, that it may not be done on the *Petition* of the Delinquent *himself*, in which Case it may be considered as an Instance of Royal Mercy shewn to the Criminal in

in the *Mitigation* of his Punishment, or at least of the Infamy of it.] But if the Party may have the Benefit of the Clergy for the Felony, he shall be sent (if the Judges think fit) to the House of Correction, at least for *six Months*, and not above *two Years* from the Conviction. Upon Escape, for not less than twelve Months, nor more than *four Years* from the Re-taking. [See 5 *An. ch. 6.*] But,

By 31 *Car. 2. ch. 2.* If any one convicted of Felony, shall in open Court pray to be transported, it may be done, if the Court thinks fit. And,

By 4 *Geo. 1. ch. 11.* Persons convicted of Larceny, or stealing from the Person or House of another, or in any other Manner, who by Law are intitled to the Benefit of the Clergy (except Persons convicted for receiving or buying stolen Goods, knowing them to be stolen) the Court instead of Burning in the Hand, or Whipping, may order such Offenders to be transported to any of the King's Plantations in America for seven Years; and where for other Felony not within the Benefit of the Clergy, the King shall think fit to extend Mercy on Condition of Transportation, or to any Person convicted of receiving or buying stolen Goods knowing them to be stolen, the proper Court may allow such Offenders the Benefit of a Pardon, and order them to be transported for the Term of fourteen Years, if such Condition of Transportation is general, or for such other particular Time, as is specified in such Condition.

If such Offenders shall return within the Time, they shall be executed, as Persons attainted of Felony without Benefit of Clergy.

Nevertheless, the King may dispense with such Transportation, and allow of the Return of such Offender, &c.

[See 6 *Geo. 1. ch. 23.* For the more effectual Transportation of Felons, &c.]

Note, That if an Act of Parliament directs in any Case, that there shall be Judgment of Life and Member, &c. Judgment shall be given as in Case of Felony, (*viz.*) to be hanged by the Neck till he is dead; and consequently his Blood corrupted, and he shall forfeit as in Case of Felony. [See *Of Forfeiture in Felony, post.*]

By 25 *Geo. 2. ch. 37.* Persons found guilty of wilful Murder shall be executed the Day next but one after Sentence passed, unless the same be a Sunday, and then on the Monday following. In London or Middlesex the Body of the Murderer shall be delivered to the Surgeons Company, and be dissected and anatomized; in other Counties to such Surgeon as the Judge shall direct, for the Purpose aforesaid. Sentence shall be pronounced in open Court immediately after Conviction of the Murderer, unless the Court shall see reasonable Cause to postpone the same; in which Sentence shall be expressed not only the usual Judgment of Death, but the Time appointed for the Execution, and the Marks of Infamy before directed. After Sentence, if there shall appear reasonable Cause, the Judge may stay Execution at his Discretion. The Judge may appoint the Body of such Criminal to be hung in Chains; but in no Case to be buried, unless after dissected and anatomized as aforesaid. After Judgment such Criminal is to be kept apart from other Prisoners, and no Person, except the Gaoler and his Servants, to have Access to him, without Licence under the Hand of the Judge or of the Sheriff or Under-Sheriff. The Judge, if he respites Execution, may relax any of the above or after mentioned Restraints. After Sentence, the Criminal to be fed on Bread and Water only, (except in Case of receiving the

the Sacrament, or of any violent Sickness) in which Case some known Physician, Surgeon, or Apothecary may be admitted.

In Manslaughter, the Offender is to be burnt in the Hand. [See Of Forfeiture, *infra*.]

The Judgment upon Outlawry in Treason or Felony.

There is no Judgment pronounced, because the Outlawry itself is a Judgment. But Execution shall be awarded, as^a in Treason or Felony upon Confession or Verdict, according to the Crime for which he is outlawed. [See 1 Ed. 6. *ch.* 12. 4 & 5 Pb. & M. *ch.* 4. 8 El. *ch.* 4. 18 El. *ch.* 7. 22 Car. 2. *ch.* 5. 3 W. & M. *ch.* 9. ^b where one outlawed loseth the Benefit of the Clergy; and Of Forfeiture, *post*.]

^a See p. 401, ante.

He that is indicted of a Trespass and outlawed, shall be fined.

The Judgment in Petit Larceny.

A Man or Woman was to be^c whipt, and sent to the House of Correction. [See 5 An. *ch.* 6.] But now they may be transported. [See 4 Geo. 1. *ch.* 11. 6 Geo. 1. *ch.* 23. *supra*; and of Forfeiture, *post*.]

^c 2 Inst. 177. 3 Inst. 218.

If one stands Mute on an Arraignment for Petit Larceny, he shall have the same Judgment, &c. as if he had confessed the Indictment.

The Judgment in Chancemedley, or Se Defendendo.

There is no^d express Judgment. But the Offender is let to Mainprize, to sue out his Pardon of Course. [See the Statute of Marlebridge, or 52 H. 3. *ch.* 26. and the Statute of Gloucester, or 6 Ed. 1. *ch.* 9.] The Lord Chancellor may do it without Warrant from the King. [See of Forfeiture, *post*.]

^d 2 Inst. 148, 149, 315, 316, 317. 3 Inst. 220. 11 Rep. 32.

The Judgment in Misprision of Felony.

To be^e fined and imprisoned. [See of Forfeiture, *infra*.]

^e 3 Inst. 36.

The Judgment in Appeal of Death.

To be^f hang'd.

^f 2 Inst. 183. 3 Inst. 212.

The Judgment for striking in Westminster-Hall, &c. fitting the Courts, though no Blood is drawn.

The^g Right Hand is to be cut off, and the Offender is to be imprisoned during Life.

^g 2 Inst. 549. 3 Inst. 140. 141, 142, 218.

The Judgment for striking and drawing Blood in the King's Palace, where the King is resident.

The^h Right Hand is to be cut off, and the Offender is to be fined at Discretion, and to be imprisoned during Life. [See 33 H. 8. *ch.* 12.]

^h 3 Inst. 140, 218.

ch. 12. And of Forfeiture, post.] If no Blood is drawn, he shall not lose his Right Hand.

The Judgment in *Præmunire*.

To be out of the King's Protection, and to be imprisoned during Pleasure.

[See 16 R. 2. ch. 5.] But if the Offender is not in Prison, the Judgment also is *Quod Capiatur*. Here is no Corruption of Blood. [See 5 El. ch. 1. And of Forfeiture, post.]

The Judgment in *Conspiracy*.

The villainous Judgment at the Common Law, at the Suit of the King, is out of Use. [See of Conspiracy, p. 434. ante. See also Artic. super Chartas, or 28 Ed. 1. ch. 10.]

The Judgment in *Attaint*.

The Judgment in *Attaint* against the Petty Jury is as in the Case of *Conspiracy* at the Suit of the King. In those two Cases only that villainous Judgment was given. But now see the 23 H. 8. ch. 3. whereby the Severity of the Punishment at Common Law is moderated, if the Writ of *Attaint* is grounded upon that

The Judgment in *Misdemeanors*.

The Judgment and Punishment for *Misdemeanors* may be a Fine, Fine and Pillory, Fine and Whipping, Papers to be fixed on the Head or Breast, or to be read in publick Places, by Way of Acknowledgment of the Offence, &c. A Fine here is a Sum of Money which one is to pay to the King for any Contempt or Offence against the Government. Where a Delinquent is to be fined, the Judgment is *Quod Capiatur*, (i. e.) to be imprisoned till the Fine is paid. But if the Fine is tendered, there ought to be no Imprisonment. [See 5 & 6 W. & M. ch. 12.] When a Defendant is to be amerced, and not fined, then the Defendant is in *Misericordia*. A Fine may be mitigated in the same Term in which it was set, but after the Term it cannot be altered. [22.] Some lay that a Fine and Ransom are the same. Others lay, that Ransom (*Redemptio*) implies that an Offender ought first to be imprisoned, and then to be delivered in Consideration of a Fine.

Where a Statute enacts, That an Offender shall be fined at the King's Pleasure, it is to be understood, that the King's Judges, before whom the Party is convicted, shall set the Fine.

It is a common Practice in the King's Bench, to give a Defendant Leave, to speak with the Prosecutor (i. e.) to make Satisfaction for the Costs of the Prosecution, and also for the Damages sustained by him, that there may be an End of all Suits, the Court at the same Time shewing on that Account, an Inclination to set a moderate Fine on the Behalf of the King.

Pillory

* 3 Inst. 219,
220.

Pillory is derived from *Pilastre* or *Pillar*. For it is a Wooden Pillar, wherein the Neck of the Offender is put and pressed, upon which Account it is called *Collistrigium*. By Statutes it is appointed for Bakers, Foretallers, for those that use false Weights, for Perjury, Forgery, &c.

* Lamb. Eir.
61.
Kellw. 138.

The Judgment of the Pillory, or Tumbrel^b (a Dung-Cart), doth make the Delinquent infamous. Therefore the Judges ought to consider, before they give such a Judgment. Fine and Imprisonment for Offences fineable, is a fair and sure Way; especially for Offenders of Quality, Note, or Figure.

There are particular Punishments appointed by divers Statutes for several Offences. In such Cases the Punishment cannot be mitigated. [See 4 Geo. 1. ch. 11. and 12 Geo. 2. ch. 21. Concerning Transportation of unlawful Exporters of Wool and Woolfels; 6 G. 1. ch. 21. §. 34. and 9 G. 2. ch. 35. Concerning the Transportation of those that forcibly hinder, wound, or beat any Officer of the Customs in the Execution of his Office, &c. in p. 360. ante. And 5 Geo. 1. ch. 28. Concerning the Transportation of Deer-stealers, in p. 454. ante. And 6 Geo. 1. ch. 23. For the more effectual Transportation of Offenders; and for Transportation of those that maliciously assault any Person in the Streets or Highways, with Intent to tear or spoil their Clothes, &c.]

Of Forfeiture:
* 1 Inst. 59. a.
391. a.
3 Inst. 227.
Hawk. P. C.
B. 2. ch. 49.

XII. * *Forfeiture* (*Forisfactura*, *Foris aut extra Legem facere*) is a Penalty for an Offence committed, extending to Freehold and Copyhold Lands, and to Goods and Chattels. It is more or less, according to the Nature of the Offence, and may be by Conviction or Attainder. A Traitor's or Felon's Goods and Chattels are forfeited upon Conviction, but Lands or Tenements upon Attainder, and not before.

Forfeiture in High Treason.

* 1 Inst. 37. a.
41. a.
391. a. & b.
3 Inst. 19,
211.
3 Rep. 10,
82.

It is implied in the Judgment of High Treason. 1. That the Delinquent shall forfeit to the King all his Lands, Tenements, and Hereditaments in Fee-simple or Fee-tail (or for Life, as to the Profits during the Offender's Life) holden or not holden of any other, Uses, Conditions, Entries, &c. (not Rights of Action where the Entry is taken away) which he had at the Time of the Treason committed, or afterwards, the Right of all others being saved. [See 26 H. 8. ch. 13. 33 H. 8. ch. 20. 5 & 6 Ed. 6. ch. 11. infra.] There is no Forfeiture of Lands, or Tenements, or Rights in *Auter Droit*, (as in Right of the Church; in Right of a Wife, but only during the Coverture; nor of a Foundership of a House of Religion in *Frank almoin*; for that is annexed to the Blood of the Founder.) And in Clipping, the Hereditaments are forfeited only for Life. [See 5 El. ch. 11. 18 El. ch. 1.] 2. That his Wife shall lose her Dower, not her Jointure. So it is in Petit Treason. [But see 5 El. ch. 11. 18 El. ch. 1. 8 & 9 W. 3. ch. 26. for Clipping, &c.] 3. That his Blood shall be corrupted, by becoming base as to his Birth, and that his Children shall not inherit to him or any of his Ancestors through him. [See of Conviction and Attainder, *supra*.] In Counterfeiting the Coin or Clipping there is no Corruption of Blood. [See again 5 El. ch. 11. 18 El.

18 El. ch. 1. 8 & 9 W. 3. ch. 26.] 4. That all his Goods and Chattels shall be forfeited from the Time of the Conviction. For as Goods and Chattels forfeited, there shall be no Relation to the Crime committed, as it is in Forfeiture of Lands. A Traitor or Felon after the Treason or Felony committed, and before Conviction, may sell his Goods *Bona Fide*, whether Chattels Real or Personal, for his Maintenance. I say, he may sell them *Bona Fide*. But if one, to prevent Forfeiture by Treason, Felony, or Outlawry, maketh a Gift of all his Goods, and afterwards is attainted or outlaw'd, these Goods are forfeited. [See 13 El. ch. 5.] An Executor cannot forfeit the Goods, which he hath as Executor.

If one commits Treason, and dies before Attainder, or is slain in actual Rebellion; he forfeits nothing, if not attainted by Act of Parliament. [See 34 Ed. 3. ch. 12.] But if the Chief Justice of the King's Bench, (who is Head Coroner of all England) in Person, upon View of the Body of him that was slain in open Rebellion, makes a Record thereof, and returneth it into the King's Bench, he shall forfeit his Lands and Goods. [29.]

Those that are hang'd by Martial Law, in Time of War, forfeit no Lands.

By 7 Ann. ch. 21. After the Decease of the Pretender, (and all his Sons by 17 G. 2. ch. 39,) no Attainder for Treason shall inherit the Heir, &c.

In Gavelkind, if the Father is hang'd for Treason or Felony, the Sons shall inherit. [See 17 Ed. 2. St. 1. ch. 16.]

Forfeiture in Misprision of Treason.

Forfeiture of Goods and Chattels, and Profits of Land during Life, for his Concealment. [See 1 & 2 Mar. ch. 10.] But the Wife is dowable. [See 1 Ed. 6. ch. 12.]

Forfeiture in Petit Treason and Felony.

For standing mute, and adjudged to Penance in Cases of Petit Treason and Felony, Forfeiture of Goods and Chattels. So it is for challenging above thirty-five Jurors. But not for challenging above twenty and under thirty-six; for no Law giveth Forfeiture for challenging above twenty. Neither is one convicted by the challenging above twenty, as one was by the Common Law by Challenge of three Juries. [24.]

The Forfeiture is as in High Treason as to Lands and Tenements upon Attainder, and as to Goods and Chattels upon Conviction; except that upon Attainder in Petit Treason or Felony, Lands and Tenements intailed are forfeited only during the Life of the Tenant in Tail. [See 33 H. 8. ch. 20. *infra*.] The Inheritance goes to the Issue. The King shall have the Profits of Inheritances that are not holden, during the Life of the Person attaint in Felony; but after his Decease, the Inheritances that are not holden extinguish. Again, it must be observed, that upon Attainder of Petit Treason, the Wife is not Dowable; but upon Attainder of Felony she is Dowable. [See 1 Ed. 6. ch. 12. 5 & 6 Ed. 6. ch. 11.]

Pirates,

Pirates, Robbers, and Murderers on the Sea, attainted before Commissioners by Virtue of 18 H. 8. *cap. 12.* for the Land, and incur Corruption of Blood. But about they are tried before the Lord Admiral in the Court of Admiralty according to the Civil Law.

^a 1 Inst. 13. a. The Forfeiture of Lands relates to the Time alleged in the
^{& b. 390. b.} Indictment, for avoiding any Estates, Charges, and Incumbrances made by the Felon after the Felony committed. But for the mean Profit of the Lands, it shall relate only to the Judgment upon the
^b 1 Inst. 391. a. Indictment. If a Felon is *Convict* by Verdict or Confession, he doth forfeit his Goods and Chattels, Real and Personal, presently. But Lands and Tenements are not forfeited, nor Blood corrupted, before Attainder, or before Judgment (as before was said in general) and then it relates to the Time alleged in the Indictment, for avoiding Estates, &c. Where Tenant in Fee-simple committeth *Treason* or *felony*, and is attainted, the King shall have a Year, Day and Waste in his Lands, or rather a Year and a Day in Lieu of Waste, and afterwards it cometh to the Lord by Escheat. [See ^c 2 Inst. 36, 37, 38. ³ Inst. 111. Coke's Copyh. 5. 58. *Magna Charta*, *ch. 22.* 17 Ed. 2. *ch. 10.* 42 Ed. 3. *ch. 1.*] But the Lord may compound with the King, and have the Estate presently. It must be a Tenant in Fee-simple, not Tenant in Tail, or for Life. For the King shall have the Profits only of their Lands during their Lives. A Copyhold Estate is of Common Right presently forfeited to the Lord of the Manor in Case of Felony. This must be understood of Felonies punishable with Death, not of Petit Larceny. But if a Copyholder for Life is attainted of Felony, and pardon'd, he in the Reversion for Life shall have the Estate. [See 24 H. 8. *ch. 5.* where one who is indicted or appeal'd for the Death of another, who attempted to murder or rob him, shall forfeit nothing.]

Forfeiture of Felo de se.

^a 3 Inst. 55. A Felo de se forfeits all his Goods and Chattels Real and Personal, which he hath in his own Right; and all such Chattels Real which he hath jointly with his Wife, or in her Right, but not until it is lawfully found by the Oath of twelve Men before the Coroner *Super Visum Corporis*, that he is Felo de se. He forfeits also Bonds, or Things in Action, belonging solely to himself, and all entire Chattels in Possession [24.]; except in the Case of Merchants, where a Moiety only of such joint Chattels, as may be severed, is forfeited. He does not forfeit any Lands of Inheritance; for he was not attainted in his Life-Time; nor the Goods and Chattels which he possessed as Executor or Administrator, nor a Guardianship in Socage or by Nature, because here he hath nothing to his own Use. [See of the Court of the Coroner, *ch. 1. ante.*]

Forfeiture in Manslaughter.

^g S.P.C. 185. Forfeiture of Goods and Chattels upon Conviction.

¹ Inst. 391. a.
² Inst. 149.

*Forfeiture in Chance-medley, and**Se. Defendendo.*

* All Goods and Chattels, Debts and Duties whatsoever, are forfeited upon Conviction, but no Freehold or Inheritance. Yet the Offenders have their Pardon of Course.

*Forfeiture upon Outlawry in**Treason, Felony, &c.*

* Upon Outlawry in *Treason* or *Felony* the Offender shall lose and forfeit as much as if he had appear'd, and Judgment had been given against him, as long as the Outlawry is in Force.

Those that tarry till the *Exigent* in *Treason*, *Felony* or *Petty Larceny*, forfeit their *Goods* and *Chattels*, though they render themselves to Justice, and are acquitted; for it was a *Flight in Law*. [See 26 H. 8. ch. 13. 5 & 6 Ed. 6. ch. 11. *infra*, and of the *Process* after *Indictment*, *supra*.]

* Upon Attainder of *Felony* by Outlawry on an *Appeal*, the Defendant shall forfeit only such *Lands*, as he had at the Time of the Outlawry pronounced. For if, hanging the *Process*, the Defendant conveyeth away his Land, and after is outlaw'd, the Conveyance is good, and shall defeat the Lord of his *Escheat*. But if one is indicted of *Felony*, and hanging the *Process* against him, he conveyeth away his Land, and after is outlaw'd, notwithstanding the Conveyance, the Lord shall have his *Escheat*. For in an *Appeal* the *Writ* (whereon the *Forfeiture* is grounded) containeth no Time when the *Felony* was committed, as an *Indictment* doth. Therefore the *Escheat* in an *Appeal* can relate only to the Outlawry pronounc'd; whereas it relates to the certain Time of the Fact set forth in the *Indictment*. But though in an *Indictment* the *Forfeiture* shall relate to the Time alledged in the *Indictment*, for avoiding *Estates* or *Incumbrances* made by the *Felon* after the *Felony* committed, the mean *Profits* of the Land shall relate only to the Judgment, as well in Case of Outlawry, as in other *Cases*.

By Outlawry in *Actions* all the Offender's *Goods* and *Chattels* are forfeited to the King, whether *Real* as a Term for Years, or *Personal* as *Goods* not fixt to the *Freehold*, *Debts* due by *Specialty*, but not by a simple *Contract*, *Profit* of the *Lands*, as *Rents*, *Corn*, (but not the Land itself) wherein the Offender hath *Freehold* or *Inheritance*. But before the Time that the Outlawry appears of Record, the Defendant does not forfeit his *Goods* and *Chattels*; nor the *Profits* of his *Lands*, if a *Feoffment* is made before *Seizure*.

Forfeiture in Petty Larceny.

* The Offender upon Conviction, forfeits *Goods* and *Chattels*, but no *Freehold* or *Inheritance*. [See *Forfeiture* upon Outlawry, &c. *ante*.]

Forfeiture upon Flight.

^a 3 Inst. 218, ^a If * *Flight* is found by Indictment *Super Visum Corporis* before the Coroner in Case of Death; or if the Jury find *Flight* in Treason, Felony, or Petit Larceny, upon Acquittal; it is a Forfeiture of the Goods and Chattels, which one had at the Time of the Indictment or Acquittal. [See of *Falsifying Attainers*, *post*.]

Forfeiture upon Appeal of Death.

^b 1 Inst. 13. a. ^b The Defendant forfeits as in Felony, and the Lord shall have his Land by Escheat. But the Forfeiture of the Land on Appeal relates to the Judgment only; whereas the Forfeiture on an Indictment of Felony shall relate to the Day on which it was committed. [See of Forfeiture in Felony and upon Outlawry on Appeal, *supra*.]

Forfeiture for Drawing a Weapon upon a Judge, or for Striking in Westminster-Hall, &c. sitting the Courts.

^c 3 Inst. 140, ^c The Offender forfeits Lands and Tenements, Goods and Chattels. Some say the Profits of his Lands only during Life. Others say the Land shall be forfeited during Life. *Note*, That for Striking or Drawing Blood in the King's Palace, where his Royal Person resides, there is no Forfeiture of Lands or Goods. [See 33 H. 8. ch. 12.]

Forfeiture in Præmunire.

^d 1 Inst. 129. b. ^d Lands and Tenements in Fee-simple are forfeited, with Goods and Chattels. But Estates in Tail or for Life are forfeited only during Life. *Quære*, Whether an Attainder in a *Præmunire* shall have Relation to the Offence as to the Forfeiture of Lands, or only to the Time of the Judgment. It extendeth not to Forfeiture of Fairs, Markets, Rent-Charges, Warrens, Annuities, or other Hereditament that is not within the Word *Land*.

Forfeiture for Assaulting or Challenging to Fight for Money won at Play, &c.

BT 9 Ann. ch. 14. The Offender forfeits his Personal Estate.

Forfeiture by Papists.

By 1 Geo. 1. St. 2. ch. 55. *Papists not taking the Oaths, &c. or in Default thereof not registering their Names and Estates, forfeit the Fee-simple and Inheritance of all such Lands, Tenements, and Hereditaments, not register'd, or fraudulently register'd, wherein they or any in Trust for them were seised; and the full Value of the Inheritance of all such Lands, &c.* [See of Absence or Non-conformity to the Church, B. 3. ch. 3.]

* *Fatetur facinus, qui judicium fugit.* 3 Inst. 188. 5 Rep. 109.

Forfeiture

Forfeiture by Artificers exercising or teaching their Trades in Foreign Parts.

By 5 Geo. 1. ch. 27. If any Artificer in Wool, Iron, Steel, Brass, or any other Metal, Clock-maker, Watch-maker, or other Artificer or Manufacturer of Great Britain, shall go into any Country out of his Majesty's Dominions, there to exercise or teach his Trade, or shall there exercise or teach his Trade, and shall not return into this Realm within six Months after Warning from the Ambassador, Envoy, &c. in such Country, or one of the Secretaries of State, and from thenceforth continually inhabit within this Realm; he shall be incapable of taking any Legacy, or of being Executor or Administrator, or of taking any Lands or Tenements, and shall forfeit all his Lands, Tenements, and Goods to his Majesty's Use, and shall be deem'd an Alien, and out of the King's Protection.

By 33 H. 8. ch. 20. If any Person shall be attainted of High Treason, the King shall be deemed and adjudged in actual Possession of the Lands, Tenements, Hereditaments, Uses, Goods, Chattels, and all other Things of the Offender so attainted, which the King might lawfully have, or which the Offender might lawfully forfeit, if he had been attainted by Parliament, without any Office or Inquisition found.

Saving to all others (except the Offender attainted of High Treason, his Heirs and Assigns, and all other Persons claiming by him, or to his Use after the Treason committed) all such Rights, Titles, Interests, &c. which any of them ought to have, if this Act had never been made.

This Act doth vest the actual Possession in the King presently by the Attainder, as well in the Life as after the Death of the Person attainted, and as well of Lands in Tail as of Lands in Fee-simple.

It also extendeth to all Manner of Attainders for Treason, whether by Confession, Verdict, Process, or Outlawry, or Attainder by Parliament.

In the Case of Purchase by an Alien, and in Case of a Person attainted of Felony, who is not the King's Tenant, *Præmunire*, Alienation in Mortmain, Condition broken, &c. The Inheritance or Freehold of Land is not vested in the King, till Office found by Force of a Commission under the Great Seal; for that is an Office of Intitling, not under the Exchequer Seal; for an Office found by Force of a Commission from the Exchequer, is only an Office of Instruction, or to instruct the King and his Officers of the Certainty of the Land, &c. by which it may be put in Charge.

By 1 Ri. 3. ch. 3. None shall seize the Goods of any Person arrested for Felony or Suspicion thereof, before he is convicted or attainted of such Felony; upon Pain to forfeit double the Value of the Goods so taken.

The Goods of any Delinquent cannot be seized, before they are forfeited; though they may be inventoried, and the Town may be charged therewith, before Indictment.

In some Statutes it is said Upon Forfeiture to be at the King's Will, of Body, Lands, and Goods, &c. But this is not to be extended further than Imprisonment, Lands, and Goods.

Of Arrest or
Reversal of
Judgment in
Criminal
Causes, and
of falsifying
Attainders.

Hawk. P. C.
B. 2. ch. 50.
Salk. 78.

2 Str. 845.

The King v.
Robinson,
K. B. East. T.

32 G. 2.

1 Inst. 259 b.

2 Inst. 670.

3 Inst. 31, 32,

33, 210, 214,

215.

2 Str. 824.

1 Ld. Ray.

154.

XIII. A Judgment may be *arrested* and *staid* for good Cause, as well in Criminal as Civil Cases, if the Indictment is insufficient or void, though not for false or improper Latin. [See the 7 & 8 W. 3. ch. 3. *infra*.]

Four Days are allow'd in the King's Bench, to move in Arrest of Judgment: [but a Motion in Arrest of Judgment in Criminal Cases may be made any time before Judgment is signed.]

A Judgment may be *reversed* in Treason or Felony, with Respect to an Outlawry, or the Judgment on a Verdict.

1. Upon Outlawry in Treason or Felony it may be reversed by Writ of Error, or by Plea. See for Outlawry the 1 H. 5. ch. 5. 6 H. 6. ch. 1. 8 H. 6. ch. 10. and observe, That few Outlawries for Treason, Felony, or Trespas are valid, because these Acts are not pursued. [See 4 & 5 W. & M. ch. 18. For the more easy Reversal of Outlawries in Offences under Treason and Felony.]

By 26 H. 8. ch. 13. and 5 & 6 Ed. 6. ch. 11. Process of Outlawry against one for Treason, being out of the Realm, or beyond Sea, shall be good in Law. And if the Party within one Year after the Outlawry, or Judgment thereon, shall yield himself to the Chief Justice of England, and offer to traverse the Indictment or Appeal, whereupon he was outlaw'd, he shall be admitted to such Traverse, and being acquit, shall be discharged of such Outlawry, and of all Penalties, as if no such Outlawry had been.

So that now in Case of Treason one by these Statutes is barr'd of his Writ of Error, if he does not come in within a Year after the Outlawry, though he was out of the Realm, or beyond Sea.

Note, That after an Outlawry of Treason or Felony is reversed, the Party must plead to the Indictment.

2. If a Judgment on a Verdict is erroneous, both the Judgment and the Execution, and all the Proceedings, may be reversed by Writ of Error. But if the Indictment is insufficient, and the Party acquitted thereon, the King need not bring a Writ of Error; for the Party may be again indicted. [See of the Process in Treason or Felony after Presentment or Indictment, *ante*.]

By 7 & 8 W. 3. ch. 3. No Miswriting or Misspelling, or false or improper Latin in any Indictment of High Treason, whereby any Corruption of Blood may be made, or for Misprision of such Treason, after Conviction, shall be Cause to arrest Judgment: Yet any Judgment given upon such Indictment may be reversed by Writ of Error, as formerly.

1 Inst. 104. b. Attainders may be *falsified* (proved to be false) by Writ of Error or by Plea, in Respect of Lands and Goods.

1. Attainders in Respect of Lands may be falsified by the Party himself; as when the Attainder is void, as by such as had no Commission, &c. [See *infra*.] or by Plea of Pardon by Act of Parliament; for if the Treason or Felony is pardon'd, the Attainder cannot stand. [See *infra*.] By others; as by a Purchaser, &c. if the Purchase was before the Attainder, and the Offence is alledged in the Indictment before it was done to their Prejudice, and the Offender is found Guilty generally. Here he may falsify in Respect of

of the *Time*, but not for the Offence. But if one enfeoffeth another of his Lands, and after is indicted of Felony, supposed to be committed before the Feoffment, and is thereupon *outlaw'd*, the Feoffee may traverse either the Felony or the Time, though the Party himself is bound by it. And so it is, if one is indicted of Felony, and is attainted by his own Confession, the Feoffee may falsify the Attainder, by denying the Felony. But if the Attainder is by Verdict of twelve Men, the Feoffee shall not falsify by traversing the Offence, but the Time only. If there is an Attainder of Treason or Felony, and then the Treason is pardon'd by Act of Parliament, the Heir may falsify the Attainder by Plea, as well as the Party. 3 Inst. 239.
H. P. C. 731.

The Heir of a Person attainted of Treason may (with the King's Licence, or Consent of the Attorney-General, but not otherwise) bring his Writ of Error, to reverse the Attainder of his Ancestor; tho' properly speaking, a Person attainted can have no Heir. But this is suffered, because otherwise he would be without Remedy. Nay, the Person himself may have a Writ of Error, to reverse his Attainder, if he assigns his Errors, and hath Leave from the Court, to prosecute his Writ. The Heir may falsify by Plea an Attainder of the Accessory in Felony, where the Principal has reversed an Outlawry, and has been acquitted by Verdict. So the Reversal of the Attainder of the Principal *ipso facto* reverses the Attainder of the Accessory. An Executor may bring a Writ of Error, to reverse an Attainder of Treason or Felony, as well as the Heir. 3 Inst. 239.
4 Inst. 21.
1 Sid. 69.
3 Inst. 231.
5 Rep. 111.
9 Rep. 119.

Note, That where the Judgment is void, or *Coram non Judice*, the Party is not driven to his Writ of Error, but may falsify the Attainder by Plea; shewing the special Matter which makes it void. Thus one may plead a Pardon of the Treason or Felony by Act of Parliament, and avoid the Attainder by Plea; for he hath no other Remedy. The King's Letters Patent cannot reverse an Attainder. 3 Inst. 231.
232.
2 Roll. Abr.
489.

2. Attainders may be falsified in Respect of *Goods and Chattels*, by the Party himself, or by others. By the Party himself; as if one is indicted before the Coroner for the Death of another, and it is found that he fled for the same. Here all his Goods and Chattels are forfeited, which he had at the Time of the Verdict given. This cannot be falsified by Traverse, but it may be falsified by Matter of Law; for where the Indictment is void or insufficient, there is no Forfeiture. By others, as where one is indicted before Justices of Oyer and Terminer, and is acquitted by Verdict, but the Jury find, that he fled for the same; and also find in particular, what Goods he had at the Time of the Verdict; any one that had Property in those Goods, may traverse the Finding. So when an Exigent is awarded, and the Defendant is in Prison, &c. the Party, or his Executors or Administrators, shall have a Writ of Error, to reverse the Award of the Exigent. 3 Inst. 232.
233.
5 Rep. 111.
9 Rep. 119.
H. P. C. 271.

There is a Flight in Law; as when one is indicted of Felony, and Process continued against him upon his Default of Appearance, and an Exigent is awarded. For altho' he appeareth, all his Goods and Chattels are forfeited by the Award of the Exigent, tho' he is afterwards acquitted. But the Outlawry may be falsified by Matter of Law, if the Indictment is insufficient, or the Process in Exigent erroneous. Thus also upon Matter of Fact or Record, one may excuse his Absence; as where one was in Prison, or beyond Sea,

at the Time of the *Exigent* awarded : Or if the King before the *Exigent* does grant his Pardon.

By 33 H. 8. ch. 20. If any Person shall be attainted of High Treason by the Course of the Common Law or Statutes of this Realm, every such Attainder by the Common Law shall be of as great Force and Effect, as if it had been done by Authority of Parliament.

3 Inst. 31,
215.

This Statute is to be intended of ^a lawful Attainders by the due Course of the Common Law, and not of erroneous or void Attainders ; which therefore may be avoided by Writ of Error.

By 29 El. ch. 2. No Record of Attainder, that now is, of any Person for Treason, where the Party attainted is or hath been executed for the same Treason, shall hereafter be reversed by any Plea or Writ of Error.

3 Inst. 31,
215.

Note, This Statute extends only to Attainders of Treason ^b before the Statute.

Of Execution
in Criminal
Cases.
3 Inst. 31, 32.
211, 212, 217.
Finch 478.
H.P.C. 272.
Hawk. P.C.
B. 2. ch. 51.
3 Cro. 176.
1 Lev. 61.

XIV. ^c Execution must be according to the Judgment. [See of Judgment, *supra*.] But some Examples have been to the contrary by Virtue of the Privy Seal. (24. and see of Judgment in Felony, *ante*.) The Execution ought to be in the same ^d County, where the Party was tried and convicted ; except the Record of the Attainder is removed into the King's Bench, which may award the Execution in the same County, where it sits, &c. The King's Bench hath Power to award Execution against Persons attainted in Parliament, the Record and the Person being remov'd thither. The Judgment belongs to the Judge, but the Execution must be done by the Sheriff, &c. who in Case of Life and Death may do it upon the Precept of the Judge under his Seal, without any Writ. If the Sheriff, or other proper Officer, alters the Execution, or any other doth execute the Offender, or if he is slain without Authority of Law, it is Felony, and the Law implies Malice. But (as has been said before) the King may pardon Part of the Execution in Treason, (*viz.*) all but the Beheading. If one condemn'd to be hang'd comes to Life after he is hang'd, ^e he ought to be hang'd again till he is dead.

Finch 389,
467.

As the Body of a Traitor or Felon is forfeited to the King by the Execution, so in High Treason the Quarters were formerly, but now the Head only is, usually stuck up in some publick Place ; and in Felony for barbarous Murder, the Body of the Felon after Execution is usually hung upon a Gibbet near the City, Town, or Village, where the Crime was committed, and near the Highway. Now by 25 Geo. 2. ch. 37. the Body is either to be hung in Chains, or anatomized, as before set forth.

Of a Re-
prieve.
Terms of
the Law, v.
Reprieve.

XV. A ^f Reprieve, (from *Repris*, taken back) is to take back, or to suspend the Execution of a Criminal, and the Proceedings of the Law, for a Time. Every Judge that has Power to order the Execution, has of common Right a Power to grant a Reprieve.

If a Woman is convict and attainted of High Treason, Petit Treason, or Felony, and is found by an Inquest or Jury of Matrons,

^a Executio est executio juris secundum judicium. 3 Inst. 212.
^b Judicandum est legibus, non exemplis. Ibid. 4 Rep. 33.

impanelled by the Sheriff, &c. in a private Room, * *quick with* S.P.C. 198.
 Child, (for *Privement Enfeint*, or with Child, is not enough) Exe- Finch 478.
 cution shall be respited till her Delivery. But she shall take this H.P.C. 272.
 Favour but once, though she is again quick with Child. H.H.P.C. 413.

Oftentimes Execution is stopp'd upon Condition of *Transportation*.
 [See 22 & 23 *Car. 2. ch. 7.* Also see 4 *Geo. 1. ch. 11. supra.*]

^b No Prisoner convicted for any Felony, for which he cannot have ^c *Kely. 41*
 his Clergy, at the Sessions of the *Old Bailey* for *London* and *Mid-*
dlessex, &c. ought to be reprieved but in open Sessions, and not
 otherwise, without the King's express Warrant, and not by Order
 of any of the Justices of *Gaol-Delivery*, or *Oyer and Terminer*.

XVI. * *Restitution*, is where one being attainted of Treason, Petit Of Restitu-
 Treason or Felony, (whereby the Blood is stain'd and corrupted) ^{tion.}
 he, or his Heirs, is restored to his *Lands*, &c. He may be restored ^c 3 Inst. 240.
 upon a Pardon, and the *Heir* may be restored, if the Ancestor is
 executed. ^d The King may restore by his Charter, *Lands*, *Goods*, ^e 3 Inst. 233.
 and *Chattels* forfeited to him by any Attainder; * but if by Attain- ^f 1 Inst. 8. a.
 der the *Blood* is corrupted, that must be restor'd by Parliament. 391. b. 392. a.
 Of Restitutions by Parliament, some are in Blood only. Some are ^g 3 Inst. 233.
 General Restitutions to Blood, Honours, Dignities, Inheritance, and 240. 241.
 all that was lost by Attainder. H.H.P.C. 358.

The King may restore the Party or his Heirs to his *Lands*, be-
 cause no Person is prejudic'd by it. But Restitution of Blood can-
 not be made by him, because it would be a Prejudice to others.
 The King's Pardon *in Effect* restores the Blood, as to all Issue
 born after the Pardon.

Thus of our *Courts* of Justice, or of the *Jurisdiction* of *Courts*,
 and of the several *Kinds* of *Courts*; of *Remedies* without Suit in
 Court, and of the *Proceedings* in *Civil* and *Criminal* Causes; which
 concludes the Fourth *Object* of our *English Laws*, (*viz.*) the
Persons of which *England* is composed; their *Estates*; the *Crimes*
 and *Misdemeanors* that may be committed by them; and the *Courts*
 of *Justice* or *Jurisdiction* of *Courts*.

All which I submit to the Correction of the Learned, having
 made this *Attempt* to *methodize* the Study of our *Laws*, with Hopes
 that others, by finding Faults in it, may (for the Good of our Coun-
 try) direct me at last to make it more perfect.

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